

ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 70. COST OF COPIES OF PUBLIC INFORMATION

1 TAC §70.13

The Office of the Attorney General (OAG), Open Records Division, adopts §70.13, of Title 1 of the Texas Administrative Code, regarding the fee for obtaining a copy of a body worn camera recording, without changes as published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5286), and the new rule will not be republished.

Pursuant to §1701.661(g) of the Occupations Code, the OAG is to set a fee for obtaining a copy of a body worn camera recording. Section 1701.661(g) states this amount shall be sufficient to cover the cost of reviewing and making the recording when release of a body worn camera recording is required.

The new rule allows a law enforcement agency to recover costs for providing a copy of a body worn camera recording. It allows a law enforcement agency to charge a \$10.00 fee for each body worn camera recording provided. It also allows a flat fee of \$1.00 per minute of footage required to be reviewed if an identical copy has not previously been released.

No comments were received regarding the new rule.

The new rule is adopted under §1701.661(g) of the Occupations Code, which requires the OAG to set a proposed fee to obtain a copy of a body worn camera recording from a law enforcement agency under that section.

Chapter 552 of the Government Code is affected by this new rule.

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

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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER G. LENDING POWERS

7 TAC §91.709

The Credit Union Commission (Commission) adopts amendments to Texas Administrative Code Title 7, §91.709, Member Business Loans, with non-substantive changes from the proposed rule published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5301).

Section 15.402 of the Texas Finance Code authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Finance Code (the "Texas Credit Union Act"). In adopting any such rules, the Legislature has directed the Commission to consider the need to:

1. promote a stable credit union environment;
2. provide credit union members with convenient, safe, and competitive services;
3. preserve and promote the competitive parity of credit unions with regard to other depository institutions consistent with the safety and soundness of credit unions; and
4. promote or encourage economic development in this state.

Section 121.0011 of the Texas Finance Code sets out the policy of the Texas Credit Union Act. In relevant part, it states: "The purposes of this subtitle are to delegate to the department rulemaking and discretionary authority that may be necessary to assure that credit unions operating under this subtitle may be sufficiently flexible and readily responsive to changes in economic conditions and practices, to maintain sound credit union growth ... to permit credit unions to effectively provide a full array of financial and financially related services, to provide effective supervision and regulation of credit unions and their fields of membership, and to clarify and modernize the law governing the credit unions doing business in this state. This subtitle is the public policy of this state and necessary to the public welfare." Furthermore, §121.004 of the Texas Finance Code expressly states: "This subtitle shall be liberally construed to effect its purposes."

As published, the amendments to the rule will promote a stable credit union environment, provide credit union members with

convenient, safe, and competitive services, preserve and promote the competitive parity of credit unions with regard to other depository institutions consistent with the safety and soundness of credit unions, and promote or encourage economic development in Texas by providing state chartered credit unions parity, under Texas Finance Code §123.003, with federal credit unions engaged in the business of making member business loans in Texas. The amendments will eliminate detailed collateral criteria and portfolio limits, and instead will focus on broad, yet well-defined, principles that clarify regulatory expectation for credit unions engaged in member business lending activities, thus promoting a stable credit union environment and providing credit union members with convenient, safe and competitive services. The proposed amendments also distinguish between the broad commercial lending activities in which a credit union is authorized to engage, and the more narrowly defined category of member business loans subject to statutory aggregate limits in 12 U.S.C. §1757a, thus promoting the safety and soundness of credit unions. Additional safety and soundness considerations are addressed by the proposed amendments clarification that, in addition to the other limitations set forth in the amendments, a credit union may not make a loan to a member or a business interest of the member if the loan would cause the aggregate amount of loans to the member and the member's business interests to exceed an amount equal to 10 percent of the credit union's total assets as provided by Texas Finance Code §124.003.

In general, the National Credit Union Administration (NCUA) adopted a final rule to modernize its member business loans rule (12 C.F.R. Part 723) to provided federally insured credit unions with greater flexibility and autonomy to provide commercial and business loans to their members. The final rule, effective January 1, 2017, amends NCUA's current regulatory requirements pertaining to credit union commercial lending activities by replacing the existing prescriptive requirements with a broad, principles-based regulatory approach. NCUA's final rule eliminates most of the regulatory thresholds and limits, and replaces those provisions with expanded requirements pertaining to policies, procedures, and oversight by credit union management and credit union directors. NCUA's final rule also provides that federally insured credit unions in a given state are exempted from compliance with 12 C.F.R. Part 723 if a state supervisory authority administers a state commercial and member business loan rule for use by federally insured credit unions in that state, provided that the state rule at least covers all the provisions in 12 C.F.R. Part 723 and is no less restrictive (based on NCUA's determination).

States that currently have exemptions from the previous 12 C.F.R. Part 723 are grandfathered in NCUA's final rule. As a result, without action by the Commission, the grandfathered Texas Administrative Code Title 7, §91.709, Member Business Loans, will continue to require state chartered credit unions to comply with the extensive regulatory thresholds and limits and will place them at a competitive disadvantage to federally chartered credit unions when offering commercial and business loans to their members. The Commission thus proposed amendments to address this competitive disadvantage and to promote economic development in the state.

In keeping with NCUA's "no less restrictive" requirement to obtain an exemption from the new 12 C.F.R. Part 723, the proposed amendments closely track the provisions of NCUA's final rule and remove the current credit union requirements for collateral and security, equity, loans limits, and waiver processes, and re-

place them with broad principles intended to permit credit unions to govern safe and sound member business lending as part of their commercial lending program. Under the amendments, the Commission requires credit unions to maintain and update written policies concerning the maximum amount of assets, credit underwriting standards, loan approval standards, loan monitoring standards and loan documentation standards. Credit unions are also required to have qualified staff and commercial loan risk management systems. In addition, the amendments contain prohibitions on certain types of commercial loans and contain an aggregate member business loan limit. The amendments will not take effect until January 1, 2017, to coincide with the effective date of NCUA's final 12 C.F.R. Part 723.

As adopted, the amendments make three non-substantive changes. The first non-substantive change is in Subsection (c)(1)(D) adding the missing verb "evaluating" between the words "in" and "collateral". The second non-substantive change is in Subsection (i)(1)(C), changing the (4) to a (3). The third non-substantive change is in Subsection (k) changing 121.003 to 124.003.

The Commission received fifteen (15) written comments on the proposed rule amendments during the comment period. Twelve (12) commenters were in favor of the proposed rule. One commenter, GECU Credit Union (GECU) was partially in favor and partially opposed to the proposed rule. GECU stated that clarification is needed as to whether the parity provision applies to both making and purchasing loans, in addition to servicing the loans. The Commission disagrees with this need for clarification and notes that the plain language of Texas Finance Code §123.003(a) governs. That language states: "A credit union may engage in any activity in which it could engage, exercise any power it could exercise, or make any loan or investment it could make, if it were operating as a federal credit union."

GECU also makes the following objections: (1) that for construction and development loans, the term "cost to complete" does not align with NCUA's rule; and (2) that NCUA's "regulation ensures that if the land was purchased over 12 months ago (for example in the 1950s, when the cost to purchase land was substantially less than current prices), then the appraised market value should be utilized." These objections are based on an inaccurate reading of the NCUA final rule. The NCUA final rule does not contain the language that GECU quotes.

GECU also objects that the proposed Subsection (h)(2) "indicates that these exceptions are not commercial loans if the outstanding aggregate net MBL balance is \$50,000 or greater. Conversely, the NCUA indicates that such loans are not commercial loans, but are MBLs and must be counted toward the aggregate limit." GECU's statement is based on an inaccurate reading of the NCUA final rule. In that rule, NCUA defines commercial loan as "Commercial loan means any loan ... and loans that would otherwise meet the definition of commercial loan and which, when the aggregate outstanding balances plus unfunded commitments less any portion secured by shares in the credit union to a borrower or an associated borrower, are equal to less than \$50,000." The Commission amendments define commercial loan as "a loan ... and a loan that would otherwise meet the definition of commercial loan and which, when the aggregate outstanding balance plus unfunded commitments less any portion secured by shares in the credit union to a borrower, is equal to less than \$50,000." Additionally, NCUA's rule in 12 C.F.R. §723.8 states: "Exceptions. Any loan secured by a lien on a 1- to 4-family residential property that is not a member's primary

residence, and any loan secured by a vehicle manufactured for household use that will be used for a commercial, corporate, or other business investment property or venture, or agricultural purpose, is not a commercial loan but it is a member business loan (if the outstanding aggregate net member business loan balance is \$50,000 or greater) and must be counted toward the aggregate limit on a federally insured credit union's member business loans." The proposed aggregate member business loan limit in the Commission's Subsection (h) provides: "(2) Exceptions. Any loan secured by a lien on a 1- to 4-family residential property that is not a member's primary residence, any loan secured by a lien on a vehicle manufactured for household use that will be used for commercial, corporate, or other business investment property or venture, and any other loan for an agricultural purpose are not commercial loans (if the outstanding aggregate net member business loan balance is \$50,000 or greater), and must be counted toward the aggregate limit on a credit union's member business loans under this subsection." The Commission thus determines that there is no substantive difference between the NCUA final rule and the amendments.

GECU also objects that the list in the Commission amendment Subsection (i)(3) should be exclusive. The Commission disagrees that the amendments should be an exclusive list and notes the Commission's direction under Texas Finance Code, §15.402(b-1): "In adopting rules under this section, the commission shall consider the need to: (1) promote a stable credit union environment; (2) provide credit union members with convenient, safe, and competitive services; (3) preserve and promote the competitive parity of credit unions with regard to other depository institutions consistent with the safety and soundness of credit unions; and (4) promote or encourage economic development in this state."

Finally, GECU seeks clarification concerning Subsection (k)'s reference to Texas Finance Code §121.003. The Commission acknowledges this typo and is making a non-substantive change in Subsection (k) changing 121.003 to 124.003.

The Texas Banker's Association objected to the amendments on the following grounds: (1) the amendments are beyond the scope of powers of the Commission; and (2) the amendments pose safety and soundness concerns, as does the federal rule. The Commission disagrees that it does not have the power to adopt the amendments. In general, a court will presume a rule adopted by an administrative agency to be valid, and the party challenging the rule has the burden of demonstrating its invalidity. See *Texas Ass'n of Psychological Assocs. v. Texas State Bd. of Exam'rs of Psychologists*, 439 S.W.3d 597, 603 (Tex. App. - Austin 2014, no pet.). To establish a rule's facial invalidity, the challenger must show that the rule (1) contravenes specific statutory language; (2) is counter to the statute's general objectives; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. See *Ware v. Texas Comm'n on Law Enforcement Officer Standards & Educ.*, No. 03-12-00740-CV, 2013 WL2157244, at *2 (Tex. App. - Austin May 16, 2013, no pet.) (mem. op.). Texas Finance Code §15.402 clearly authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Finance Code (the "Texas Credit Union Act"). Additionally, Texas Finance Code §121.0011 sets out the policy of the Texas Credit Union Act. In relevant part, §121.0011 states: "The purposes of this subtitle are to delegate to the department rulemaking and discretionary authority that may be necessary to assure that credit unions operating under this subtitle may be sufficiently flexible and readily responsive to changes

in economic conditions and practices, to maintain sound credit union growth ... to permit credit unions to effectively provide a full array of financial and financially related services, to provide effective supervision and regulation of credit unions and their fields of membership, and to clarify and modernize the law governing the credit unions doing business in this state. This subtitle is the public policy of this state and necessary to the public welfare." Furthermore, Texas Finance Code §121.004 expressly states: "This subtitle shall be liberally construed to effect its purposes." The Commission also disagrees that the proposed amendments pose safety and soundness concerns and finds instead that the amendments "preserve and promote the competitive parity of credit unions with regard to other depository institutions consistent with the safety and soundness of credit unions" in accordance with Texas Finance Code §15.402(b-1).

The Independent Bankers Association of Texas (IBAT) comment letter received during the comment period objected that the amendments circumvent the statutory requirement limiting member business loans to 12.25% of total credit union assets. The Commission notes that there is no statutory requirement limiting member business loans to 12.25% of total credit union assets. The 12.25% requirement was from the existing Commission rule found in Texas Administrative Code Title 7, §91.709, Member Business Loans, which the Commission has the statutory authority to change. IBAT also objects that credit unions may develop a policy that diminish safety and soundness principles; however, the Commission finds that the controls in the amendments are adequate to ensure safety and soundness. IBAT further objects that the Commission has not performed an analysis that reflects a need for increased commercial lending and that the Commission should provide proof there is a need for additional credit union lending and the benefit. The Commission notes that IBAT's final two objections concern items that are neither required under the Administrative Procedure Act nor under the Texas Finance Code.

The Commission received one comment from IBAT outside the comment period. That comment urged the Commission to suspend adoption of the rule until the outcome of the Independent Community Bankers of America's lawsuit against NCUA. The Commission disagrees with this suggested action. The Commission disagrees about the success of the challenge against the NCUA rule. The Commission also notes that even if the challenge is successful, the Commission independently has sufficient authority and justification under §15.402 of the Finance Code to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Finance Code (the "Texas Credit Union Act").

The amendments are adopted under Texas Finance Code §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under and Texas Finance Code §123.003, which authorizes the Commission, in conjunction with the exercise of its specific rulemaking authority, to adopt rules reflecting the statutory right of a state credit union to engage in any activity in which it could engage, exercise any power it could exercise, or make any loan or investment it could make, if it were operating as a federal credit union.

The specific sections affected by the amendments are Texas Finance Code, §124.001 and §124.003.

§91.709. *Member Business and Commercial Loans.*

(a) Definitions. Definitions in TEX. FIN. CODE §121.002, are incorporated herein by reference. As used in this section, the following

words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Borrower" means a member or any other person named as a borrower, obligor, or debtor in a loan or extension of credit; or any other person, including, but not limited to, a comaker, drawer, endorser, guarantor or surety who is considered to be a borrower under the requirements of subsection (i) of this section concerning aggregation and attribution for commercial loans.

(2) "Commercial loan" means a loan or an extension of credit to an individual, sole proprietorship, partnership, corporation, or business enterprise for commercial, industrial, agricultural, or professional purposes, including construction and development loans, any unfunded commitments, and any interest a credit union obtains in such loans made by another lender. A commercial loan does not include a loan made for personal expenditure purposes; a loan made by a corporate credit union; a loan made by a credit union to a federally insured credit union; a loan made by a credit union to a credit union service organization; a loan secured by a 1- to 4-family residential property (whether or not the residential property is the borrower's primary residence); a loan fully secured by shares in the credit union making the extension of credit or deposits in another financial institution; a loan secured by a vehicle manufactured for household use; and a loan that would otherwise meet the definition of commercial loan and which, when the aggregate outstanding balance plus unfunded commitments less any portion secured by shares in the credit union to a borrower, is equal to less than \$50,000.

(3) "Control" means a person directly or indirectly, or acting through or together with one or more persons who:

(A) own, control, or have the power to vote twenty-five (25) percent or more of any class of voting securities of another person;

(B) control, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(C) have the power to exercise a controlling influence over the management or policies of another person.

(4) "Immediate family member" means a spouse or other family member living in the same household.

(5) "Loan secured by a lien on a 1- to 4-family residential property" means a loan that, at origination, is secured wholly or substantially by a lien on a 1- to 4-family residential property for which the lien is central to the extension of the credit; that is the borrower would not have been extended credit in the same amount or on terms as favorable without the lien. A loan is wholly or substantially secured by a lien on a 1- to 4-family residential property if the estimated value of the real estate collateral at origination (after deducting any senior liens held by others) is greater than fifty (50) percent of the principal amount of the loan.

(6) "Loan secured by a lien on a vehicle manufactured for household use" means a loan that, at origination, is secured wholly or substantially by a lien on a new and used passenger car or other vehicle such as a minivan, sport-utility vehicle, pickup truck, and similar light truck or heavy-duty truck generally manufactured for personal, family, or household use and not used as a fleet vehicle or to carry fare-paying passengers, for which the lien is central to the extension of credit. A lien is central to the extension of credit if the borrower would not have been extended credit in the same amount or on terms as favorable without the lien. A loan wholly or substantially secured by a lien on a vehicle manufactured for household use if the estimated value of the collateral at origination (after deducting any senior liens held by others) is greater than fifty (50) percent of the principal amount of the loan.

(7) "Loan-to-value ratio for collateral" means the aggregate amount of all sums borrowed and secured by the collateral, including outstanding balances plus any unfunded commitment or line of credit from another lender that is senior to the credit union's lien, divided by the current collateral value. The current collateral value must be established by prudent and accepted commercial loan practices and comply with all regulatory requirements.

(8) "Member business loan" has the meaning assigned by 12 C.F.R. Part 723.

(9) "Net worth" has the meaning assigned by 12 C.F.R. Part 702.2.

(10) "Readily marketable collateral" means financial instruments and bullion that are salable under ordinary market conditions with reasonable promptness at a fair market value determined by quotations based upon actual transactions on an auction or similarly available daily bid and ask price market.

(11) "Residential property" means a house, townhouse, condominium unit, cooperative unit, manufactured home, a combination of a home or dwelling unit and a business property that involves only minor or incidental business use, real property to be improved by the construction of such structures, or unimproved land zoned for 1- to 4-family residential use but does not include a boat, motor home, or timeshare property, even if used as a primary residence. This applies to such structure whether under construction or completed.

(b) Parity. A credit union may make, commit to make, purchase, or commit to purchase any member business loan it could make if it were operating as a federal credit union domiciled in this state, so long as for each transaction the credit union complies with all applicable regulations governing such activities by federal credit unions. However, all such loans must be documented in accordance with the applicable requirements of this chapter.

(c) Commercial Loan Responsibilities and Operational Requirements. Prior to engaging in the business of making commercial loans, a credit union must address the responsibilities and operational requirements under this subsection:

(1) Written policies. A credit union must establish comprehensive written commercial loan policies approved by its board of directors instituting prudent loan approval, credit underwriting, loan documentation, and loan monitoring standards in accordance with this paragraph. The board must review its policies at least annually and, additionally, prior to any material change in the credit union's commercial lending program or related organizational structure, in response to any material change in the credit union's overall portfolio performance, or in response to any material change in economic conditions affecting the credit union. The board must update its policies when warranted. Policies under this paragraph must be designed to identify:

(A) type(s) of commercial loans permitted;

(B) trade area;

(C) the maximum amount of assets, in relation to net worth, allowed in secured, unsecured, and unguaranteed commercial loans and in any given category or type of commercial loan and to any one borrower;

(D) credit underwriting standards including potential safety and soundness concerns to ensure that action is taken to address those concerns before they pose a risk to the credit union's net worth; the size and complexity of the loan as appropriate to the size of the credit union; the scope of the credit union's commercial loan activities; the level and depth of financial analysis necessary to evaluate financial trends and the condition of the borrower and the ability of the

borrower to meet debt service requirements; requirements for a borrower-prepared projection when historic performance does not support projected debt payments; the financial statement quality and degree of verification sufficient to support an accurate financial analysis and risk assessment; the methods to be used in evaluating collateral authorized, including loan-to-value ratio limits; the means to secure various types of collateral; and other risk assessment analyses including analysis of the impact of current market conditions on the borrower.

(E) loan approval standards including consideration, prior to credit commitment, of the borrower's overall financial condition and resources; the financial stability of any guarantor; the nature and value of underlying collateral; environmental assessment requirements; the borrower's character and willingness to repay as agreed; the use of loan covenants when warranted; and the levels of loan approval authority commensurate with the proficiency of the individuals or committee of the credit union tasked with such approval authority in evaluating and understanding commercial loan risk, when considered in terms of the level of risk the borrowing relationship poses to the credit union;

(F) loan monitoring standards including a system of independent, ongoing credit review and appropriate communication to senior management and the board of directors; the concentration of credit risk; and the risk management systems under subsection (d) of this section; and

(G) loan documentation standards including enabling the credit union to make informed lending decisions and assess risk, as necessary, on an ongoing basis; identifying the purpose of each loan and source(s) of repayment; assessing the ability of each borrower to repay the indebtedness in a timely manner; ensuring that any claim against a borrower is legally enforceable; and demonstrating appropriate administration and monitoring of each loan.

(2) **Qualified Staff.** A credit union must ensure that it is appropriately staffed with qualified personnel with relevant and necessary expertise and experience for the types of commercial lending in which the credit union is engaged, including appropriate experience in underwriting, processing, overseeing and evaluating the performance of a commercial loan portfolio, including rating and quantifying risk through a credit risk rating system and collections and loss mitigation activities for the types of commercial lending in which the credit union is engaged. At a minimum, a credit union making, purchasing, or holding any commercial loans must internally have a senior management employee that has a thorough understanding of the role of commercial lending in the credit union's overall business model and establish risk management processes and controls necessary to safely conduct commercial lending as provided by subsection (d) of this section.

(3) **Use of Third-Party Experience.** A third party may provide the requisite expertise and experience necessary for a credit union to safely conduct commercial lending if:

(A) the third party has no affiliation or contractual relationship with the borrower;

(B) the third party is independent from the commercial loan transaction and does not have a participation interest in a loan or an interest in any collateral securing a loan that the third party is responsible for reviewing, or an expectation of receiving compensation of any sort that is contingent on the closing of the loan, with the following exceptions:

(i) the third party may provide a service to the credit union that is related to the transaction, such as loan servicing;

(ii) the third party may provide the requisite experience to a credit union and purchase a loan or a participation interest in a loan originated by the credit union that the third party reviewed; and

(iii) the third party is a credit union service organization and the credit union has a controlling financial interest in the credit union service organization as determined under generally accepted accounting principles.

(C) the actual decision to grant a commercial loan resides with the credit union; and

(D) qualified credit union staff exercise ongoing oversight over the third party by regularly evaluating the quality of any work the third party performs for the credit union.

(4) **De Minimis Exception.** The responsibilities and operational requirements described in paragraphs (1) and (2) of this subsection do not apply to a credit union if it meets all of the following conditions:

(A) the credit union's total assets are less than \$250 million;

(B) the credit union's aggregate amount of outstanding commercial loan balances (including any unfunded commitments, any outstanding commercial loan balances and unfunded commitments of participations sold, and any outstanding commercial loan balances and unfunded commitments sold and serviced by the credit union) total less than fifteen (15) percent of the credit union's net worth; and

(C) in a given calendar year, the amount of originated and sold commercial loans and the amount of originated and sold commercial loans the credit union does not continue to service, total fifteen (15) percent or less of the credit union's net worth.

(D) A credit union that relies on this de minimis exception is prohibited from engaging in any acts or practices that have the effect of evading the requirements of this subsection.

(d) **Commercial Loan Risk Management Systems.**

(1) **Risk Management Processes.** A credit union's risk management process must be commensurate with the size, scope and complexity of the credit union's commercial lending activities and borrowing relationships. The processes must, at a minimum, address the following:

(A) use of loan covenants, if appropriate, including frequency of borrower and guarantor financial reporting;

(B) periodic loan review, consistent with loan covenants and sufficient to conduct portfolio risk management, which, based upon current market conditions and trends, loan risk, and collateral conditions, must include a periodic reevaluation of the value and marketability of any collateral, and an updated loan-to-value ratio for collateral calculation;

(C) a credit risk rating system under paragraph (2) of this subsection; and

(D) a process to identify, report, and monitor commercial loans that are approved by the credit union as exceptions to the credit union's loan policies.

(2) **Credit Risk Rating System.** The credit risk rating system must be a formal process that identifies and assigns a relative credit risk rating to each commercial loan in a credit union's portfolio, using ordinal ratings to represent the degree of risk. The credit risk score must be determined through an evaluation of quantitative factors based on the financial performance of each commercial loan and qualitative factors based on the credit union's management, operational, market, and

business environment factors. A credit risk rating must be assigned to each commercial loan at the inception of the loan. A credit risk rating must be reviewed as frequently as necessary to satisfy the credit union's risk monitoring and reporting policies, and to ensure adequate reserves as required by generally accepted accounting principles.

(3) Independent Review. Periodic independent reviews should be conducted by a person who is both qualified to conduct such a review and independent of the function being reviewed. The review should provide an objective assessment of the overall commercial loan portfolio quality and verify the accuracy of ratings and the operational effectiveness of the credit union's risk management processes. A credit union is not required to hire an outside third party to conduct this independent review, if it can be done in-house by a competent person that is considered unconnected to the function being reviewed.

(e) Collateral and Security for Commercial Loans.

(1) Collateral. A commercial loan must be secured by collateral commensurate with the level of risk associated with the size and type of the commercial loan. The collateral must be sufficient to ensure the credit union is protected by a prudent loan-to-value ratio for collateral along with appropriate risk sharing with the borrower and principal(s). A credit union making an unsecured commercial loan must determine and document in the loan file that mitigating factors sufficiently offset the relevant risk of making an unsecured loan.

(2) Personal Guarantees. A credit union that does not require the full and unconditional personal guarantee from all principals of the borrower who have a controlling interest, as defined by subsection (a)(3) of this section, in the borrower must determine and document in the loan file that mitigating factors sufficiently offset the relevant risk.

(f) Construction and Development Loans.

(1) Terms. In this subsection:

(A) "construction or development loan" means any financing arrangement to enable the borrower to acquire property or rights to property, including land or structures, with the intent to construct or renovate an income producing property, such as residential housing for rental or sale, or a commercial building, that may be used for commercial, agricultural, industrial, or other similar purposes. It also means a financing arrangement for the construction, major expansion or renovation of the property types referenced in this subsection. The collateral valuation for securing a construction or development loan depends on the satisfactory completion of the proposed construction or renovation where the loan proceeds are disbursed in increments as the work is completed. A loan to finance maintenance, repairs, or other improvements to an existing income-producing property that does not change the property's use or does not materially impact the property is not a construction or development loan.

(B) "cost to complete" means the sum of all qualifying costs necessary to complete a construction project and documented in an approved construction budget. Qualifying costs generally include on- or off-site improvements; building construction; other reasonable and customary costs paid to construct or improve a project, including a general contractor's fees; other expenses normally included in a construction contract such as bonding and contractor insurance; the value of the land, determined as the sum of the cost of any improvements to the land and the lesser of appraised market value or purchase price; interest as provided by this subparagraph; project costs as provided by this subparagraph; a contingency account to fund unanticipated overruns; and other development costs such as fees and related pre-development expenses. Interest expense is a qualifying cost only to the extent it is included in the construction budget and is calculated based on the

projected changes in the loan balance up to the expected "as-complete" date for owner-occupied non-income-producing commercial real property or the "as stabilized" date for income-producing real estate. Project costs for related parties, such as developer fees, leasing expenses, brokerage commissions and management fees, are included in qualifying costs only if reasonable in comparison to the cost of similar services from a third party. Qualifying costs exclude interest or preferred returns payable to equity partners or subordinated debt holders, the developer's general corporate overhead, and selling costs to be funded out of sales proceeds such as brokerage commissions and other closing costs.

(C) "prospective market value" means the market value opinion determined by an independent appraiser in compliance with the relevant standards set forth in the Uniform Standards of Professional Appraisal Practice. Prospective value opinions are intended to reflect the current expectations and perceptions of market participants, based on available data. Two (2) prospective value opinions may be required to reflect the time frame during which development, construction, or occupancy occur. The prospective market value "as-completed" reflects the real property's market value as of the time that development is to be completed. The prospective market value "as-stabilized" reflects the real property's market value as of the time the real property is projected to achieve stabilized occupancy. For an income producing property, stabilized occupancy is the occupancy level that a property is expected to achieve after the real property is exposed to the market for lease over a reasonable period of time and at comparable terms and conditions to other similar real properties.

(2) Policies. A credit union that elects to make a construction or development loan must ensure that its commercial loan policies under subsection (c) of this section meets the following conditions:

(A) qualified personnel representing the interest of the credit union must conduct a review and approval of any line item construction budget prior to closing the loan;

(B) a requisition and loan disbursement process approved by the credit union is established;

(C) release or disbursement of loan funds occurs only after on-site inspections which are documented in a written report by qualified personnel who represents the interest of the credit union and certifies that the work requisitioned for payment has been satisfactorily completed, and the remaining funds available to be disbursed from the construction and development loan is sufficient to complete the project; and

(D) each loan disbursement is subject to confirmation that no intervening liens have been filed.

(3) Establishing Collateral Values. The current collateral value must be established by prudent and accepted commercial loan practices and comply with all regulatory requirements. The collateral value depends on the satisfactory completion of the proposed construction or renovation where the loan proceeds are disbursed in increments as the work is completed and is the lesser of the project's cost to complete or its prospective market value.

(4) Controls and Processes for Loan Advances. A credit union that elects to make a construction and development loan must have effective commercial loan control procedures in place to ensure sound loan advances and that liens are paid and released in a timely manner. Effective controls should include segregation of duties, delegation of duties to appropriate qualified personnel, and dual approval of loan disbursements.

(g) Commercial Loan Prohibitions.

(1) Ineligible borrowers. A credit union may not grant a commercial loan to the following:

(A) any senior management employee directly or indirectly involved in the credit union's commercial loan underwriting, servicing, and collection process, and any of their immediate family members;

(B) any person meeting the requirements of subsection (i) of this section concerning aggregations and attribution for commercial loans, with respect to persons identified in subparagraph (A) of this paragraph; or

(C) any director, unless the credit union's board of directors approves granting the loan and the borrowing director was recused from the board's decision making process.

(2) Equity Agreements and Joint Ventures. A credit union may not grant a commercial loan if any additional income received by the credit union or its senior management employees is tied to the profit or sale of any business or commercial endeavor that benefits from the proceeds of the loan.

(3) Fees. No director, committee member, volunteer official, or senior management employee of a credit union, or immediate family member of such director, committee member, volunteer official, or senior management employee, may receive, directly or indirectly, any commission, fee, or other compensation in connection with any commercial loan made by the credit union. Employees, other than senior management, may be partially compensated on a commission or performance based incentive, provided the compensation is governed by a written policy and internal controls established by the board of directors. The board must review the policies and controls at least annually to ensure that such compensation is not excessive or expose the credit union to inappropriate risks that could lead to material financial loss. Loan origination employees are prohibited from receiving, in connection with any commercial loan made by the credit union, any compensation from any source other than the credit union. For the purposes of this paragraph, compensation includes non-monetary items and anything reasonably regarded as pecuniary gain or pecuniary advantage, including a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest, but compensation does not include nonmonetary items of nominal value.

(h) Aggregate Member Business Loan Limit.

(1) Limits. The aggregate limit on a credit union's net member business loan balances is the lesser of 1.75 times the actual net worth of the credit union, or 1.75 times the minimum net worth required under 12 U.S.C. §1790d(c)(1)(A). For purposes of this calculation, member business loan means any commercial loan, except that the following commercial loans are not member business loans and are not counted toward the aggregate limit on member business loans:

(A) any loan in which a federal or state agency (or its political subdivision) fully insures repayment, fully guarantees repayment, or provides an advance commitment to purchase the loan in full; and

(B) any non-member commercial loan or non-member participation interest in a commercial loan made by another lender, provided the credit union acquired the non-member loans or participation interest in compliance with applicable laws and the credit union is not, in conjunction with one or more other credit unions, trading member business loans to circumvent the aggregate limit under this subsection.

(2) Exceptions. Any loan secured by a lien on a 1- to 4-family residential property that is not a member's primary residence, any loan secured by a lien on a vehicle manufactured for household

use that will be used for commercial, corporate, or other business investment property or venture, and any other loan for an agricultural purpose are not commercial loans (if the outstanding aggregate net member business loan balance is \$50,000 or greater), and must be counted toward the aggregate limit on a credit union's member business loans under this subsection.

(3) Exemption. A credit union that has a federal low-income designation, or participates in the federal Community Development Financial Institution program, or was chartered for the purpose of making member business loans, or which as of the date of the Credit Union Membership Access Act of 1998 had a history of primarily making commercial loans, is exempt from compliance with the aggregate member business loan limits in paragraph (1) of this subsection.

(4) Method of Calculation for Net Member Business Loan Balance. For the purposes of NCUA form 5300 reporting (call report), a credit union's net member business loan balance is determined by calculating the sum of the outstanding loan balance plus any unfunded commitments and reducing that sum by any portion of the loan that is: secured by shares in the credit union, by shares or deposits in other financial institutions, or by a lien on a borrower's primary residence; insured or guaranteed by any agency of the federal government, a state, or any political subdivision of a state; or subject to an advance commitment to purchase by any agency of the federal government, a state, or any political subdivision of a state; or sold as a participation interest without recourse and qualifying for true sales accounting under generally accepted accounting principles.

(i) Aggregation and Attribution for Commercial Loans.

(1) General Rule. A commercial loan or extension of credit to one borrower is attributed to another person, and each person will be considered a borrower, when:

(A) the proceeds of the commercial loan or extension of credit are to be used for the direct benefit of the other person, to the extent of the proceeds so used, as provided by paragraph (2) of this subsection;

(B) a common enterprise is deemed to exist between the persons as persons as provided by paragraph (3) of this subsection; or

(C) the expected source of repayment for each commercial loan or extension of credit is the same for each person as provided by paragraph (3) of this subsection.

(2) Direct Benefit. The proceeds of a commercial loan or extension of credit to a borrower is considered used for the direct benefit of another person and attributed to the other person when the proceeds, or assets purchased with the proceeds, are transferred in any manner to or for the benefit of the other person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services from such other person.

(3) Common Enterprise.

(A) Description. A common enterprise is considered to exist and commercial loans to separate borrowers will be aggregated when:

(i) the expected source of repayment for each loan or extension of credit is the same for each borrower and neither borrower has another source of income from which the loan (together with the borrower's other obligations) may be fully repaid. An employer will not be treated as a source of repayment under this subparagraph because of wages and salaries paid to an employee, unless the standards of clause (ii) of this subparagraph are met:

(ii) the loans or extension of credit are made:

(I) to borrowers who are related directly or indirectly through control as defined by subsection (a) of this section; and

(II) substantial financial interdependence exists between or among the borrowers. Substantial financial interdependence is deemed to exist when fifty (50) percent or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues/expenses, intercompany loans, dividends, capital contributions, and other similar receipts or payments;

(iii) separate persons borrow from a credit union to acquire a business of enterprise of which those borrowers will own more than fifty (50) percent of the voting securities of voting interest, in which case a common enterprise is deemed to exist between the borrowers for purposes of combining the acquisition loans; or

(iv) the Department determines, based upon an evaluation of the facts and circumstances of particular transactions, that a common enterprise exists.

(B) Commercial Loans to Certain Entities. A commercial loan or extension of credit:

(i) to a partnership or joint venture is considered to be a commercial loan or extension of credit to each member of the partnership or joint venture. Excepted from this subdivision is a partner or member who: is not held generally liable, by the terms of the partnership or membership agreement or by applicable law, for the debts or actions of the partnership, joint venture, or association, provided those terms are valid against third parties under applicable law; and has not otherwise agreed to guarantee or be personally liable on the loan or extension of credit.

(ii) to a member of a partnership, joint venture, or association is generally not attributed to the partnership, joint venture, or associations, or to other members of the partnership, joint venture, or association, except as otherwise provided by paragraphs (2) and (3) of this subsection, provided that a commercial loan or extension of credit made to a member of a partnership, joint venture or association for the purpose of purchasing an interest in the partnership, joint venture or association, is attributed to the partnership, joint venture or association.

(C) Guarantors and Accommodation Parties. The derivative obligation of a drawer, endorser, or guarantor of a commercial loan or extension of credit, including a contingent obligation to purchase collateral that secures a commercial loan, is aggregated with other direct commercial loans or extensions of credit to such a drawer, endorser, or guarantor.

(j) Commercial Loans to One Borrower Limit. The total aggregate dollar amount of commercial loans by a credit union to any borrower at one time may not exceed the greater of fifteen (15) percent of the credit union's net worth or \$100,000, plus an additional ten (10) percent of the credit union's net worth if the amount that exceeds the credit union's fifteen (15) percent general limit is fully secured at all times with a perfected security interest in readily marketable collateral. Any insured or guaranteed portion of a commercial loan made through a program in which a federal or state agency (or its political subdivision) insures repayment, guarantees repayment, or provides an advance commitment to purchase the commercial loan in full, is excluded from this limit.

(k) Finance Code Limitation. In addition to the other limitations of this section, a credit union may not make a loan to a member or a business interest of the member if the loan would cause the aggregate amount of loans to the member and the member's business interests to exceed an amount equal to 10 percent of the credit union's total assets as provided by TEX. FIN. CODE §124.003.

(l) Commercial Loans Regarding Federal or State Guaranteed Loan Programs. A credit union may follow the loan requirements and limits of a guaranteed loan program for loans that are part of a loan program in which a federal or state agency (or its political subdivision) insures repayment, guarantees repayment, or provides an advance commitment to purchase the loan in full if that program has requirements that are less restrictive than those required by this section.

(m) Transitional Provisions.

(1) Waivers. Upon the effective date of this section, any waiver approved by the Department concerning a credit union's commercial lending activity is rendered moot, except for waivers granted for the commercial loan to one borrower limit. Borrowing relationships granted by waivers will be grandfathered however, the debt associated with those relationships may not be increased.

(2) Administrative Constraints. Limitations or other conditions imposed on a credit union in any written directive from the Department are unaffected by the adoption of this section. As of the effective date of this section, all such limitations or other conditions remain in place until such time as they are modified by the Department.

(n) Effective Date. This section takes effect on January 1, 2017.

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

Filed with the Office of the Secretary of State on November 4, 2016.

TRD-201605721

Harold E. Feeney

Commissioner

Credit Union Department

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Proposal publication date: July 22, 2016

For further information, please call: (512) 837-9236



PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §§153.5, 153.8, 153.13, 153.14, 153.17

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") adopt amendments to the following home equity lending interpretations: §153.5, concerning Three percent fee limitation, §153.8, concerning Security of the Equity Loan, §153.13, concerning Preclosing Disclosures, §153.14, concerning One Year Prohibition, and §153.17, concerning Authorized Lenders.

The commissions adopt the amendments without changes to the proposed text as published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5309).

The amendments apply the administrative interpretation of the home equity lending provisions of Article XVI, Section 50 of the Texas Constitution ("Section 50") allowed by Section 50(u) and Texas Finance Code, §11.308 and §15.413.

In general, the purpose of the amendments to Chapter 153 is to implement changes resulting from the commissions' review of this chapter under Texas Government Code, §2001.039. The notice of intention to review 7 TAC, Chapter 153 was published in the *Texas Register* on February 26, 2016 (41 TexReg 1503). The Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, the Office of Consumer Credit Commissioner, and the Texas Credit Union Department ("agencies") received one comment on the notice of intention to review. The comment was submitted by Black, Mann & Graham, L.L.P.

The agencies prepared an initial draft of amendments with technical corrections and updates to Chapter 153. The agencies distributed the initial draft to home equity stakeholders for pre-comments, in order to prepare an informed and well-balanced proposal for the commissions. The agencies received written precomments from several stakeholders. The agencies incorporated suggestions offered by stakeholders into the amendments. The agencies believe that this early participation of stakeholders has greatly benefited the resulting adoption.

The individual purposes of the adopted amendments to each rule are provided in the following paragraphs.

The purpose of the amendments to §153.5 is to use terminology that is consistent with other interpretations. In paragraphs (3)(B) and (7), the amendments add "equity" before "loan" to ensure that the provisions use the term "equity loan," which is defined in §153.1(7).

The purpose of the amendment to §153.8(5) is to make a technical correction in a citation to Section 50(a)(6)(H). In the comment on the notice of intention to review, the commenter notes that this section currently contains an incorrect reference to "Section 50(a)(H)." In response to this comment, the amendment corrects the provision to cite Section 50(a)(6)(H).

The purpose of the adopted amendments to §153.13 is to specify how lenders can comply with the preclosing disclosure requirement in Section 50(a)(6)(M)(ii), and to include updated citations to federal rules. Under Section 50(a)(6)(M)(ii), a home equity loan may not be closed before "one business day after the date that the owner of the homestead receives . . . a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing." Previously, §153.13(3) explained that lenders could comply with this requirement by providing a properly completed HUD-1 form from the U.S. Department of Housing and Urban Development. The Consumer Financial Protection Bureau (CFPB) recently adopted a closing disclosure that integrates and replaces the HUD-1 form. The CFPB's rules containing the requirements for the integrated closing disclosure are located at Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38. The requirement to provide the closing disclosure went into effect on October 3, 2015. The requirement generally applies to closed-end residential mortgage loans for which the lender or servicer received a loan application on or after that date. For loans where the application was received before October 3, 2015, the HUD-1 form (rather than the CFPB closing disclosure) was the appropriate form for lenders to use. The closing disclosure requirement does not apply to home equity lines of credit, which require separate account-opening disclosures under a different section of Regulation Z, 12 C.F.R. §1026.6(a).

In the comment on the notice of intention to review, the commenter recommends replacing the reference to the HUD-1 form in §153.13(3) with a reference to the CFPB's closing disclosure. Based on this recommendation and the federal rules discussed

above, the adopted amendments to §153.13(3) delete the reference to the HUD-1 form, and add new references to the disclosures currently required under Regulation Z: the closing disclosure (for closed-end equity loans) and the account-opening disclosures (for home equity lines of credit). When these disclosures are properly completed, they provide borrowers with a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing, in accordance with Section 50(a)(6)(M)(ii).

The purpose of the amendment to §153.14(2)(A) is to update a citation to federal law. Previously, this provision cited the Soldiers' and Sailors' Civil Relief Act. In 2003, the Servicemembers Civil Relief Act replaced the former Soldiers' and Sailors' Civil Relief Act. The amendment to §153.14(2)(A) replaces a citation to the previous law with a citation to the current law.

The purpose of the amendments to §153.17 is to specify who is authorized to make a home equity loan, in light of recent changes in federal policy and amendments to the licensing provisions of Texas Finance Code, Chapters 156 and 342. Section 50(a)(6)(P) lists the types of lenders that are authorized to make home equity loans, including "a person approved as a mortgagee by the United States government to make federally insured loans," "a person licensed to make regulated loans, as provided by statute of this state," and "a person regulated by this state as a mortgage broker."

In §153.17(2), an adopted amendment removes a reference to "Approved correspondents" and replaces it with "Loan correspondents." In 2010, the Department of Housing and Urban Development ended its program of approving loan correspondents, as described in mortgagee letter 2010-20. As amended by the adoption, §153.17(2) explains that loan correspondents to an approved mortgagee are not authorized lenders unless they qualify under another provision of Section 50(a)(6)(P). In addition, in the comment on the notice of intention to review, the commenter recommends correcting a reference in §153.17(2) to "another section of (a)(6)(P)." In response to this recommendation, an adopted amendment replaces this phrase with "another provision of Section 50(a)(6)(P)."

Adopted new §153.17(3) explains that a person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi). Until 2011, Chapter 156 of the Texas Finance Code described the licensing requirements for mortgage brokers. In 2011, the chapter was amended to replace the term "mortgage broker" with the terms "residential mortgage loan company" and "residential mortgage loan originator." In 2011, the Texas Department of Savings and Mortgage Lending published a "Home Equity Terminology Advisory Bulletin," explaining that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution. In the comment on the notice of intention to review, the commenter recommends an amendment to §153.17 describing this interpretation. In response to this comment, adopted new §153.17(3) explains that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution.

Adopted new §153.17(4) replaces former paragraphs (3) and (4), and explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution. Former §153.17(3) explained that a nondepository lender must hold a license under Chapter 342 to make, transact, or negotiate a secondary mortgage loan. Former §153.17(4) explained that if a person does not meet the definition of Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must ob-

tain a Chapter 342 license to be authorized to make home equity loans. In 2007, Texas Finance Code, §342.051 was amended to include an exemption for a person licensed under Chapter 156. In a precomment, one stakeholder recommends deleting former paragraph (3), because the paragraph does not acknowledge the exemption for Chapter 156 licensees, and because current paragraph (1) already explains that lenders must comply with statutory licensing requirements. In response to this precomment, the adoption replaces paragraphs (3) and (4) with a new paragraph (4). The new paragraph explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution, and that if a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans.

The commissions received no written comments on the proposal.

The amendments are adopted under Article XVI, Section 50(u) of the Texas Constitution and Texas Finance Code, §11.308 and §15.413, which authorize the commissions to adopt interpretations of Article XVI, Section 50(a)(5) - (7), (e) - (p), (t), and (u) of the Texas Constitution. The constitutional provisions affected by the adopted amendments are contained in Article XVI, Section 50 of the Texas Constitution.

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

Filed with the Office of the Secretary of State on November 4, 2016.

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Leslie L. Pettijohn

Consumer Credit Commissioner

Joint Financial Regulatory Agencies

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For further information, please call: (512) 936-7621



TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 17. STATE ARCHITECTURAL PROGRAMS

13 TAC §17.2

The Texas Historical Commission (hereinafter referred to as the "commission") adopts the amendments to §17.2, concerning Review of Work on County Courthouses without changes to the text as published in the August 12, 2016, issue of the *Texas Register* (41 TexReg 5862), and will not be republished.

The Texas Historical Commission adopted an amendment to Title 13 of the Texas Administrative Code, Part 2, Chapter 17, §17.2 in July 2013. The amendment included an inadvertent revision to the text that created a grammatical error and confused the rule. The purpose of this revision is to correct that text so that it forms a complete sentence and replicates the text in the statute §442.008 of the Texas Government Code, as intended

by the July 2013 amendment. In addition, the commission takes this opportunity to rearrange the procedure section text in order to form a more logical sequence.

Section 17.2 relates to Review of Work on County Courthouses. The commission's Review of Work on County Courthouses is the agency's responsibility under Texas Government Code (TGC) §442.008.

The adoption of this amendment by the commission is needed to correct an inadvertent revision to the text of §17.2 that created a grammatical error during a previous amendment adopted in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5711). The text will be updated so that it forms a complete sentence and replicates the statute TGC §442.008 as intended by the July 2013 amendment. In addition, the text of the procedure section of the rule will be rearranged to form a more logical sequence.

No comments were received regarding adoption of amendments.

These amendments are adopted under the authority of Texas Government Code §442.005(q), which provides the Texas Historical Commission with the authority to promulgate rules to reasonably affect the purposes of those chapters.

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

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

TRD-201605701

Mark Wolfe

Executive Director

Texas Historical Commission

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Proposal publication date: August 12, 2016

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



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

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

SUBCHAPTER B. ROLE AND MISSION, TABLES OF PROGRAMS, COURSE INVENTORIES

19 TAC §§5.21, 5.23 - 5.25

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Chapter 5, Rules Applying to Public Universities, Health-Related Institutions, and/or Selected Public Colleges of Higher Education in Texas, Subchapter B, §§5.21 and 5.23 - 5.25, concerning role and mission statements

for public institutions of higher education and submission of planning notifications with changes to proposed text as published in the August 12, 2016, issue of the *Texas Register* (41 TexReg 5877). The intent of the amendments is to clarify and streamline rules regarding the submission of changes to the role and mission statements and submission of planning notifications from public institutions of higher education to the Texas Higher Education Coordinating Board.

Six comments were received from The University of Texas at Austin (UT Austin), the Texas Tech University System (TTU System), the Texas A&M University System, and the University of North Texas System.

Comment: Texas A&M University System expressed concern that the proposed notification process would hinder the ability of institutions to respond to market needs, student demand, and opportunity, and noted that private/for-profit institutions do not have the same limitations. Texas A&M University System estimated that the proposed planning notification would delay responsiveness to need/opportunity by at least three months (time from one THECB meeting to another), and would require considerably longer preparation times and approval delays. The University of North Texas System submitted a similar comment.

Staff Response: The program approval process for Texas public institutions of higher education is not required for private institutions of higher education, as they do not submit their proposed programs for approval by the Board. The approval process for new programs at public higher education institutions includes many factors prescribed by statute and administrative code, including input from the Board. This revised planning notification process will improve the Board's ability to carry out its statutory mission to provide leadership and coordination for the Texas higher education system. No change was made in the rules as a result of these comments.

Comment: Texas A&M University System noted that the proposed language is logistically problematic, saying the proposed language requires institutions to submit materials at the point where they "intend to engage in planning." Elsewhere the proposed language notes institutions must submit planning notification if they "intend to engage in any action that leads to the preparation of a proposal for a new program including but not limited to...." It is not possible to submit anticipated costs and revenues without first planning. The University of North Texas System (UNTS), The University of Texas System, and the Texas Tech University System submitted similar comments.

Staff Response: Staff agrees with the institutional comments, and made the revisions to §§5.23(1) and (6) of the proposed rules by deleting references to the terms "intent to plan" and "intends to engage in." The amended rules now require institutions to submit planning notification in order to notify the Board that planning for a new degree program has begun.

Comment: Texas A&M University System commented that the information to be submitted in the planning notification is significant: "Anticipated costs and revenues during the first five years, and identify the existing or new administrative unit." To provide this information requires planning and is more appropriate for the proposal stage of review. The Texas Tech University System submitted a similar comment.

Staff Response: Staff agrees with this comment, and made the corresponding corrections to section 5.24(a) of the proposed rules by removing the requirement to submit "anticipated costs and revenues during the first five years" and "identify the existing

or new administrative unit in which the proposed program would be offered."

Comment: Texas A&M University System commented that the proposed planning notification requirement would be redundant with the program approval process, requiring some of the same elements, and therefore will render the program submission process less efficient.

Staff Response: This revised planning notification process will improve the Board's ability to carry out its statutory mission to provide leadership and coordination for the Texas higher education system. No change was made in the proposed rules as a result of this comment.

Comment: The University of North Texas System expressed their concern that the proposed changes to rules exceed the statutory authority provided under Texas Education Code §61.0512 by requiring an institution to notify the Board before any planning work has begun. The University of Texas System submitted a similar comment.

Staff Response: The proposed rules have been amended in §5.23(1) to clarify that planning notification is "Formal notification from an institution that planning has begun for a proposal for a new degree program," rather than notification before planning begins. Once recognition from the Board is obtained, an institution would complete its planning and then submit its proposal.

Comment: The University of North Texas System expressed their objection to provisions in the proposed rules that define "planning" in an unduly broad manner, based upon intent to commit certain actions rather than the actions themselves. The definition also prescribes certain actions, along with the phrase "including but not limited to", which suggests that almost any action could be prohibited.

Staff Response: Staff agrees with the institution's comments, and deleted references to "intent to plan" and "including but not limited to" in §5.23(1) and (6) of the proposed rules.

The amendments are adopted under Texas Education Code, Chapter 61, Subchapter C, §61.0512(a-5) and (b), which authorizes the Coordinating Board to evaluate the role and mission of public institutions of higher education and requires institutions of higher education to notify the Coordinating Board when planning for a new degree program.

§5.21. Purpose.

The purpose of this subchapter is to implement rules regarding the role and mission for each public institution of higher education in Texas and for submission of the role and mission statements, submission of planning notification, and periodic review of all degree and certificate programs offered by a public institution of higher education. Section 5.24(a) of this title (relating to Submission of Mission Statements and Planning Notification) applies to selected Public Colleges.

§5.23. Definitions.

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

(1) Planning Notification--Formal notification from an institution that planning has begun for a proposal for a new degree program.

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

(3) Commissioner--The Commissioner of Higher Education.

(4) Mission Statement--A narrative description of the general mission of each institution prepared by the institution and approved by its Board of Regents. The statement should address the fundamental purpose of the institution with respect to its teaching, research, and public service responsibilities. The institution's special concerns for quality and access, liberal arts, admissions, career-oriented programming, extension and articulation with community colleges and public schools, traditional and nontraditional education, and similar issues also may be described. The mission statement must be consistent with any statutory mission description.

(5) Organized classes--Classes whose primary mode of instruction is lecture, laboratory, or seminar.

(6) Planning--An institution is considered by the Board to be planning for a new degree program if it takes any action that leads to the preparation of a proposal for a new program, including hiring personnel, including consultants and planning deans, leasing and/or purchasing real estate, building facilities, and/or developing curriculum.

(7) Program Inventory--The official list of all degree and certificate programs approved for a public community college, university or health-related institution.

(8) Role and Mission or Role and Scope--Equivalent phrases used to refer to the overall purpose of an institution, including its role within the overall system of Texas higher education. The role and mission for a university or health-related institution are described in its Mission Statement.

(9) Texas Classification of Instructional Programs (CIP) Coding System--The Texas adaptation of the federal Classification of Instructional Programs taxonomy developed by the National Center for Education Statistics and used nationally to classify instructional programs and report educational data.

(10) Selected Public Colleges--Those public colleges authorized to offer baccalaureate degrees in Texas.

(11) Statutory mission description--A statement of an institution's mission or purpose that is established directly in statute.

§5.24. Submission of Mission Statements and Planning Notification.

(a) When submitting a Planning Notification to add a degree program (baccalaureate, master's, and doctoral) to the institution's program inventory, an institution of higher education may be requested to address the Board at a regularly scheduled meeting to describe how the institution believes the potential program contributes to the efficient and effective diffusion of education throughout the state while avoiding costly duplication in program offerings, faculties, and physical plants. An institution shall submit written information to the Board including the title of the potential proposed program, level, Classification of Instructional Program (CIP) Code, anticipated date of proposal submission, and provide a brief description of the proposed program. Planning Notification must occur prior to an institution beginning planning for or submitting a proposal for a new degree program that requires Board approval.

(b) Review Process.

(1) As provided by Texas Education Code, §61.051(a-5) and §61.052, the Board shall regularly review the role and mission statements, and all similar degree and certificate programs offered by each public senior university or health related institution.

(2) The Boards of Regents shall approve or re-approve institutional mission statements. Each Board of Regents shall provide the

Coordinating Board with its current institutional mission statements after any change has been approved.

(3) Planning Notification must be submitted at least one year prior to submission of a proposal to offer the degree if the proposed program would be a program leading to the award of a "professional degree," as defined by Texas Education Code 61.306, including Doctor of Medicine (M.D.), Doctor of Osteopathy (D.O.), Doctor of Dental Surgery (D.D.S.), Doctor of Veterinary Medicine (D.V.M.), Juris Doctor (J.D.), and Bachelor of Laws (LL.B.).

§5.25. Course Inventories at Public Universities.

(a) Each institution shall report its course offerings and changes to its course offerings following procedures established by the Commissioner. The report must specifically identify any course included in the common course numbering system approved by the Board that has been added to or removed from the institution's list of courses, beginning with course lists submitted for the 2014-2015 academic year.

(b) Institutions may not offer courses at levels or in programs not approved by the Board.

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

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

TRD-201605707

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**SUBCHAPTER D. OPERATION OF
OFF-CAMPUS EDUCATIONAL UNITS OF
PUBLIC SENIOR COLLEGES, UNIVERSITIES
AND HEALTH-RELATED INSTITUTIONS**

19 TAC §§5.71 - 5.73, 5.76, 5.78

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Chapter 5, Rules Applying to Public Universities, Health-Related Institutions, and/or Selected Public Colleges of Higher Education in Texas, Subchapter D, Operation of Off-Campus Educational Units of Public Senior Colleges, Universities and Health-Related Institutions, §§5.71 - 5.73, 5.76, and 5.78, concerning the approval and operation of off-campus educational units with changes to proposed text as published in the August 12, 2016, issue of the *Texas Register* (41 TexReg 5878). The intent of the amendments is to clarify and streamline rules to reflect current statute, rule references, policies, and practices regarding the approval processes and operation of off-campus educational units.

Four comments were received from the Texas Tech University System, The University of Texas System, The University of North Texas System, and the Texas A&M University System regarding these proposed rules.

Comment: The Texas Tech University System, The University of Texas System, and the Texas A&M University System expressed their objection to language in §5.76(b) that provides the Commissioner authority to establish policies to designate off-campus educational units.

Staff Response: The rule to which the system offices are referring was adopted in 2003 as §5.76(i). The rule was not changed, only reorganized and renumbered in the proposed rules. No change was made in the proposed rules as a result of these comments.

Comment: The Texas Tech University System, The University of Texas System, The University of North Texas System, and the Texas A&M University System expressed their objection to language in §5.76(c) that provides the Board authority to withdraw the approval of an off-campus educational unit. Their opinion is that withdrawing the approval of the off-campus educational unit would, in effect, constitute the elimination of degree programs and would be in conflict with statute.

Staff Response: In §5.76 (c), the word "recognition" was replaced with "approval" in the proposed rule. Staff has reverted the rule back to its original language giving the board authority to withdraw the recognition of an off-campus educational unit, instead of the approval of an off-campus educational unit.

Comment: The Texas Tech University System expressed their objection to language in section 5.76(d) that prohibits off-campus educational units from requesting legislative funding separate from their parent institutions.

Staff Response: The rule to which the system offices are referring was adopted in 2003 as §5.76(h). The rule was not changed, only reorganized and renumbered in the proposed rules. No change was made in the proposed rules as a result of these comments.

Comment: The Texas A&M University System requested that staff revisit the policy requiring an institution to notify other public institutions within a 50-mile radius of the off-campus teaching site of its intention to offer new programs at the site 60 days prior to proposed first day of instruction.

Staff Response: No time frame is specified in the proposed rules regarding area notification to institutions within a 50-mile radius of off-campus educational units relating to new program delivery. This rule does not apply to notification of planning related to new sites. No change was made in the proposed rules as a result of this comment.

Comment: The Texas A&M University System requested that staff eliminate the repeated definition of multi-institution teaching center from §5.73(4) and §5.73(5)(C).

Staff Response: The language in the proposed rules serves the purpose of defining the multi-institutional teaching center and how it relates to an off-campus educational unit. No change was made in the proposed rules as a result of this comment.

Comment: The Texas A&M University System expressed their objection to the revision in the language of the University System Center definition in §5.73(5)(g) that specifies the partners of the center to be two or more of the system's parent institutions. It believes that this language discourages collaboration between community colleges and universities in the operation of the center.

Staff Response: The language in the proposed rules does not prohibit or restrict collaboration with community college partners

within a University System Center. No change was made in the proposed rules as a result of this comment.

Comment: The Texas A&M University System expressed their objection to language in §5.76(e)(1) that requires research at the center be limited to that necessary for the courses and programs offered.

Staff Response: The rule to which the system offices are referring was adopted in 2003 as §5.76(c)(1). The rule was not changed, only reorganized and renumbered in the proposed rules. No change was made in the proposed rules as a result of these comments.

The amendments are adopted under Texas Education Code, Chapter 61, Subchapter G, §61.0512 (g), which authorized the Coordinating Board to approve off-campus courses offered by institutions of higher education within the state.

§5.71. Purpose.

The provisions of this subchapter define off-campus educational units, establish criteria and procedures applicable to the classification, authorization, operation, and reclassification of these units. The provisions of this subchapter are applicable to all units of public senior colleges, universities and health-related institutions which offer instruction for credit but are geographically separate from their institutions' main campuses.

§5.72. Authority.

The authority for this subchapter is Texas Education Code, §61.051 and §61.0512(g).

§5.73. Definitions.

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

- (1) Board--The Texas Higher Education Coordinating Board.
- (2) Commissioner--The Commissioner of Higher Education.
- (3) Memorandum of Understanding (MOU)--Formal Agreement between two or more public institutions of higher education that define their roles in the establishment and operation of a multi-institutional teaching center. One or more private institutions may be included in the memorandum of understanding.
- (4) Multi-Institution Teaching Center (MITC)--An off-campus educational unit administered under a memorandum of understanding (MOU) between two or more public higher education institutions. It may also involve one or more private institutions. It has minimal administration and locally provided facilities.
- (5) Off-campus educational unit--A subdivision under the management and control of a parent institution(s), in a separate geographic setting with varying degrees of dependence in academic, administrative and fiscal matters. Off-campus education units include:
 - (A) Branch campus--A major, secondary location of an institution offering multiple programs, usually with its own administrative structure and usually headed by a Dean. A branch campus must be established by the Legislature or approved by the Board.
 - (B) Higher education teaching site--An off-campus teaching location that promotes access to a very limited array of courses and/or programs. Teaching sites may not own facilities, nor are they eligible for state support to acquire or build facilities, and do not entail a permanent commitment for continued service. See §5.76(i).

While higher education teaching sites do not require Board approval or recognition, institutions must notify the Board and institutions within a 50-mile radius of the teaching site and/or Higher Education Regional Council(s) prior to offering courses and/or programs. Issues and concerns must be resolved following Board policy related to approval of distance education off-campus courses and programs.

(C) Multi-Institution Teaching Center (MITC)--An off-campus educational unit administered under a memorandum of understanding (MOU) between two or more public higher education institutions. It may also involve one or more private institutions. It has minimal administration and locally provided facilities.

(D) Regional Academic Health Center (RAHC)--A special purpose campus of parent health-related institution(s) that may be used to provide undergraduate clinical education, graduate education, including residency training programs, or other levels of medical education in specifically identified counties.

(E) Single institution center--An off-campus educational unit administered by a single parent institution. It has minimal administration and locally provided facilities.

(F) Special Purpose Campus--A major, secondary location of an institution offering programs related to specific and limited field(s) of study, usually with its own administrative structure and usually headed by a Dean. Regional Academic Health Centers are considered special-purpose campuses. Special Purpose Campuses must be established by the Legislature or approved by the Board.

(G) University System Center (USC)--An off-campus educational unit administered by a single university system comprised of two or more of the system's parent institutions. A memorandum of understanding must be established between all parties that governs the operations of the USC. It has minimal administration and locally provided facilities.

(6) Parent institution--General academic teaching institution, medical or dental unit, or university system as defined in TEC §61.003 that offers its courses, programs or training at an off-campus educational unit. Credit hours are reported by the parent institution and degrees are awarded in the name of the parent institution.

§5.76. *General Principles for Off-Campus Educational Units.*

(a) The general purpose of off-campus educational units of all sizes is to meet the education needs of the people of Texas with a level of service that is appropriate for the area and cost effective to offer. Their specific purpose is directly related to the teaching of courses for academic credit from the parent institution(s) and/or for health professions' medical training.

(b) The Commissioner shall establish policies concerning how a location receives designation as a specific type of off-campus educational unit and how to expand educational activities.

(c) The type and name of all off-campus educational units, with the exception of higher education teaching sites, must be approved by the Board. Recognition of an off-campus educational unit may be withdrawn by the Board.

(d) An off-campus educational unit is financially dependent upon its parent institution(s) and is supported by the budget of the institution(s). It is not eligible to request separate legislative funding. Off-campus educational units should use locally provided facilities, where possible.

(1) Degree programs offered at off-campus educational units must be offered by and in the name of the parent institution(s).

(2) The parent institution must commit to providing a program long enough for a student to have a reasonable opportunity to graduate before the resource is withdrawn or to make other reasonable arrangements for students to complete programs that they have started.

(3) The Board must be notified of programs offered or discontinued at off-campus educational units. The Board shall maintain a list of these degree programs and make that list readily available to the public.

(4) Courses offered at off-campus educational units must be reported separately and accurately in required Board reports. Semester credit hours completed at the unit must be reported appropriately by the parent institution(s) and shall be funded as determined by the Legislature.

(5) The facilities of off-campus educational units shall comply with Chapter 17 of this title, relating to Resource Planning.

(e) Off-campus educational units are not intended to duplicate the full array and types of offerings available at regular general academic campuses. Their specific purpose is to:

(1) Focus on teaching and on delivery of high demand courses and programs for academic credit from the parent institution(s) and/or for health professions' training. Research conducted at off-campus educational units should be limited to that necessary for the courses and programs offered.

(2) Develop articulation agreements with community colleges in the area for provision of lower-division courses. In general, off-campus educational units are not intended to offer lower-division courses. Lower-division courses can only be offered in accordance with Chapter 4, subchapter Q of this title, relating to Approval of Off-Campus and Self-Supporting Courses and Programs for Public Institutions, and related Board procedures.

(f) Degree programs offered at off-campus educational units must be offered by and in the name of the parent institution(s).

(g) Off-campus educational units shall adhere to quality and approval criteria regarding courses, programs, student services and other academic matters contained in §§4.101 - 4.108 of this title (relating to Approval of Distance Education and Off-Campus Instruction for Public Colleges and Universities), and in the Approval of Distance Education, including Off-Campus Courses and Programs located in Board policies.

(h) The facilities of off-campus educational units shall comply with Chapter 17 of this title, relating to Resource Planning.

(i) Courses offered at off-campus educational units must be reported separately and accurately in required Board reports. Semester credit hours completed at the unit must be reported appropriately by the parent institution(s) and shall be funded as determined by the Legislature.

§5.78. *Supply/Demand Pathway.*

(a) The Board has developed the Supply/Demand Pathway (SDP) as a particular way to address anticipated large-scale enrollment demand in a specified region. The SDP shall be used as the model to address higher education needs in areas without ready geographic access to existing public higher education institutions. The general principles set forth in §5.76 of this title (relating to General Principles for Off-Campus Educational Units) are even more significant in regard to the larger scale efforts designated as SDP initiatives.

(b) An off-campus educational unit is on the "Pathway" when it is awarded that designation by the Board.

(c) The SDP consists of three categories:

(1) Category A. Institutions temporarily test the market both in terms of demand and staying power by providing off-campus courses and/or programs by one or more institutions. Should demand decrease or not materialize, courses and programs can be discontinued and resources moved to areas of greater demand.

(2) Category B. As demand increases, offerings may be organized through a multi-institution teaching center or as a university system center as a Pathway Education Center (PEC). A group of institutions may request that the Board authorize the establishment of a MITC. Alternatively, a university system may request that the Board authorize the establishment of a university system center. In either case, a lead institution shall be designated to provide leadership for the center and facilitate the provision of programs and resources from other institutions.

(3) Category C. After an entity in Category B has attained a full-time equivalent upper-level and graduate enrollment of 3,500 for one fall semester, the parent institution(s) and Board(s) of Regents may request that the Board review the status of the center and recommend that the Legislature reclassify the unit as an upper-level general academic institution--a university. The 3,500 FTSE standard approximates the headcount enrollment included in the current university funding formula as the minimum size needed to achieve economies of scale.

(d) Counting. The following general criteria and standards will be used to determine enrollments applicable to the SDP thresholds.

(1) Upper-division and graduate semester credit hours generated in academic courses delivered by the parent universities or by other institutions to on-site students at a PEC shall be counted towards the relevant SDP threshold.

(2) Upper-division and graduate semester credit hours generated in academic courses delivered electronically to students on-site at a PEC shall be counted towards the SDP threshold. For interactive video courses that originate at a PEC, only students taking the course at the PEC shall be counted.

(3) Upper-division and graduate semester credit hours generated in academic Internet-based courses and other courses offered in non-traditional formats that do not require the physical presence of the student at a PEC for a normal number of contact hours shall not be counted.

(4) Lower-division semester credit hours generated in academic courses offered at PECs shall not be counted towards the thresholds except when:

(A) the courses are required at the lower-division level for degree programs offered at the PEC,

(B) the courses are not offered by community colleges in the vicinity of the Center,

(C) the courses have been reviewed by Higher Education Regional Councils as described in Chapter 4.107(b) of this title, relating to Approval of Distance Education and Off-Campus Instruction for Public Colleges and Universities, and related Board procedures, and

(D) the Board has granted permission to teach the courses at the PEC.

(5) Enrollments in extension courses, continuing education and non-formula funded courses shall not be counted towards the thresholds.

(6) Semester credit hours generated in courses that do not receive formula funding (e.g., military science, theology and religious

vocations, some basic skills, personal awareness) shall not be counted toward the thresholds.

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

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



CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§7.3 - 7.8, 7.10, 7.11, 7.14

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Chapter 7, Subchapter A, Rules Applying to Degree Granting Colleges and Universities Other Than Texas Public Institutions, §§7.3 - 7.8, 7.10, 7.11, and 7.14 concerning the oversight of new postsecondary educational institutions with changes to proposed text as published in the August 12, 2016 issue of the *Texas Register* (41 TexReg 5882). The intent of the amendments is to provide clearer guidance to degree granting colleges and universities other than Texas public institutions and accrediting agencies and ensure continuing protection of students.

Ten comments were received from Western Technical College, El Paso; the Career Colleges & Schools of Texas board of directors; the Texas Workforce Commission; and Education Corporation of America regarding these proposed rules.

Comment: Western Technical College, El Paso, Texas (Western Tech), is one of two Texas institutions which have been grandfathered in and allowed to grant AOS degrees. Western Tech asked if the associate of occupational studies (AOS) degree programs will be limited to 72 Semester Credit Hours, as defined in revised §7.3(4)(B).

Staff Response: The definition in revised §7.3(4)(B) specifically provides a semester credit hour range for associate of applied arts and associate of applied science degrees. AOS degrees are not included in the semester credit hour range. Revised §7.5(u) sets forth the limitations on AOS degrees, but does not require a semester credit range. Neither the current rule nor the revised rule include a semester credit hour limitation of AOS degrees. No further change is needed in the proposed rules.

Comment: Western Tech referred to revised §7.3(20) defining experiential learning. Experiential learning for medical, nursing, allied health, and other health professions degree programs are included in the definition. Western Tech asked if it, as a Texas-based campus, would be required to provide a listing of all its clinical sites for its AAS Physical Therapist Assistant program.

Staff Response: Current §7.7(1)(A)(ii) requires institutions which are only providing clinicals or internships in Texas to list the physical location of its clinical or internship sites. These clinicals or internships are included in the experiential learning definition found in revised §7.3(2). However, §7.7(1)(A)(ii) does not require institutions which have campus locations in Texas to report their clinical or internship sites. No further change is needed in the proposed rules.

Comment: Western Tech stated that its accreditor, the Accrediting Commission of Career Schools and Colleges (ACCSC), requires general education instructors to have a Master's degree and a minimum of 15 hours in their discipline. The current and revised §7.4(11)(C) requires at least 18 graduate semester credit hours in the discipline, or closely related discipline, being taught. Western Tech asked if general education faculty will be required to have 18 semester credit hours, all at the master's level.

Staff Response: The 18 graduate semester credit hours in the discipline taught is a current requirement for general education faculty that has not been changed in the revised §7.4(11)(C). This requirement will remain in the rule. The subsection was revised to require a Master's degree for general education faculty. This revision aligns with the requirements of most accrediting agencies and clarifies that general education faculty should hold at least a Master's degree with 18 of the graduate semester credit hours in the discipline taught. No further change is needed in the proposed rules.

Comment: The Career Colleges & Schools of Texas board of directors (CCST) asked if, under revised §7.4(11)(C), a long-time faculty member, with a successful program, would be grandfathered in and considered to have exceptional experience in the field.

Staff response: Institutions continue to have the option found in §7.4(11)(E) to document justification for faculty with exceptional experience in the field of appointment. Such documentation includes continuous documented excellence in teaching. A long-time faculty member, with a successful program, may meet this standard. No further change is needed to the proposed rules.

Comment: Western Tech asked if in revised §7.4(24)(b), faculty qualifications were being removed for faculty size.

Staff Response: Revised §7.4(24) was revised to clarify that the only standards for operation which may be deviated for a compelling academic reason are the standards relating to faculty size and credit for work completed outside a collegiate setting. Faculty qualifications remain in subsection (11) of §7.4. No further change is needed in the proposed rules.

Comment: Texas Workforce Commission staff noted that revised §7.5(u) states that Texas has two career schools or colleges awarding the AOS degree, Universal Technical Institute and Western Technical College. Southwest Institute of Technology is no longer in operation. However, the revised rule later refers to three institutions.

Staff Response: Staff agrees with this change. Further revision is made to correctly state the number of career schools or colleges allowed to award the AOS degree.

Comment: Western Tech asked if they will not be allowed to add any further sub-specialties or concentrations to the AOS degree programs under §7.5(u).

Staff Response: The current §7.5(u) limits the AOS degree to the following fields: automotive mechanics, diesel mechanics, refrigeration, electronics, and business. The grandfathered institutions may continue to award the AOS degree for those fields listed in this subsection and shall be restricted to those fields. The revised rule does not change this restriction. No further change is needed in the proposed rules.

Comment: Education Corporation of America (ECA), on behalf of Brightwood College, Golf Academy of America, and Virginia College locations in Texas, requested additional revisions in §7.7 to clarify procedures to request a provisional time period if an institution's accrediting agency is removed from the US Department of Education and/or the Board's list of approved accreditors.

Staff Response: Staff agrees with this change. Further revisions are made to clarify what an institution must do in order to stay a revocation of its Certificate of Authorization.

Comment: CCST noted inconsistencies in revised §7.7(2) and (3) regarding the language of revocation.

Staff response: Clarifications based on changes suggested by ECA and made to §7.7(2) and (3) addressed inconsistencies. No further change is needed in the proposed rules.

Comment: CCST asked for clarification of revised §7.11, specifically subsection (a) regarding voiding a Certificate of Authorization and subsection (b)(3) and (4) of this section regarding documentation. CCST asked if a time lapse will occur for approval of a Change of Ownership, noting there have been delays in the past.

Staff response: A Certificate of Authorization will only be automatically void if the institution does not meet the requirements of this section. Requirements include documentation showing the new owner has been approved by the institution's Board-recognized accreditor or is able to meet the requirements of the existing Certificate of Authority; and that the institution has the financial ability to adequately support and conduct all approved programs. Inadequate documentation or inability to meet the requirements of this Rule may result in a delay for approval of a Change of Ownership. Sufficient notification and submission of documentation prior to a change of ownership should mitigate unnecessary delays. No further change is needed in the proposed rules.

The amendments are adopted under the Texas Education Code, Chapter 61, Subchapter G, §61.311, which authorized the Coordinating Board to promulgate standards, rules, and regulations governing the administration of the subchapter.

§7.3. Definitions.

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

(1) Accreditation--The status of public recognition that an accrediting agency grants to an educational institution.

(2) Accrediting Agency--A legal entity recognized by the Secretary of Education of the United States Department of Education as an accrediting agency that conducts accreditation activities through voluntary peer review and makes decisions concerning the accreditation status of institutions, including ensuring academic, financial, and operational quality. A Board-recognized Accrediting Agency is any accrediting agency authorized by the Secretary of Education of the United States Department of Education to accredit educational institutions that

offer the associate degree or higher, the standards of accreditation or membership for which have been found by the Board to be sufficiently comprehensive and rigorous to qualify its institutional members for an exemption from certain provisions of this chapter.

(3) Agent--A person employed by or representing a post-secondary educational institution that does not have a Certificate of Authorization or Certificate of Authority, within or without Texas who:

(A) solicits any Texas student for enrollment in the institution (excluding the occasional participation in a college/career fair involving multiple institutions or other event similarly limited in scope in the state of Texas);

(B) solicits or accepts payment from any Texas student for any service offered by the institution; or

(C) while having a physical presence in Texas, solicits students or accepts payment from students who do not reside in Texas.

(4) Associate Degree Program--A grouping of courses designed to lead the individual directly to employment in a specific career or to transfer to an upper-level baccalaureate program. This specifically refers to the associate of arts (AA), the associate of science (AS), the associate of applied arts (AAA), the associate of applied science (AAS), and the associate of occupational studies (AOS) degrees.

(A) Academic Associate Degree Program--A grouping of courses designed to transfer to an upper-level baccalaureate program and that includes sixty (60) semester credit hours and not more than sixty-six (66) semester credit hours or ninety (90) quarter credit hours and not more than ninety-nine (99) quarter credit hours. An academic associate degree must include at least twenty (20) semester credit hours or thirty (30) quarter credit hours of general education courses. This specifically refers to the associate of arts (AA) and the associate of science degrees (AS).

(B) Applied Associate Degree Program--A grouping of courses designed to lead the individual directly to employment in a specific career and that includes at least sixty (60) semester credit hours and not more than seventy-two (72) semester credit hours or ninety (90) quarter credit hours and not more than one hundred eight (108) quarter hours. An applied associate degree must include at least fifteen (15) semester credit hours or twenty-three (23) quarter credit hours of general education courses. This specifically refers to the associate of applied arts (AAA) and the associate of applied science (AAS) degrees. Associate of Occupational Studies (AOS) degrees are only allowed under §7.5(u) of this chapter.

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

(6) Board Staff--The staff of the Texas Higher Education Coordinating Board including the Commissioner of Higher Education and all employees who report to the Commissioner.

(7) Career School or College--Any business enterprise operated for a profit, or on a nonprofit basis, that maintains a place of business in the state of Texas or solicits business within the state of Texas, and that is not specifically exempted by Texas Education Code, §132.002 or §7.4 of this chapter (relating to Standards for Operations of Institutions), and:

(A) that offers or maintains a course or courses of instruction or study; or

(B) at which place of business such a course or courses of instruction or study is available through classroom instruction, by electronic media, by correspondence, or by some or all, to a person for the purpose of training or preparing the person for a field of endeavor

in a business, trade, technical, or industrial occupation, or for career or personal improvement.

(8) Certificate of Approval--The Texas Workforce Commission's approval of career schools or colleges with operations in Texas to maintain, advertise, solicit for, or conduct any program of instruction in this state.

(9) Certificate of Authority--The Board's approval of post-secondary institutions (other than exempt institutions), with operations in the state of Texas, to confer degrees or courses applicable to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees, while seeking Board-recognized accreditation. Additional conditions, restrictions, or requirements will be placed on a Certificate of Authority, including, but not limited to, application and review requirements for the initial application and supplementary reporting requirements during the first two years of operation, if an institution does not meet one of the three previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter. Additional conditions, restrictions, or requirements may be placed on any Certificate of Authority if recommended to and approved by the Board.

(10) Certificate of Authorization--The Board's acknowledgment that an institution is qualified for an exemption from certain identified regulations in this subchapter.

(A) A Certificate of Authorization for an institution offering degrees or courses leading to degrees at a physical location in Texas will be issued for the period of time in the institution's current grant of accreditation by its Board-recognized accreditor.

(B) A Certificate of Authorization may be issued as provisional for a 15-month temporary exemption from certain identified regulations in this subchapter based on its main campus' accreditation while seeking final approval for the new Texas-based campus from its Board-recognized accreditor and the Texas Workforce Commission.

(C) An out-of-state institution may be issued a renewable one-year Certificate of Authorization in order to allow students to complete experiential learning experiences in Texas.

(11) Certificate of Registration--The Board's approval of an agent to solicit students on behalf of a private postsecondary educational institution in the state of Texas.

(12) Certification Advisory Council--The Council as established by Board rules Chapter 1, Subchapter H, §§1.135 - 1.141 of this title (relating to Certification Advisory Council).

(13) Change of Ownership or Control--Any change in ownership or control of a career school or college, or a postsecondary educational institution, or an agreement to transfer control of such institution.

(A) The ownership or control of a career school or college or postsecondary educational institution is considered to have changed:

(i) in the case of ownership by an individual, when more than fifty (50) percent of the institution has been sold or transferred;

(ii) in the case of ownership by a partnership or a corporation, when more than fifty (50) percent of the institution or of the owning partnership or corporation has been sold or transferred; or

(iii) 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 institution.

(B) A change of ownership or control does not include a transfer that occurs as a result of the retirement or death of the owner if transfer is to a member of the owner's family who has been directly and constantly involved in the management of the institution for a minimum of two years preceding the transfer. For the purposes of this section, a member of the owner's family is a parent, sibling, spouse, or child; spouse's parent or sibling; or sibling's or child's spouse.

(14) Cited--Any reference to an institution in a negative finding or action by an accrediting agency.

(15) Classification of Instructional Programs (CIP) Code--The four (4) or six (6)-digit code assigned to an approved degree program in accordance with the CIP manual published by the U.S. Department of Education, National Center for Education Statistics. CIP codes define the authorized teaching field of the specified degree program, based upon the occupation(s) for which the program is designed to prepare its graduates.

(16) Commissioner--The Commissioner of Higher Education.

(17) Degree--Any title or designation, mark, abbreviation, appellation, or series of letters or words, including "associate," "bachelor's," "master's," "doctor's" and their equivalents and foreign cognates, which signify, purport to signify, or are generally taken to signify satisfactory completion of the requirements of all or part of a program of study which is generally regarded and accepted as an academic degree-level program by accrediting agencies recognized by the Board.

(18) Educational or Training Establishment--An enterprise offering a course of instruction, education, or training that is not represented as being applicable to a degree.

(19) Exempt Institution--A postsecondary educational institution that is accredited by an agency recognized by the Board under §7.6 of this chapter (relating to Recognition of Accrediting Agencies), is defined as a "private or independent institution of higher education" under Texas Education Code, §61.003(15), a career school or college that applies for and is declared exempt under this chapter, an institution that has received approval by a state agency authorizing the institution's graduates to take a professional or vocational state licensing examination administered by that agency as described in Texas Education Code, §61.303(a), or an institution exempted by the Texas Workforce Commission under Texas Education Code, §132.002. Exempt institutions must comply with certain Board rules.

(20) Experiential Learning--Process through which students develop knowledge, skills, and values from direct experiences outside an institution's classrooms. Experiential learning encompasses a variety of activities including, but not limited to, internships, externships, practicums, clinicals, field experience, or other professional work experiences. References to clinicals within this chapter encompasses all site-specific health professions experiential learning. Clinicals include site experiences for medical, nursing, allied health, and other health professions degree programs.

(21) Fictitious Degree--A counterfeit or forged degree or a degree that has been revoked.

(22) Fraudulent or Substandard Degree--A degree conferred by a person who, at the time the degree was conferred, was:

(A) operating in this state in violation of this subchapter;

(B) not eligible to receive a Certificate of Authority under this subchapter and was operating in another state in violation of a law regulating the conferral of degrees in that state or in the state in which the degree recipient was residing or without accreditation by a

recognized accrediting agency, if the degree is not approved through the review process described by §7.12 of this chapter (relating to Review and Use of Degrees from Institutions Not Eligible for Certificates of Authority); or

(C) not eligible to receive a Certificate of Authority under this subchapter and was operating outside the United States, and whose degree the Board, through the review process described by §7.12 of this chapter, determines is not the equivalent of an accredited or authorized degree.

(23) Out-of-State Public Postsecondary Institution--Any senior college, university, technical institute, junior or community college, or the equivalent which is controlled by a public body organized outside the boundaries of the state of Texas. For purposes of this chapter, out-of-state public institutions of higher education are considered postsecondary educational institutions.

(24) Person--Any individual, firm, partnership, association, corporation, enterprise, postsecondary educational institution, other private entity, or any combination thereof.

(25) Physical Presence--

(A) While in Texas, a representative of the school or a person being paid by the school, who conducts an activity related to postsecondary education, including for the purposes of recruiting students (excluding the occasional participation in a college/career fair involving multiple institutions or other event similarly limited in scope in the state of Texas), teaching or proctoring courses including internships, clinicals, externships, practicums, and other similarly constructed educational activities (excluding those individuals that are involved in teaching courses in which there is no physical contact with Texas students or in which visiting students are enrolled), or grants certificates or degrees; and/or

(B) The institution has any location within the state of Texas which would include any address, physical site, telephone number, or facsimile number within or originating from within the boundaries of the state of Texas. Advertising to Texas students, whether through print, billboard, internet, radio, television, or other medium alone does not constitute a physical presence.

(26) Postsecondary Educational Institution--An educational institution which:

(A) is not a public community college, public technical college, public senior college or university, medical or dental unit or other agency as defined in Texas Education Code, §61.003;

(B) is incorporated under the laws of this state, or maintains a place of business in this state, or has an agent or representative present in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, by correspondence, or by some means or all leading to a degree; provides or offers to provide credits alleged to be applicable to a degree; or represents that credits earned or granted are collegiate in nature, including describing them as "college-level," or at the level of any protected academic term.

(27) Private Postsecondary Educational Institution--An institution which:

(A) is not an institution of higher education as defined by Texas Education Code, §61.003;

(B) is incorporated under the laws of this state, maintains a place of business in this state, has an agent or representative presence in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, or by correspondence leading to a degree or providing credits alleged to be applied to a degree.

(28) Professional Degree--A degree that is awarded for a Doctor of Medicine (M.D.), Doctor of Osteopathy (D.O.), Doctor of Dental Surgery (D.D.S.), Doctor of Veterinary Medicine (D.V.M.), Juris Doctor (J.D.), and Bachelor of Laws (LL.B.) and their equivalents and foreign cognates.

(29) Program or Program of Study--Any course or grouping of courses which are represented as entitling a student to a degree or to credits applicable to a degree.

(30) Protected Term--The terms "college," "university," "school of medicine," "medical school," "health science center," "school of law," "law school," or "law center," its abbreviation, foreign cognate or equivalents.

(31) Reciprocal State Exemption Agreement--An agreement entered into by the Board with an out-of-state state higher education agency or higher education system for the purpose of creating a reciprocal arrangement whereby that entity's institutions are exempted from the Board oversight for the purposes of distance education. In exchange, participating Texas public or private institutions of higher education as defined in Texas Education Code, §61.003 would be exempted from that state's oversight for the purposes of distance education.

(32) Representative--A person who acts on behalf of an institution regulated under this subchapter. The term includes, without limitation, recruiters, agents, tutors, counselors, business agents, instructors, and any other instructional or support personnel.

(33) Required State or National Licensure--The requirement for graduates of certain professional programs to obtain a license from state or national entities for entry-level practice.

(34) Single Point of Contact--An individual who is designated by an institution as the person responsible for receiving and conveying information between an institution and the Board or Board staff. The Board will direct all communications regarding an institution to the Single Point of Contact. Institutions must inform the Board of changes in the designated Single Point of Contact within 30 days of change.

(35) Substantive Change--Any change in principal location, ownership, or governance of an institution, change in accrediting agency or final action by an accrediting agency changing such institution's status with such accrediting agency, including negative actions taken by the accrediting agency against an institution, change in degree- or credential-level for an approved program, addition of new programs, degrees or credentials offered, or change in United States Department of Education requirements for receipt of federal financial aid based on financial or accreditation status.

(36) Visiting Student--A student pursuing a degree at an out-of-state institution (i.e., home institution) with no physical presence in Texas who has permission from the home institution and a Texas institution, which is either exempt from Board rules or currently in compliance with Board rules, to take specific courses at the Texas institution. The two institutions have an agreement that courses taken at the Texas institution will transfer back to the home institution.

§7.4. *Standards for Operation of Institutions.*

(a) All institutions that operate within the state of Texas are required to meet the following standards. These standards will be enforced through the Certificate of Authority process. Standards addressing the same principles will be enforced by Board-recognized accrediting agencies under the Certificate of Authorization process. Particular

attention will be paid to the institution's commitment to education, responsiveness to recommendations and suggestions for improvement, and, in the case of a renewal of a Certificate of Authority, record of improvement and progress. These standards represent generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas. Such practices and principles are generally set forth by institutional and specialized accrediting bodies and the academic and professional organizations.

(1) Legal Compliance. The institution shall be maintained and operated in compliance with all applicable ordinances and laws, including the rules and regulations adopted to administer those ordinances and laws. Postsecondary educational institutions shall demonstrate compliance with Texas Education Code, Chapter 132 by supplying either a copy of a Certificate of Approval to operate a career school or college or a Letter of Exemption from the Texas Workforce Commission.

(2) Qualifications of Institutional Officers.

(A) The character, education, and experience in higher education of governing board administrators, supervisors, counselors, agents, representatives, and other institutional officers shall reasonably ensure that the institution can maintain the standards of the Board and progress to accreditation within the time limits set by the Board.

(B) The chief academic officer shall hold an earned advanced degree appropriate for the mission of the institution, preferably, an earned doctorate awarded by an institution accredited by a recognized accrediting agency, and shall demonstrate sound aptitude for and experience with curriculum development and assessment; accreditation standards and processes as well as all relevant state regulations; leadership and development of faculty, including the promotion of scholarship, research, service, academic freedom and responsibility, and tenure (where applicable); and the promotion of student success.

(C) In the case of a renewal of a Certificate of Authority, the institutional officers also shall demonstrate a record of effective leadership in administering the institution.

(3) Governance. The institution shall have a system of governance that facilitates the accomplishment of the institution's mission and purposes, supports institutional effectiveness and integrity, and protects the interests of its constituents, including students, faculty and staff. If the institution has a governing board consisting of at least three (3) members, and that board focuses on the accomplishment of the institution's mission and purposes, supports institutional effectiveness and integrity, and protects the interests of its constituents, this standard will be considered as met. In the absence of such a governing board, the burden to establish appropriate safeguards within its system of governance and to demonstrate their effectiveness falls upon the institution.

(4) Distinction of Roles. The institution shall define the powers, duties and responsibilities of the governing body and the executive officers. There shall be a clear distinction in the roles and personnel of the chief business officer and the chief academic officer.

(5) Financial Resources and Stability. The institution shall have adequate financial resources and financial stability to provide education of good quality and to be able to fulfill its commitments to students. The institution shall have sufficient reserves, line of credit, or surety instrument so that, together with tuition and fees, it would be able to complete its educational obligations to currently enrolled students if it were unable to admit any new students.

(6) Financial Records. Financial records and reports of the institution shall be kept and made separate and distinct from those of

any affiliated or sponsoring person or entity. Financial records and reports at a not-for-profit institution shall be kept in accordance with the guidelines of the National Association of College and University Business Officers as set forth in College and University Business Administration (Sixth Edition), or such later editions as may be published. An annual independent audit of all fiscal accounts of the educational institution shall be authorized by the governing board and shall be performed by a properly authorized certified public accountant.

(7) Institutional Assessment. Continual and effective assessment, planning, and evaluation of all aspects of the institution shall be conducted to advance and improve the institution. These aspects include, but are not limited to, the academic program of teaching, research, and public service; administration; financial planning and control; student services; facilities and equipment, and auxiliary enterprises.

(8) Program Evaluation.

(A) The institution shall establish adequate procedures for planning and evaluation, define in measurable terms its expected educational results, and describe how those results will be achieved.

(B) For all associate degree programs, the evaluation criteria shall include the following: mission, labor market need, curriculum, enrollment, graduates, student placement, follow-up results, ability to finance each program of study, facilities and equipment, instructional practices, student services, public and private linkages, qualifications of faculty and administrative personnel, and success of its students.

(C) For applied associate degree programs relating to occupations where state or national licensure is required, graduates must pass the licensing examination at a rate acceptable to the related licensing agency.

(9) Administrative Resources. The institution has the administrative capacity to meet the daily needs of the administration, faculty and students, including facilities, laboratories, equipment, technology and learning resources that support the institution's mission and programs.

(10) Student Admission and Remediation.

(A) Upon the admission of a student to any undergraduate program, the institution shall document the student's level of preparation to undertake college level work by obtaining proof of the student's high school graduation or General Educational Development (GED) certification. If a GED is presented, to be valid, the score must be at or above the passing level set by the Texas Education Agency. The academic skills of each entering student may be assessed with an instrument of the institution's choice. The institution may provide an effective program of remediation for students diagnosed with deficiencies in their preparation for collegiate study.

(B) Upon the admission of a student to any graduate program, the institution shall document that the student is prepared to undertake graduate-level work by obtaining proof that the student holds a baccalaureate degree from an institution accredited by a recognized accrediting agency, or an institution holding a Certificate of Authority to offer baccalaureate degrees under the provisions of this chapter, or a degree from a foreign institution equivalent to a baccalaureate degree from an accredited institution. The procedures used by the institution for establishing the equivalency of a foreign degree shall be consistent with the guidelines of the National Council on the Evaluation of Foreign Education Credentials or its successor.

(11) Faculty Qualifications. The character, education, and experience in higher education of the faculty shall be such as may rea-

sonably ensure that the students will receive an education consistent with the objectives of the course or program of study.

(A) Each faculty member, except as provided by subparagraph (E) of this paragraph, teaching in an academic associate, applied associate leading to required state or national licensure, or baccalaureate level degree program shall have at least a master's degree from an institution accredited by a recognized agency with at least eighteen (18) graduate semester credit hours in the discipline, or closely related discipline, being taught.

(B) Each faculty member except, as provided by subparagraph (E) of this paragraph, teaching career and technical courses in an applied associate degree program, or career and technical courses that academic associate or baccalaureate students may choose to take, shall have at least an associate degree in the discipline being taught from an institution accredited by a recognized agency and or at least three (3) years of full-time direct or closely related experience in the discipline being taught.

(C) Each faculty member, except as provided by subparagraph (E) of this paragraph, teaching general education courses in an applied associate degree program shall have at least a master's degree from an institution accredited by a recognized accrediting agency with at least eighteen (18) graduate semester credit hours in the discipline, or closely related discipline, being taught.

(D) Except as provided by subparagraph (E) of this paragraph, graduate-level degree programs shall be taught by faculty holding doctorates, or other degrees generally recognized as the highest attainable in the discipline, or closely related discipline, awarded by institutions accredited by an agency recognized by the Board.

(E) With the approval of a majority of the institution's governing board, an individual with exceptional experience in the field of appointment, which may include direct and relevant work experience, professional licensure and certification, honors and awards, continuous documented excellence in teaching, or other demonstrated competencies and achievements, may serve as a faculty member without the degree credentials specified in subparagraphs (A) - (D) of this paragraph. Such appointments shall be limited and the justification for each such appointment shall be fully documented. The Board may review the qualifications of the full complement of faculty providing instruction at the institution to verify that such appointments are justified.

(12) Faculty Size. There shall be a sufficient number of faculty holding full-time teaching appointments that are accessible to the students to ensure continuity and stability of the education program, adequate educational association between students and faculty and among the faculty members, and adequate opportunity for proper preparation for instruction and professional growth by faculty members. At the associate and baccalaureate levels, there shall be at least one (1) full-time faculty member in each program. At the graduate level, there shall be at least two (2) full-time faculty members in each program.

(13) Academic Freedom and Faculty Security. The institution shall adopt, adhere to, and distribute to all members of the faculty a statement of academic freedom assuring freedom in teaching, research, and publication. All policies and procedures concerning promotion, tenure, and non-renewal or termination of appointments, including for cause, shall be clearly stated and published in a faculty handbook, adhered to by the institution, and supplied to all faculty. The specific terms and conditions of employment of each faculty member shall be clearly described in a written document to be given to that faculty member, with a copy to be retained by the institution.

(14) Curriculum.

(A) The quality, content, and sequence of each course, curriculum, or program of instruction, training, or study shall be appropriate to the purpose of the institution and shall be such that the institution may reasonably and adequately achieve the stated objectives of the course or program. Each program shall adequately cover the breadth of knowledge of the discipline taught and coursework must build on the knowledge of previous courses to increase the rigor of instruction and the learning of students in the discipline. A majority of the courses in the areas of specialization required for each degree program shall be offered in organized classes by the institution. An institution may offer for-credit coursework that does not directly relate to approved programs, provided that it does not exceed twenty-five (25) percent of all courses.

(B) Academic associate degrees must consist of at least sixty (60) semester credit hours and not more than sixty-six (66) semester credit hours or ninety (90) quarter credit hours and not more than ninety-nine (99) quarter credit hours. Applied associate degrees must consist of at least sixty (60) semester credit hours and not more than seventy-two (72) semester credit hours or ninety (90) quarter credit hours and not more than one hundred eight (108) quarter hours. A baccalaureate degree must consist of at least one hundred twenty (120) semester credit hours or one hundred eighty (180) quarter credit hours. A master's degree must consist of at least thirty (30) semester credit hours and not more than thirty-six (36) semester credit hours or forty-five (45) quarter credit hours and not more than fifty-four (54) quarter credit hours of graduate level work past the baccalaureate degree.

(C) Courses designed to correct deficiencies, remedial courses for associate and baccalaureate programs, and leveling courses for graduate programs, shall not count toward requirements for completion of the degree.

(D) The degree level, degree designation, and the designation of the major course of study shall be appropriate to the curriculum offered and shall be accurately listed on the student's diploma and transcript.

(15) General Education.

(A) Each academic associate degree program shall contain a general education component consisting of at least twenty (20) semester credit hours or thirty (30) quarter credit hours. Each applied associate degree program shall contain a general education component of at least fifteen (15) semester credit hours or twenty-three (23) quarter credit hours. Each baccalaureate degree program shall contain a general education component consisting of at least twenty-five (25) percent of the total hours required for graduation from the program.

(B) This component shall be drawn from each of the following areas: Humanities and Fine Arts, Social and Behavioral Sciences, and Natural Sciences and Mathematics. It shall include courses to develop skills in written and oral communication and basic computer instruction.

(C) The applicant institution may arrange to have all or part of the general education component taught by another institution, provided that:

(i) the applicant institution's faculty shall design the general education requirement;

(ii) there shall be a written agreement between the institutions specifying the applicant institution's general education requirements and the manner in which they will be met by the providing institution; and

(iii) the providing institution shall be accredited by a Board-recognized accrediting agency or hold a Certificate of Authority.

(16) Credit for Work Completed Outside a Collegiate Setting.

(A) An institution awarding collegiate credit for work completed outside a collegiate setting (outside a degree-granting institution accredited by a recognized agency) shall establish and adhere to a systematic method for evaluating that work, shall award credit only in course content which falls within the authorized degree programs of the institution or, if by evaluative examination, falls within the standards for awarding credit by exam used by public universities in Texas, in an appropriate manner shall relate the credit to the student's current educational goals, and shall subject the institution's process and procedures for evaluating work completed outside a collegiate setting to ongoing review and evaluation by the institution's teaching faculty. To these ends, recognized evaluative examinations such as the Advanced Placement program (AP) or the College Level Examination Program (CLEP) may be used.

(B) No more than one half of the credit applied toward a student's associate or baccalaureate degree program may be based on work completed outside a collegiate setting. Those credits must be validated in the manner set forth in subparagraph (A) of this paragraph. No more than fifteen (15) semester credit hours or twenty-three (23) quarter credit hours of that credit may be awarded by means other than recognized evaluative examinations. No graduate credit for work completed outside a collegiate setting may be awarded. In no instance may credit be awarded for life experience per se or merely for years of service in a position or job.

(17) Learning Resources. The institution shall maintain and ensure that students have access to learning resources with a collection of books, educational material and publications, on-line materials and other resources and with staff, services, equipment, and facilities that are adequate and appropriate for the purposes and enrollment of the institution. Learning resources shall be current, well distributed among fields in which the institution offers instructions, cataloged, logically organized, and readily located. The institution shall maintain a continuous plan for learning resources development and support, including objectives and selections of materials. Current and formal written agreements with other institutions or with other entities may be used. Institutions offering graduate work shall provide access to learning resources that include basic reference and bibliographic works and major journals in each discipline in which the graduate program is offered. Applied associate degree programs shall provide adequate and appropriate resources for completion of course work.

(18) Facilities. The institution shall have adequate space, equipment, and instructional materials to provide education of good quality. Student housing owned, maintained, or approved by the institution, if any, shall be appropriate, safe, adequate, and in compliance with applicable state and local requirements.

(19) Academic Records. Adequate records of each student's academic performance shall be securely and permanently maintained by the institution.

(A) The records for each student shall contain:

(i) student contact and identification information, including address and telephone number;

(ii) records of admission documents, such as high school diploma or GED (if undergraduate) or undergraduate degree (if graduate);

(iii) records of all courses attempted, including grade; completion status of the student, including the diploma, degree or award conferred to the student; and

(iv) any other information typically contained in academic records.

(B) Two copies of said records shall be maintained in separate secure places.

(C) Transcripts shall be provided upon request by a student, subject to the institution's obligation, if any, to cooperate with the rules and regulations governing state and federally guaranteed student loans.

(20) Accurate and Fair Representation in Publications, Advertising, and Promotion.

(A) Neither the institution nor its agents or other representatives shall engage in advertising, recruiting, sales, collection, financial credit, or other practices of any type which are false, deceptive, misleading, or unfair. Likewise, all publications, by any medium, shall accurately and fairly represent the institution, its programs, available resources, tuition and fees, and requirements.

(B) The institution shall provide students, prospective students prior to enrollment, and other interested persons with a printed or electronically published catalog. Institutions relying on electronic catalogs must ensure the availability of archived editions in order to serve the needs of alumni and returning students. The catalog must contain, at minimum, the following information:

(i) the institution's mission;

(ii) a statement of admissions policies;

(iii) information describing the purpose, length, and objectives of the program or programs offered by the institution;

(iv) the schedule of tuition, fees, and all other charges and expenses necessary for completion of the course of study;

(v) cancellation and refund policies;

(vi) a definition of the unit of credit as it applies at the institution;

(vii) an explanation of satisfactory progress as it applies at the institution, including an explanation of the grading or marking system;

(viii) the institution's calendar, including the beginning and ending dates for each instructional term, holidays, and registration dates;

(ix) a complete listing of each regularly employed faculty member showing name, area of assignment, rank, and each earned degree held, including degree level, degree designation, and institution that awarded the degree;

(x) a complete listing of each administrator showing name, title, area of assignment, and each earned degree held, including degree level, degree designation, and institution that awarded the degree;

(xi) a statement of legal control with the names of the trustees, directors, and officers of the corporation;

(xii) a complete listing of all scholarships offered, if any;

(xiii) a statement describing the nature and extent of available student services;

(xiv) complete and clearly stated information about the transferability of credit to other postsecondary institutions including two-year and four-year colleges and universities;

(xv) any such other material facts concerning the institution and the program or course of instruction as are reasonably likely to affect the decision of the student to enroll therein; and

(xvi) any disclosures specified by the Board or defined in Board rules.

(C) The institution shall adopt, publish, and adhere to a fair and equitable cancellation and refund policy.

(D) The institution shall provide to each prospective student, newly-enrolled student, and returning student, complete and clearly presented information indicating the institution's current graduation rate by program and, if required by the Board, job placement rate by program for applied associate degree programs.

(E) Any special requirements or limitations of program offerings for the students at the Texas location must be made explicit in writing. This may be accomplished by either a separate section in the catalog or a brochure separate from the catalog. However, if a brochure is produced, the student must also be given the regular catalog.

(F) Upon satisfactory completion of the program of study, the student shall be given appropriate educational credentials indicating the degree level, degree designation, and the designation of the major course of study, and a transcript accurately listing the information typically found on such a document, subject to the institution's obligation, if any, to enforce with the rules and regulations governing state, and federally guaranteed student loans by temporarily withholding such credentials.

(21) Academic Advising and Counseling. The institution shall provide an effective program of academic advising for all students enrolled. The program shall include orientation to the academic program, academic counseling, career information and planning, placement assistance, and testing services.

(22) Student Rights and Responsibilities. The institution shall establish and adhere to a clear and fair policy regarding due process in disciplinary matters; outline the established grievance process of the institution, which shall indicate that students should follow this process and may contact the Board using the student complaint procedures established by Board rules Chapter 1, Subchapter H, §§1.110 - 1.120 of this title (relating to Student Complaint Procedure) and/or the Texas Attorney General to file a complaint about the institution if all other avenues have been exhausted, and publish these policies in a handbook, which shall include other rights and responsibilities of the students. This handbook shall be supplied in print or electronically to each student upon enrollment in the institution.

(23) Health and Safety. The institution shall provide an effective program of health and safety education reflecting the needs of the students. The program shall include information on emergency and safety procedures at the institution, including appropriate responses to illness, accident, fire, and crime.

(24) Learning Outcomes. An institution must have an objective system of assessing learning outcomes in place for each part of the curriculum and the institution can demonstrate that appropriate learning outcomes are being achieved.

(b) An institution may deviate, for a compelling academic reason, from Standard (12) relating to Faculty Size and Standard (16) relating to Credit for Work Completed Outside a Collegiate Setting, as long as academic objectives are fully met.

§7.5. *Administrative Penalties and Injunctions.*

(a) A person or institution may not:

(1) Granting of Degrees--Grant, award, or offer to award a degree on behalf of a nonexempt institution unless the institution has been issued a Certificate of Authority to grant the degree by the Board;

(2) Transferability of Credit--Represent that credits earned or granted by that person or institution are applicable for credit toward a degree to be granted by some other person or institution unless the institution is operating under a Certificate of Authority or Certificate of Authorization and has written agreement(s) with the institution which will accept the credit in transfer;

(3) Honorary Degrees--Award or offer to award an honorary degree on behalf of a private postsecondary institution subject to the provisions of this subchapter, unless the institution has been awarded a Certificate of Authority or Certificate of Authorization to award such a degree, or solicits another person to seek or accept an honorary degree and, further, unless the degree shall plainly state on its face that it is honorary;

(4) Protected Terms--Use a protected term in the official name or title of a nonexempt private postsecondary institution, an educational or training establishment, or describe an institution using any of these terms or a term having a similar meaning, except as authorized by the Board, or solicit another person to seek a degree or to earn a credit that is offered by an institution or training establishment that is using a term in violation of this section;

(5) Agent--Act as an agent who solicits students for enrollment in a private postsecondary institution subject to the provisions of this subchapter without a Certificate of Registration, if required by this chapter;

(6) Fraudulent Degree--Use or claim to hold a degree that the person knows is a fraudulent, substandard, or is a fictitious degree:

(A) in a written or oral advertisement or other promotion of a business; or

(B) with the intent to:

(i) obtain employment;

(ii) obtain a license or certificate to practice a trade, profession, or occupation;

(iii) obtain a promotion, compensation or other benefit, or an increase in compensation or other benefit, in employment or in the practice of a trade, profession, or occupation;

(iv) obtain admission to an educational program in this state; or

(v) gain a position in government with authority over another person, regardless of whether the actor receives compensation for the position.

(C) The use of fictitious, fraudulent, or substandard degrees--The Board shall provide the following information through the Board's Internet website:

(i) the accreditation status or the status regarding authorization or approval under this subchapter, to the extent known by the Board, of each exempt institution operating in the state, each postsecondary educational institution or other person that is regulated under §§7.7 - 7.11 of this chapter or for which a determination is made under §7.12 of this chapter (relating to Review and Use of Degrees from Institutions Not Eligible for Certificates of Authority), and any institution offering fraudulent, substandard, or fictitious degrees, including:

(I) the name of each educational institution accredited, authorized, or approved to offer or grant degrees in this state;

(II) the name of each educational institution whose degrees the Board has determined may not be legally used in this state;

(III) the name of each educational institution that the Board has determined to be operating in this state in violation of this chapter; and

(IV) any other information considered by the Commissioner to be useful to protect the public from fraudulent, substandard, or fictitious degrees.

(ii) the Board shall utilize such usual and customary sources for determining the accreditation status of institutions, such as: guides to international education; the Board's knowledge of legal actions taken against institutions, either by an agency of the state of Texas or agencies of other states or nations; or civil actions against institutions brought by governmental agencies or individuals.

(D) In determining the legitimacy of institutions headquartered or operating outside of Texas, the Board may determine if the state or nation in which the person or institution is headquartered, operates, or holds legal authorization to operate has standards and practices that are as rigorous as those of the Board's. A determination that a particular state or nation's standards or practices are not appropriately rigorous shall be sufficient reason to disapprove the use of the degrees of a person or institution.

(b) Institutions Located on Federal Land in Texas--An institution that is operating on land in Texas over which the federal government has exclusive jurisdiction:

(1) shall limit to the confines of the federal land and to the military or civilian employees and their dependents who work or live on that land:

(A) the recruitment of students;

(B) advertising of the postsecondary educational institution or its programs or courses; and

(C) providing degree programs or courses leading to degrees.

(2) shall be subject to compliance with all rules under this chapter when recruiting students, advertising the postsecondary institution or its programs or courses, or providing degree programs or courses leading to degrees on land over which the federal government does not have exclusive jurisdiction.

(c) Offenses--A violation of this subsection may constitute a violation of the Texas Penal Code, §32.52, or Texas Education Code §§61.312, 61.313. An offense under subsection (a)(1) - (5) of this section may be a Class A misdemeanor and an offense under subsection (a)(6) of this section may be a Class B misdemeanor.

(d) Transfer of Records--In the event any institution now or hereafter operating in this state proposes to discontinue its operation, the chief administrative officer, by whatever title designated, of said institution shall cause to be filed with the Board the original or legible true copies of all such academic records of said institution as may be specified by the Commissioner. Such records shall include, without limitation:

(1) such academic information as is customarily required by colleges when considering students for transfer or advanced study; and

(2) the academic records of each former student.

(e) Record Protection--In the event it appears to the Commissioner that any records of an institution that is discontinuing its operations are in danger of being destroyed, secreted, mislaid, or otherwise made unavailable to the Board, the Commissioner may seek, on the Board's behalf, court authority to take possession of such records.

(f) Maintenance of Records--The Board shall maintain or cause to be maintained a permanent file of such records coming into its possession.

(g) Administrative Penalties--If a person or institution violates a provision of this subchapter, the Commissioner may assess an administrative penalty against the person or institution as provided in this section.

(h) Notice of Violation--The Commissioner shall send written notice by certified mail to the person or institution charged with the violation. The notice shall state the facts on which the penalty is based, the amount of the penalty assessed, and the right of the person or institution to request a hearing.

(i) Appeal of Assessment--The Commissioner's assessment shall become final and binding unless, within forty-five (45) days of receipt of the notice of assessment, the person or institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(j) Collection of Assessment--If the person or institution does not pay the amount of the penalty within thirty (30) days of the date on which the assessment becomes final, the Commissioner may refer the matter to the attorney general for collection of the penalty, plus court costs and attorney fees.

(k) Specific Administrative Penalty--Any person or institution that is neither exempt nor the holder of a Certificate of Authority to grant degrees, shall be assessed an administrative penalty of not less than \$1,000 or more than \$5,000 for, either individually or through an agent or representative:

(1) conferring or offering to confer a degree;

(2) awarding or offering to award credits purported to be applicable toward a degree to be awarded by another person or institution (except under conditions and in a manner specified and approved by the Board);

(3) representing that any credits offered are collegiate in nature subject to the provisions of this subchapter; and

(4) with regard to assessment of such specific administrative penalties, each degree conferred without authority, and each person enrolled in a course or courses at the institution whose decision to enroll was influenced by the misrepresentations, constitutes a separate offense.

(l) Other Administrative Penalties--Any person or institution that violates subsection (a)(4) of this section shall be assessed an administrative penalty of not less than \$1,000 or more than \$3,000.

(m) Specific Administrative Penalties for Agents--Any agent who solicits students for enrollment in an institution subject to the provisions of this subchapter without a Certificate of Registration shall be assessed an administrative penalty of not less than \$500 or more than \$1,000. Each student solicited without authority constitutes a separate offense.

(n) Termination of Operation--Any operations which are found to be in violation of the law shall be terminated.

(o) Report to Attorney General--The Commissioner may report possible violations of this subchapter to the attorney general. The

attorney general, after investigation and consultation with the Board, shall bring suit to enjoin further violations.

(p) Venue--An action for an injunction under this section shall be brought in a district court in Travis County.

(q) Civil Penalties--A person who violates this subchapter or a rule adopted under this subchapter is liable for a civil penalty in addition to any injunctive relief or any other remedy allowed by law. A civil penalty may not exceed \$1,000 a day for each violation.

(r) Civil Litigation--The attorney general, at the request of the Board, shall bring a civil action to collect a civil penalty under this section.

(s) Deceptive Trade Practice Act--A person who violates this subchapter commits a false, misleading, or deceptive act or practice within the meaning of the Texas Business and Commerce Code, §17.46.

(t) Applicability of Other Law--A public or private right or remedy under the Texas Business and Commerce Code, Chapter 17, may be used to enforce this section.

(u) Associate of Occupational Studies (AOS Degree- Texas has three career schools or colleges awarding the AOS degree: Universal Technical Institute, and Western Technical College. The AOS degree shall be awarded in only the following fields: automotive mechanics, diesel mechanics, refrigeration, electronics, and business. Each of the two Institutions may continue to award the AOS degree for those fields listed in this subsection and shall be restricted to those fields. The Board shall not consider new AOS degree programs from any other career schools or colleges. A career school or college authorized to grant the AOS degree shall not represent such degree by using the terms "associate" or "associate's" without including the words "occupational studies." An institution authorized to grant the AOS degree shall not represent such degree as being the equivalent of the AAS or AAA degrees.

§7.6. Recognition of Accrediting Agencies.

(a) Eligibility Criteria--The Board may recognize accrediting agencies with a commitment to academic quality and student achievement that demonstrate, through an application process, compliance with the following criteria:

(1) Eligibility. The accrediting agency's application for recognition must demonstrate that the entity:

(A) Is recognized by the Secretary of Education of the United States Department of Education as an accrediting agency authorized to accredit educational institutions that offer the associate degree or higher. Demonstration of authorization shall include clear description of the scope of recognized accreditation.

(B) Is applying for the same scope of recognition as that for which it is recognized by the Secretary of Education of the United States Department of Education:

(i) Using the U.S. Department of Education classification of instructional programs (CIP) code at the two-digit level, the applicant shall identify all fields of study in which institutions it accredits may offer degree programs.

(ii) Accrediting agencies shall, for each field of study in which an accredited institution may offer degree programs, specify the levels of degrees that may be awarded. Levels must be differentiated at least to the following, as defined in §7.3 of this chapter (relating to Definitions): applied associate degree, academic associate degree, baccalaureate degree, master's degree, first professional degree

and doctoral degree. Associate of occupational studies (AOS) degrees are only allowed under §7.5(u) of this chapter.

(iii) Only institutions that qualify as eligible for United States Department of Education Title IV programs as a result of accreditation by the applicant agency will be considered exempt under §7.7 of this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(C) Accredits institutions that have legal authority to confer postsecondary degrees as its primary activity:

(i) Accrediting agencies must identify all institutions accredited by the agency that either the majority of the accredited institutions have the legal authority to award postsecondary degrees or that it accredits at least fifty (50) institutions that have the legal authority to award postsecondary degrees.

(ii) An accrediting agency that accredits programs as well as institutions shall demonstrate that either it accredits more institutions than programs or that it has policies, procedures and staff sufficient to address institutional standards of quality in addition to program standards of quality.

(iii) Accrediting agencies must have standards that require all accredited institutions to comply with all applicable laws in the state and local jurisdiction in which they operate and that require accredited institutions to clearly and accurately communicate their accreditation status to the public.

(D) Requires an on-site review by a visiting team as part of initial and continuing accreditation of educational institutions:

(i) Each accrediting agency shall demonstrate, through its documented practices and/or its official policies, that it requires no fewer than three (3) members on a team when conducting initial and continuing accreditation visits, that none have a monetary or personal interest in the findings of the on-site review, that all have professional experience and knowledge that qualifies them to review the institution's compliance with the standards of the agency, and that the combined team experience and knowledge are sufficient to review all applicable standards of the agency.

(ii) Accrediting agencies may conduct site visits for reasons other than initial and continuing accreditation with fewer team members.

(iii) Accrediting agencies shall provide a list of the visiting team members for the five (5) most recently completed on-site reviews. The list shall show name, employer, title of positions held with that employer and the standards for which the individual was responsible in that on-site review.

(E) Has policies or procedures that ensure the entity will promptly respond to requests for information from the Board:

(i) Each accrediting agency shall provide the Board its official policy regarding disclosure of information about institutions that are or have been candidates for accreditation and are or have been accredited. Agencies shall provide to the Board, within ten (10) working days, any new information and any requested information about a Texas institution that would be available to the public under that official policy.

(ii) Each accrediting agency shall include in its standards for accreditation of Texas institutions that the institutions disclose publicly and to the Board the number of degrees awarded at each level each year and the number of students enrolled in the fall of each year.

(F) Has sufficient resources to carry out its functions:

(i) Accrediting agencies shall identify the number of on-site reviews conducted during the most recent twelve (12) month period, the number of staff members who participated in those on-site reviews and the maximum number of on-site reviews conducted by any individual staff member. If that maximum number exceeds thirty (30), the agency shall explain how it expects to carry out its function of enforcing its standards on Texas institutions.

(ii) Each accrediting agency shall provide evidence that its ratio of current assets to current liabilities equals or exceeds 1.2.

(iii) Each accrediting agency shall demonstrate that its fees are reasonable for the accreditation services provided.

(2) Recognition--To receive and maintain recognition from the Board, the accrediting agency must, in addition to the items listed in paragraph (1) of this subsection:

(A) Provide the Board with current standards used by the entity in initial and ongoing accreditation reviews of educational institutions and invite the Board to participate in such reviews:

(i) Accrediting agencies must have publicly disclosed standards that address at a minimum the following issues: student achievement in relation to the institution's mission; curricula; faculty; facilities, equipment and supplies; fiscal and administrative capacity; student support services; recruiting and admissions practices; academic calendars; catalogs; grading; measures of program length; objectives of the degrees or credentials offered; record of student complaints received by or available to the agency; management and financial control.

(ii) In the application process, the accrediting agency must indicate how its standards address each of the quality assessment categories outlined in clause (i) of this subparagraph which represent the underlying principles described in the institutional standards of §7.4 of this chapter (relating to Standards for Operations of Institutions). Comparison of its standards with the standards in §7.4 of this chapter is required as a means of indicating how its standards meet those principles.

(iii) Each accrediting agency shall provide its policy for periodic reviews of institutions under its accreditation. At a minimum, the accrediting agency must conduct on-site reviews at least every ten (10) years.

(iv) At least ten (10) working days before each scheduled periodic on-site review of a Texas institution, accrediting agencies shall invite the Board staff to participate in the review. Such participation shall be at no expense to the institution or the accrediting agency.

(v) Within ten (10) working days of an official change in standards, the agency shall notify the Board of those changes.

(vi) By providing a copy of its publicly disclosed policies and procedures, each accrediting agency shall demonstrate that its initial and ongoing reviews and the resultant accreditation decisions are fair and consistent with the available evidence.

(vii) Accrediting agencies that use an advisory body, similar to the Certification Advisory Council described in §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor), shall describe the advisory body's composition and authority. Accrediting agencies that do not use such a body shall describe the process used to ensure that the evidence obtained from reviews results in appropriate accreditation decisions.

(viii) The initial and ongoing reviews shall include an institutional self-evaluation process or a documented alternative process to promote continuous quality improvement.

(ix) Each accrediting agency shall have and publicly disclose its processes for appealing accreditation decisions.

(B) Provide the Board with written evidence of continuing recognition by the Secretary of Education of the United States Department of Education. Loss of recognition from the Secretary automatically results in loss of Board recognition at the same time. Written evidence may consist of a letter from the chief executive officer of the accrediting agency. Accrediting agencies shall submit the evidence upon notice of continued recognition or upon a change in recognition status, scope or level;

(C) Provide a list of Texas educational institutions accredited by it; notify the Board in writing of any change to its list of Texas accredited institutions within ten (10) days of the change;

(D) Notify the Board of any investigated complaints concerning a Texas institution where the accrediting agency took official action on issues of non-compliance and the disposition of those complaints;

(E) Seek Board approval for any expansion of its recognized scope of accreditation authority; and

(F) Demonstrate that the ownership and control of the accrediting agency is sufficiently independent to ensure that the accreditation process is conducted in the public interest.

(G) Each time the accrediting agency applies for continued recognition by the Secretary of Education of the United States Department of Education, the accrediting agency must apply for continued recognition by the Coordinating Board. Applications forms will be provided by Board staff. Application for continued recognition must, at a minimum, contain all information required for initial eligibility and recognition by the Coordinating Board under this rule.

(b) Other Information, Denial or Withdrawal of Recognition and Appeals.

(1) Once recognized, an accrediting agency retains that recognition unless and until the Board withdraws the recognition. Failure to comply with any of the requirements in this chapter, including failure to comply with information requests during periodic reviews, will be grounds for the Board to consider withdrawing recognition.

(2) Each accrediting agency shall provide its policy for periodic reviews. Periodic review shall be conducted at the time an accrediting agency applies for continued recognition by the Secretary of the United States Department of Education. The Coordinating Board reserves the right to request and review current policies at other times for good cause, including, but not limited to, student complaints, accredited institution complaints, or concerns raised by the United States Department of Education or other state or federal agencies.

(3) The Board may use information provided by parties other than the accrediting agency to assess the accrediting agency's commitment to academic quality and student achievement. The Board will consider any such information in an open, public meeting during which the accrediting agency may challenge the information.

(4) The Board will make any decision to deny recognition of an accrediting agency or to withdraw recognition from an accrediting agency in a public meeting.

(5) An institution operating in Texas as an exempt institution pursuant to §7.7 of this chapter when its recognized accrediting agency loses or voluntarily relinquishes its recognition will have a

provisional time period set by the Board, or Board staff as delegated, within which the institution may continue to operate pursuant to the requirements in §7.7(2) and (3).

(6) An accrediting agency or institution affected by any final decision under this subchapter may appeal that decision as provided in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

§7.7. *Institutions Accredited by Board-Recognized Accreditors.*

An institution which does not meet the definition of institution of higher education contained in Texas Education Code §61.003, is accredited by a Board-recognized accreditor, and is interested in offering degrees or courses leading to degrees in the State of Texas must follow the requirements in paragraphs (1) - (4) of this section.

(1) Authorization to Offer Degrees or Courses Leading to Degrees in Texas.

(A) Each institution and/or campus location must submit an application for a Certificate of Authorization to offer degree(s) or courses leading to degrees in Texas. The application form for the Certificate of Authorization may be found on the Board's website. The application must contain the following information:

(i) Name of the institution;

(ii) Physical location of campus, or in the case of only providing clinicals or internships in Texas, the physical location of all clinical or internship sites, number of students in clinicals or internships and start and end date of clinicals or internships;

(iii) Name and contact information of the Chief Administrative Officer of the campus and name and contact information of the designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions). In the case of an application based on clinicals or internships, name and contact information of clinical or internship site supervisors;

(iv) Name of Board-recognized accreditor;

(v) Level of degree, degree program name, and CIP code as authorized by the Board-recognized accreditor;

(vi) Documentation of notification to students and potential students of any program which does not make the graduate eligible to take required professional examinations in that field or to practice regulated professions in that field in Texas;

(vii) Dates of accreditation granted by the Board-recognized accreditor.

(I) If the institution is currently subject to a negative or adverse action by its Board-recognized accreditor, the institution must provide documentation explaining its current status and actions taken to reverse the negative or adverse action.

(II) If the institution applies based on accreditation of its main campus while seeking final approval for the new Texas-based campus from its Board-recognized accreditor and the Texas Workforce Commission, the institution must provide documentation from its accreditor acknowledging that a decision on campus accreditation can be made within fifteen (15) months of the issuance of a provisional Certificate of Authorization.

(viii) Acknowledgement of student complaint procedure, compliance with the institutional accrediting agency's standards for operation of institutions, annual review reporting requirements, substantive change notification, and student data reporting requirements contained in this section, §§1.110 - 1.120 of this title (relating to Student Complaint Procedure), §7.4 of this chapter (relating to Standards for Operation of Institutions), §7.11 of this chapter (relating

to Changes of Ownership and Other Substantive Changes), and §7.13 of this chapter (relating to Student Data Reporting), respectively;

(ix) Texas Workforce Commission Certificate of Approval or a Texas Workforce Commission exemption or exclusion from Texas Education Code, Chapter 132;

(x) Disclosure of most recent United States Department of Education financial responsibility composite score, including applicable academic year for score. If the institution has a score under 1.5, the institution must provide documentation of all actions taken since date of calculation to raise the score.

(B) Board staff will verify information and accreditation status. Upon determination that an institution is in good standing with its Board recognized accreditor, has sufficient financial resources, and, if applicable, has provided sufficient documentation of correcting accreditation or financial issues, Board staff will provide a Certificate of Authorization to offer in Texas those degrees or courses leading to degrees for which it is accredited. If an institution is only providing clinicals or internships in the state of Texas, a Certificate of Authorization will be issued for the institution to offer in the state of Texas identified clinicals or internships in connection with those degrees or courses leading to degrees for which the institution is accredited. The Certificate of Authorization will be issued to the institution by name, city and state.

(C) Certificates of Authorization are subject to annual review for continued compliance with the Board-recognized accreditor's standards of operation, student complaint processes, financial viability, and accurate and fair representation in publications, advertising, and promotion.

(i) Institutions must submit the following documentation on an annual basis for Board staff review and recommendation to the Board for continuation or revocation of the Certificate of Authorization:

(I) Annual audited financial statements, issued less than one year from time of submission, prepared in accordance with Generally Accepted Accounting Principles by an independent certified public accountant;

(II) Certification that the institution is providing accurate and fair representation in publications, advertising, and promotion, including disclosure to students and potential students of any program which does not make the graduate eligible to take required professional examinations in that field or to practice regulated professions in that field in Texas. The institution shall further certify that it is maintaining any advertising used in Texas for a minimum of five years and shall make any such advertisements available to the Board for inspection upon request.

(III) An annotated copy of the student catalog or student handbook showing compliance with the principles addressed in §7.4 of this chapter with cross-reference to the operational standards of its institutional accrediting agency;

(IV) A copy of the institution's student complaint policy, links to online student complaint procedures and forms, and summary of all complaints made by Texas residents or students enrolled at a Texas-based institution concerning the institution in accordance with §§1.110 - 1.120 of this title. The complaint summary shall include complaints which have been filed, with the institution, its accrediting agency, or the Board within the 12 months prior to the annual review reporting date and shall indicate whether pending or resolved;

(V) Official statement of current accreditation status and any pending or final actions that change the institution's

accreditation status from the institution's Board-recognized accreditor, including changes in degree levels or programs offered approvals, changes in ownership or management, and changes in physical location within the 12 months prior to the annual review reporting date;

(VI) Attestation that all documentation submitted is true and correct and continued acknowledgement of student complaint procedure, annual review reporting requirements, substantive change notification, and student data reporting requirements contained herein this section, §§1.110 - 1.120 of this title, §§7.4, 7.11, and 7.13 of this chapter, respectively.

(ii) Annual reviews are conducted based on an institution's name and initial date of authorization.

(I) Institutions with names starting with "A" through "O" must submit annual review documentation by January 15 of each year. The Board will review staff recommendations at the annual July Board meeting.

(II) Institutions with names starting with "P" through "Z" must submit annual review documentation by July 15 of each year. The Board will review staff recommendations at the annual January Board meeting.

(III) Institutions that have received their first Certificate of Authorization less than six months from the due date for submission of annual review documentation may wait to submit documentation until the following annual review submission date.

(iii) Prior to making a recommendation to the Board, staff has discretion to conduct a site visit at the institution if warranted by facts disclosed in the annual review documentation. The Board-recognized accreditor will be notified and invited to participate.

(D) Certificates of Authorization for institutions offering degrees or courses leading to degrees at a physical location in Texas, upon Board staff recommendation after annual review, expire at the end of the grant of accreditation by the Board-recognized accreditor.

(i) If a new grant of accreditation is awarded by the Board-recognized accreditor, the Certificate of Authorization may be renewed upon submission of documentation of the new grant of accreditation.

(ii) If an institution changes recognized accreditors, the institution must submit a new application for a Certificate of Authorization.

(E) Certificates of Authorizations based solely on providing clinicals or internships in Texas expire one year from date of issuance.

(i) If clinicals or internships are ongoing in Texas, the Certificate of Authorization based solely on providing clinicals or internships in Texas must be renewed on an annual basis. At least thirty (30) days, but no more than ninety (90) days, prior to the expiration of the current Certification of Authorization, an institution, if it desires renewal, is required to provide updated information regarding the physical location of all clinical or internship sites, number of students in clinicals or internships, and the start and end date of the clinicals or internships.

(ii) The Board shall renew the Certificate of Authorization based solely on providing clinicals or internships in Texas if it finds that the institution has maintained all requisite standards.

(F) Certificates of Authorization for Texas-based campuses which are provisionally-granted based on their main campus' accreditation expire at the end of fifteen (15) months.

(i) If accreditation has not been achieved by the expiration date, the provisionally-granted Certificate of Authorization will be withdrawn, the institution's authorization to offer degrees will be terminated, and the institution will be required to comply with the provisions of §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor).

(ii) Subsequent provisionally-granted Certificates of Authorization will not be issued.

(iii) At least ninety (90) days prior to expiration of the certificate, institutions operating under a provisionally-granted Certificate of Authorization must submit either an application for a Certificate of Authorization under this section or an application for a Certificate of Authority under §7.8 of this chapter.

(2) Grounds for Revocation of any Certificate of Authorization.

(A) Institution no longer holds a Certificate of Approval or Letter of Exemption issued by the Texas Workforce Commission.

(B) Institution loses accreditation from Board-recognized accreditor.

(C) Institution's Accreditor is removed from the U.S. Department of Education or the Board's list of approved accreditors.

(i) If the institution's Certificate of Authorization is revoked due to its accrediting agency's removal from the U.S. Department of Education and/or the Board's list of approved accreditors, the Board, or Board staff as delegated, shall set a provisional time period within which institutions may continue to operate, not to exceed any provisional time period set by the United States Department of Education.

(ii) If the institution's Certificate of Authorization is revoked due to its accrediting agency's removal from the U.S. Department of Education or the Board's list of approved accreditors, a request to extend its Certificate of Authorization for the provisional time period set under paragraph (2)(C) of this section, must be submitted to the Commissioner within ten (10) days of publication, by either the U.S. Department of Education or the Board, of such revocation.

(D) Institution fails to comply with data reporting, substantive change notification requirements, or annual review reporting requirements.

(E) Board staff recommends revocation based on deficiencies in compliance with the principles addressed in §7.4 of this chapter as evidenced by lack of compliance with the Board-recognized accreditor's standards, which are found in annual review documentation and not corrected by the institution upon request by Board staff.

(F) Institution offers degrees for which it does not have accreditor approval.

(3) Process for Removal of Authorization.

(A) Commissioner notifies institution of grounds for revocation as outlined in paragraph (2) of this section unless paragraph (2)(C) above applies and the Board sets a provisional time period for compliance.

(B) Upon receipt of the notice of revocation, the institution shall not enroll new students and may only grant or award degrees or offer courses leading to degrees in Texas to students enrolled on the date of notice of revocation until it has either been granted a Certificate of Authority to grant degrees, or has received a determination that it did not lose its qualification for a Certificate of Authorization.

(C) Within ten (10) days of its receipt of the Commissioner's notice, the institution must provide, as directed by Board staff, one or more of the following:

(i) proof of its continued qualification for the exemption; or

(ii) submit data as required by §7.13 of this chapter; or

(iii) a plan to correct any non-compliance or deficiencies which lead to revocation; or

(iv) a plan to seek new Board-recognized accreditation; or

(v) written intention to apply for a Certificate of Authority within 60 days of the notice of revocation; or

(vi) a written teach-out plan, which must be approved by Board staff before implementation.

(D) After reviewing the evidence, the Commissioner will issue a notice of determination, which in the case of an adverse determination, shall contain information regarding the reasons for the denial, and the institution's right to a hearing.

(E) If a determination under this section is adverse to an institution, it shall become final and binding unless, within forty-five (45) days of its receipt of the adverse determination, the institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(F) If a determination allows the institution to continue operating, a new Certificate of Authorization will be provisionally-granted. Provisions for continued operation under the new Certificate of Authorization may include, but are not limited to:

(i) requirements to provide updates to Board staff on a monthly basis;

(ii) continued progress toward full compliance with all Board rules and requirements;

(iii) continued progress toward new Board-recognized accreditation, if applicable, or toward approval for a Certificate of Authority; and

(iv) other requirements imposed by the Board.

(G) Certificates of Authorization which are provisionally-granted after a notice of revocation continue only as long as the institution complies with all such provisions.

(4) Closure of an Institution.

(A) The governing board, owner, or chief executive officer of an institution that plans to cease operation shall provide the Board with written notification of intent to close at least ninety (90) days prior to the planned closing date.

(B) If an institution closes unexpectedly, the governing board, owner, or chief executive officer of the school shall provide the Board with written notification immediately.

(C) If an institution closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students' education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003. The agreement shall be in writing, shall be subject to Board

approval, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) The Certificate of Authorization for an institution is automatically withdrawn when the institution closes. The Commissioner may grant to an institution that has a degree-granting authority temporary approval to award a degree(s) in a program for which the institution does not have approval in order to facilitate a formal agreement as outlined under this section.

(E) The curriculum and delivery shall be appropriate to accommodate the remaining students.

(F) No new students shall be allowed to enter the transferred degree program unless the new entity seeks and receives permanent approval for the program(s) from the Board.

(G) The institution shall transfer all academic records pursuant to §7.5(d) of this chapter (relating to Administrative Penalties and Injunctions).

§7.8. Institutions Not Accredited by a Board-Recognized Accreditor.

An institution which is not accredited by a Board-recognized accreditor and which does not meet the definition of institution of higher education contained in Texas Education Code, §61.003, must follow the Certificate of Authority process in paragraphs (1) - (9) of this section in order to offer degrees or courses leading to degrees in the state of Texas. Institutions are encouraged to contact the Board staff before filing a formal application.

(1) Certificate of Authority Eligibility.

(A) The Board will accept applications for a Certificate of Authority only from those applicants:

(i) proposing to offer a degree or credit courses leading to a degree; and

(ii) which meet one of the following conditions:

(I) has been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as either a non-degree-granting institution or an exempt institution only offering degrees in religious disciplines for a minimum of two (2) years;

(II) has been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as a degree-granting institution and seeks to open a new campus;

(III) has been legally operating as a degree-granting institution in another state for a minimum of four (4) years and can verify compliance with all applicable laws and rules in that state; or

(IV) does not meet one of the three previous operational history conditions, but meets additional application and review requirements for its initial application, and agrees to meet additional conditions, restrictions, or reporting requirements during its first two years of operation under a Certificate of Authority. The Certificate of Authority will be issued with written, specific conditions, restrictions, or reporting requirements placed upon the institution.

(V) The Board may not issue a Certificate of Authority for a private postsecondary institution to grant a professional degree, as defined in §7.3 of this title (relating to Definitions) or to represent that credits earned in this state are applicable toward a degree if the institution is chartered in a foreign country or has its principal office or primary educational program in a foreign country.

(B) To be considered by the Board as operating, means to have assembled a governing board, developed policies, materials, and resources sufficient to satisfy the requirements for a Certificate of Authority, and either have enrolled students and conducted classes or accumulated sufficient financing to do so for at least one year upon certification based on reasonable estimates of projected enrollment and costs. Sufficient financing may be demonstrated by proof of an adequate surety instrument, including but not limited to, a surety bond, an assignment of a savings or escrow account, certificate of deposit, irrevocable letter of credit, or a properly executed participation contract with a private association, partnership, corporation, or other entity whose membership is comprised of postsecondary institutions, which is:

(i) In a form and amount acceptable to the Board;

(I) The amount of the surety instrument submitted to the Board with an application shall be equal to or greater than the cost of providing a refund, including administrative costs associated with processing claims, for the maximum prepaid, unearned tuition and fees of the school for a period or term during the applicable school year for which programs of instruction are offered, including, but not limited to, on a semester, quarter, monthly, or class basis; except that the period or term of greatest duration and expense shall be utilized for this computation where a school's year consists of one or more such periods or terms;

(II) The applicant shall include a letter signed by an authorized representative of the institution showing in detail the calculations made pursuant to this section and explaining the method used for computing the amount of the surety instrument;

(ii) Conditioned to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of prepaid tuition or any fees as a result of violation of any minimum standard or as a result of a holder of a Certificate of Authority ceasing operation, and provides evidence satisfactory to the Board of its financial ability to provide such indemnification and lists the amount of surety liability the guaranteeing entity will assume; and

(iii) Held in Travis County, Texas, and conditioned to allow only the Board to withdraw funds for the benefit of persons identified in clause (ii) of this paragraph.

(2) Certificate of Authority Application Submission and Requirements.

(A) An applicant must submit an application to the Board to be considered for a Certificate of Authority to offer identified proposed degree(s), and courses which may be applicable toward a degree, in Texas.

(i) Applications must be submitted as an original and a copy in an electronic format as specified by Board staff, and accompanied by the application fee described in paragraph (3) of this section.

(ii) A single desk review of the application will be conducted to determine completeness and readiness for a site team visit.

(iii) The desk review will be done by a reviewer who will act as the site review team leader if the application is deemed complete and ready for a site team visit.

(iv) The desk reviewer, in consultation with Board staff, will make three possible recommendations. Board staff will make a final determination on acceptability of the application based on one of the three recommendations:

(I) The application is determined to be foundationally incomplete in one or more Standards for Operation of Institutions as described in §7.4 of this chapter and not ready for submission. A foundationally incomplete application is one where the Standards for Operation of Institutions have not been met to such a degree that the institution is unlikely to be sustainable or operational.

(II) The application may be resubmitted after incorporating revisions or additions suggested by the reviewer. The revisions or additions must allow the application to meet all Standards for Operation of Institutions.

(III) The application is acceptable and ready for a site review visit.

(v) If the application is foundationally incomplete and not ready for submission, a portion of the application fee, if not expended during the desk review, may be returned and another application may not be submitted for one year from the date of rejection of the foundationally incomplete application.

(B) The application form for the Certificate of Authority may be found on the Board's website.

(C) The Certificate of Authority application must include:

(i) The name and address of the institution;

(ii) The purpose and mission of the institution;

(iii) Documentary evidence of compliance with paragraph (1)(A)(i)-(iii) of this section;

(iv) Documentary evidence of either a Letter of Exemption or Certificate of Approval from the Texas Workforce Commission pursuant to Texas Education Code, Chapter 132;

(v) Documentary evidence of articles of incorporation or other Texas-authorized organizational documents, regulations, rules, constitutions, bylaws, or other regulations established for the governance and operation of the institution;

(vi) Identification, by name and contact information, of:

(I) The sponsors or owners of the institution;

(II) The designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions) ;

(III) The chief administrative officer, the principal administrators, and each member of the board of trustees or other governing board;

(IV) Identification of faculty who will, in fact, teach in each program of study, including identification of colleges attended and copies of transcripts for every degree held by each faculty member;

(vii) Information regarding each degree or course leading to a degree which the applicant proposes to offer, including a full description of the proposed degree or degrees to be awarded and the course or courses of study prerequisite thereto;

(viii) A description of the facilities and equipment utilized by the applicant, including, if applicable, all equipment, software, platforms and other resources used in the provision of education via online or other distance education;

(ix) Detailed information describing the manner in which the applicant complies with each of the Standards of Operations

of Institutions contained in §7.4 of this chapter (relating to Standards for Operations of Institutions);

(x) If applicable, institutions accredited by entities which are not recognized by the Board must submit all accrediting agency reports and any findings and institutional responses to such reports and findings for ten years immediately preceding the application for a Certificate of Authority. Accreditation by entities which are not recognized by the Board does not allow an institution to offer a degree or courses leading to a degree without a Certificate of Authority to offer such degree or courses;

(xi) A written accreditation plan, identifying:

(I) The Board-recognized accrediting agency with which the applicant intends to apply for institutional accreditation;

(II) The planned timeline for application with and approval by the Board-recognized accrediting agency;

(III) Any contacts already made with the Board-recognized accrediting agency, including supporting documents.

(xii) Any additional information which the board may request.

(D) An applicant that does not meet the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter must be able to demonstrate it is able to meet all Standards for Operation of Institutions found in §7.4 of this chapter through documentation and/or possession of adequate resources. Such demonstration includes, but is not limited to:

(i) Executed agreements with all administration and faculty identified in the application;

(ii) Complete curriculum, assessment, and learning tools for each proposed degree;

(iii) Possession of all listed facilities and resources.

(E) An applicant that does not meet the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter may not apply for a graduate degree or for more than one area of study as part of its initial application for a Certificate of Authority.

(3) Fees Related to Certificates of Authority.

(A) Each biennium the Board shall set the fees for applications for Certificates of Authority, which shall not exceed the average cost, in the preceding two fiscal years, of staff time, review and consultation with applicants, and evaluation of the applications by necessary consultants, including the cost of such consultants.

(B) Each biennium, the Board shall also set the fees for amendments to add additional degree programs to Certificates of Authority.

(C) The Commissioner shall request changes in the fees at a Board quarterly meeting.

(4) Authorization Process.

(A) Based upon the information contained in the application, the Commissioner or his/her designee shall determine whether a site review team is necessary. A site review team is always required for applications for an initial Certificate of Authority.

(B) A site review team shall be composed of no fewer than three (3) members, all of whom have experience and knowledge in postsecondary education. The combined team experience and knowledge shall be sufficient to review all applicable standards of the agency.

(C) An institution must demonstrate it is prepared to be fully operational as of the date of the on-site evaluation; i.e., it must have in-hand or under contract all the human, physical, administrative, and financial resources necessary to demonstrate its capability to meet the standards for nonexempt institutions.

(D) The conditions found at the institution as of the date of the on-site evaluation review team's visit will provide the basis for the team's evaluation and report, the Certification Advisory Council's recommendation, the Commissioner's recommendation, and the Board's determination of the institution's qualifications for a Certificate of Authority.

(E) The site review team shall conduct an on-site review of the institution and prepare a report regarding the institution's ability to meet the Standards of Operation.

(F) The applicant shall have thirty (30) days in which to respond in writing to the report.

(G) The Certification Advisory Council shall review the site review team's report and the applicant's response and make a recommendation regarding disposition to the Board and Commissioner.

(i) If the applicant has no previous operational history as described by §7.8(1)(A)(ii)(I)-(III) of this chapter, the Council shall make recommendations for additional conditions, restrictions, or reporting requirements during the first two years of operation under a Certificate of Authority.

(ii) If the applicant has previous operational history as described by §7.8(1)(A)(ii)(I)-(III) of this chapter, the Council may make recommendations for additional conditions, restrictions, or reporting requirements during the first two years of operation under a Certificate of Authority.

(H) The Commissioner shall make his/her recommendation regarding the application to the Board. The Commissioner's recommendation shall be made independent of the Certification Advisory Council's recommendation. The Commissioner may make recommendations for additional conditions, restrictions, or reporting requirements for the time the institution is operating under a Certificate of Authority.

(I) After review of the Commissioner's and Council's recommendations, if the Board approves the application, the Commissioner shall immediately have prepared a Certificate of Authority containing the issue date, a list of the approved degree(s) or courses leading to degrees, and the period for which the Certificate is valid. If applicable, the Certificate of Authority will be issued with any written, specific conditions, restrictions, or reporting requirements placed upon the institution and approved by the Board.

(J) After review of the Commissioner's and Council's recommendations, if the Board does not approve the application, the Commissioner shall immediately notify the applicant of the denial and the reasons for the denial.

(K) Upon denial, an applicant that has met the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter may not reapply for a period of one hundred eighty (180) days from date of denial.

(L) Upon denial, an applicant that has not met the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter may not reapply for a period of one year from date of denial.

(5) Terms and Limitations of a Certificate of Authority.

(A) The Certificate of Authority to grant degrees is valid for a period of two (2) years from the date of issuance.

(B) Certification by the state of Texas is not accreditation, but merely a protection of the public interest while the institution pursues accreditation from a recognized agency, within the time limitations expressed in subparagraph (A) of this paragraph. Therefore, the institution awarded a Certificate of Authority shall not use terms to interpret the significance of the certificate which specify, imply, or connote greater approval than simple permission to operate and grant certain specified degrees in Texas. Terms which may not be used include, but are not limited to, "accredited," "supervised," "endorsed," and "recommended" by the state of Texas or agency thereof. Specific language prescribed by the Commissioner which explains the significance of the Certificate of Authority shall be included in all publications, advertisements, and other documents where certification and the accreditation status of the institution are mentioned.

(C) Institutions holding a Certificate of Authority will be required to:

(i) furnish a list of their agents to the Board;

(ii) maintain records of students enrolled, credits awarded, and degrees awarded, in a manner specified by the Board; and

(iii) report any substantive change, including changes in administrative personnel, faculty, or facilities.

(D) Institutions that, upon application, did not meet one of the three previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter, in addition to the requirements of subparagraph (C) of this paragraph, are required to provide, at the end of the first year of the initial Certificate of Authority:

(i) Documentary evidence of continued exemption or approval from the Texas Workforce Commission pursuant to Texas Education Code, Chapter 132;

(ii) Current audited financial statements, including a balance sheet, income statement, statement of changes in net worth, and statement of cash flow, updated since issuance of the initial Certificate of Authority;

(iii) Documentation of continued validity of any required financial surety instrument;

(iv) Current enrollment, retention, and graduation numbers for students in all approved degree programs; and

(v) An updated accreditation plan, including any progress made toward obtaining Board-recognized accreditation identified in the initial application or a change in plans to apply for accreditation with another Board-recognized accreditation agency.

(E) Authority to Represent Transferability of Course Credit. Any institution as defined in §7.3 of this chapter, whether it offers degrees or not, may solicit students for and enroll them in courses on the basis that such courses will be credited to a degree program offered by another institution, provided that:

(i) the other institution is named in such representation, and is accredited by a Board-recognized accrediting agency or has a Certificate of Authority;

(ii) the courses are identified and documented for which credit is claimed to be applicable to the degree programs at the other institution; and

(iii) the written agreement between the institution subject to these rules and the accredited institution is approved by both institutions' governing boards in writing, and is filed with the Board.

(6) Amendments to a Certificate of Authority.

(A) An institution seeking to amend its Certificate of Authority to award a new or different degree during the period of time covered by its current Certificate of Authority may file an application for amendment, on forms provided by the Board upon request, subject to the following exceptions:

(i) An institution with no previous operational history described by §7.8(1)(A)(ii)(I)-(III) of this chapter which has been granted a Certificate of Authority may not apply for an amendment during the period of time covered by its initial Certificate of Authority.

(ii) An institution with operational history described by §7.8(1)(A)(ii)(I)-(III) of this chapter which has been granted a Certificate of Authority may not apply for an amendment within the first one hundred eighty (180) days after the grant of its initial Certificate of Authority.

(iii) An institution with operational history described by §7.8(1)(A)(ii)(I)-(III) of this chapter which has been granted a Certificate of Authority with restrictions may not apply for an amendment during the period of time covered by the restricted Certificate of Authority.

(iv) An institution seeking to discontinue a degree program, without closure of the institution, shall assure the continuity of students' education by entering into a teach-out agreement with:

(I) another institution authorized by the Board to hold a Certificate of Authority;

(II) an institution operating under a Certificate of Authorization; or

(III) a public or private institution of higher education as defined in Texas Education Code §61.003.

(v) The teach-out agreement shall be in writing, shall be subject to Board staff approval, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(B) Applications for amendments shall be accompanied by the fee described in paragraph (3) of this subsection for each amendment to an existing degree or for each application to award a new or different degree.

(C) Based upon the information contained in the application for amendment, the Commissioner or his/her designee may utilize an outside consultant, the Certification Advisory Council, or both, to review the application for amendment in order to make a recommendation to the Board.

(D) Upon Board approval that the new or revised degree program meets the required standards, the Board shall amend the institution's Certificate of Authority accordingly.

(E) A change of degree level or additional program would require an amended Certificate of Authority prior to beginning the program.

(7) Renewal of Certificate of Authority.

(A) At least one hundred eighty (180) days, but no more than two hundred ten (210) days, prior to the expiration of the current Certificate of Authority, an institution seeking renewal shall make ap-

plication to the Board on forms provided upon request. The renewal application must include any applications for or renewal of accreditation by national or regional accrediting agencies. The renewal application shall be accompanied by the fee described in paragraph (3) of this subsection.

(B) The application for renewal of the Certificate of Authority will be evaluated in the same manner as that prescribed for evaluation of an initial application, except that the renewal application must include the institution's record of improvement and progress toward accreditation. Evaluation of the renewal application will include review of compliance with any specific conditions, restrictions, or reporting requirements placed upon the institution during the period of the previous Certificate of Authority and whether continuation or addition of conditions, restrictions or reporting requirements is warranted.

(C) An institution may be granted consecutive Certificates of Authority for a total grant of no longer than eight (8) years. Absent sufficient cause, at the end of the eight (8) years, the institution must be accredited by a recognized accrediting agency.

(D) Subject to the application and authorization restrictions of this section, the Board shall renew the certificate if it finds that the institution has maintained all requisite standards and is making sufficient progress toward accreditation by a Board-recognized accrediting agency.

(8) Revocation of Certificate of Authority.

(A) Grounds for revocation include:

(i) Institution no longer holds a Certificate of Approval or Letter of Exemption issued by the Texas Workforce Commission; or

(ii) Institution fails to comply with substantive change notification and data reporting requirements as outlined in §7.11 of this chapter (relating to Changes of Ownership and Other Substantive Changes) and §7.13 of this chapter (relating to Student Data Reporting), respectively; or

(iii) Institution offers degrees or courses leading to a degree for which it does not have Board approval; or

(iv) Institution fails to maintain the Standards of Operation as defined in §7.4 of this chapter; or

(v) Failure to comply with the requirement to submit all accrediting agency correspondence, reports, or findings and institutional responses to such correspondence, reports, and findings if an institution is accredited by entities which are not recognized by the Board; or

(vi) Failure to fully comply with any additional conditions, restrictions, or reporting requirements placed upon the institution as part of its current Certificate of Authority.

(B) Process for revocation of Certificate of Authority to offer degrees in Texas:

(i) Board notifies institution of grounds for revocation as outlined in this paragraph via registered or certified mail;

(ii) Within ten (10) days of its receipt of the Commissioner's notice, the institution must either cease and desist operations or respond and offer proof of its continued qualification for the authorization, and/or submit data as required by this chapter;

(iii) After reviewing the evidence, the Commissioner will issue a notice of determination, which in the case of an adverse determination, shall contain information regarding the reasons for the denial, and the institution's right to a hearing;

(iv) If a determination under this section is adverse to an institution, it shall become final and binding unless, within forty-five (45) days of its receipt of the adverse determination, the institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(C) Without a valid Certificate of Authority, the institution must immediately cease and desist all operations, including granting degrees, offering courses leading to degrees, receiving payments from students for courses which may be applicable toward a degree, or enrolling new students.

(i) If an institution must cease and desist operations, within forty-five (45) days of the adverse determination becoming final and binding, the institution must assure the continuity of students' education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003.

(ii) The teach-out agreement shall be in writing, shall be subject to Board staff approval prior to implementation, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) Reapplication After Revocation of Certificate of Authority.

(i) The institution will not be eligible to reapply for a period of one hundred eighty (180) days.

(ii) The subsequent application must show, in addition to all other requirements described herein, correction of the deficiencies which led to the denial.

(iii) The period of time during which the institution does not hold a Certificate of Authority shall not be counted against the eight (8) year period within which the institution must achieve accreditation from a Board-recognized accrediting agency absent sufficient cause, as described in paragraph (7)(C) of this section; the time period begins to run again upon reinstatement.

(9) Closure of an Institution.

(A) The governing board, owner, or chief executive officer of an institution that plans to cease operation in the state of Texas shall provide the Board with written notification of intent to close at least ninety (90) days prior to the planned closing date.

(B) If an institution closes unexpectedly, the governing board, owner, or chief executive officer of the school shall provide the Board with written notification immediately.

(C) If an institution closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students' education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003. The agreement shall be in writing, shall be subject to Board approval prior to implementation, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) The Certificate of Authority for an institution is automatically withdrawn as of the date the institution closes. The Com-

missioner may grant to an institution that has existing degree-granting authority temporary approval to award a degree(s) in a program for which the institution does not have approval in order to facilitate a formal agreement as outlined under this section.

(i) The curriculum and delivery shall be appropriate to accommodate the remaining students.

(ii) No new students shall be admitted to the transferred degree program unless the new entity seeks and receives permanent approval for the program(s) from the Board, or Board staff, as delegated, or the transferred degree program already has such approval.

§7.10. *Registration of Agents.*

(a) Application for Registration--An agent as defined in §7.3 of this chapter (relating to Definitions) shall submit an application to the Board in the following manner:

(1) The application shall be accompanied by the fee described in this subsection.

(A) Each biennium, the Commissioner shall set the fee for Certificates of Registration of agents.

(B) The Commissioner shall report changes in the fee to the Board at a quarterly meeting.

(2) Upon request of the Commissioner or the Commissioner's designee, the agent shall provide sufficient evidence of good character.

(3) The agent's Certificate of Registration shall be issued for a five-year period.

(4) If the Commissioner denies the application for a Certificate of Registration, or a renewal of the Certificate of Registration, the applicant shall be notified in writing, and shall be given the reasons for the denial. Additionally, the Commissioner shall notify the institution or institutions which the agent represented or proposed to represent, according to the records of the Board, in the same manner.

(5) At least sixty (60), but no more than one hundred twenty (120), days prior to the expiration of an agent's certificate, the agent may complete and file with the Board an application for renewal, accompanied by the registration fee described in this section.

(6) If a determination under this section is adverse to a person or institution, it shall become final and binding unless, within forty-five (45) days of the receipt of the adverse determination, the person or institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(b) Revocation of Registration--The Commissioner may revoke an agent's Certificate of Registration at any time if the Commissioner finds that:

(1) Any statement contained in the application is untrue;

(2) The institution represented has had its Certificate of Authority revoked;

(3) The agent has made false, deceptive, or misleading statements while attempting to solicit residents of this state as students; or

(4) The agent has violated any provision of this subchapter.

(c) Notice of Revocation--Notice under subsection (b) of this section shall be given to the agent and to the institution that the agent represented or purported to represent. Immediately upon receipt of actual knowledge of the agent's violation, or upon receipt of the Commissioner's notice, whichever is earlier, the institution shall make every effort to:

(1) divest the agent of the authority and of the apparent authority to represent the institution;

(2) notify the media through which the agent made the misrepresentations of the actual facts; and

(3) notify all students whose decision to enroll in the institution was affected by the agent's misrepresentation, of the actual facts.

(d) Administrative Remedies--A revocation made pursuant to this section shall become final and binding unless, within forty-five (45) days of its receipt of the notice of revocation, the institution or agent invokes the administrative remedies contained in Chapter 1, Subchapter B of this title.

§7.11. Changes of Ownership and Other Substantive Changes.

(a) Change of Ownership or Control for Career Schools and Colleges. In the event of a change in ownership or control of a career school or college, the Certificate of Authority or Certificate of Authorization is automatically void unless the institution meets the requirements of this section.

(b) The Commissioner may authorize the institution to retain the Certificate of Authority or Certificate of Authorization during and after a change of ownership or control, provided that the institution notifies Board staff of the impending transfer in time for staff to receive, review, and approve the documents listed in paragraphs (1) - (3) of this subsection and provided that the following conditions are met:

(1) The institution must submit acceptable evidence that the new owner is complying with all Texas Workforce Commission requirements regarding the purchase or transfer of ownership of a career school or college;

(2) The institution must submit an acceptable written statement of assurance that the new owner understands and undertakes to fully comply with all applicable Board rules, regulations, and/or policies;

(3) The institution must submit documentation that the new owner has been approved by the institution's Board-recognized accreditor to operate the institution or is able to meet the requirements of the existing Certificate of Authority; and

(4) The institution must submit satisfactory evidence of financial ability to adequately support and conduct all approved programs. Documentation shall include but may not be limited to independently audited financial statements and auditor's reports and assurance that the new owner does not currently own or operate any institutions under financial restrictions for, or is not permanently debarred from participating in, federal financial aid by the United States Department of Education.

(c) If the institution does not meet the conditions outlined under this section prior to completion of transfer of ownership or control and the institution loses its Certificate of Authority or Certificate of Authorization, the new owner(s) shall submit a new application for a Certificate of Authority as outlined under §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor) or a new application for a Certificate of Authorization as outlined under §7.7 of this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(d) Any modification of an approved degree program that results from a change of ownership or control constitutes a program revision. Requests for approval of program revisions or other substantive changes as defined in §7.3 of this chapter (relating to Definitions) shall conform to the procedures and requirements contained in §7.7 and §7.8 of this chapter.

(e) If the ownership or control of a career school or college is transferred within, among, or between different subsidiaries, branches, divisions, or other components of a corporation and if said transfer in no way diminishes the career school or college's administrative capability or educational program quality, the Commissioner may permit the school to retain its Certificate of Authority or Certificate of Authorization during the transfer period. In such cases, the career school or college shall fully comply with all provisions outlined in this section.

(f) All notifications regarding changes of ownership or other substantive changes should be provided to the Board via the institution's designated Single Point of Contact.

§7.14. Distance Education Approval Processes for Degree Granting Colleges and Universities Other Than Texas Public Institutions.

An institution which does not meet the definition of institution of higher education contained in Texas Education Code §61.003 and wishes to offer distance education to students in Texas must follow the requirements in paragraph (1) or (2) of this section. For the purposes of this section distance education shall mean education or training delivered off campus via educational technologies where the student(s) and the instructor(s) are separated by physical distance and/or time.

(1) Exempt Institutions.

(A) An institution is exempt and does not need to receive permission from the Board to offer distance education programs and courses to Texas students if it fulfills the following:

(i) Accredited to offer degrees at a specific level either by an accrediting agency recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education or approved by a Texas state agency which authorizes the school's graduates to take a professional or career and technical state licensing examination administered by that agency;

(ii) No physical presence in the state as defined by §7.3 of this chapter (relating to Definitions); and

(iii) Meets and agrees to comply with Council of Regional Accrediting Commissions (C-RAC) provisions as listed in this section.

(B) An institution is also exempt and does not need to receive permission from the Board to offer distance education programs and courses to Texas students if it is covered by a reciprocal state exemption agreement.

(C) An institution's exemption applies only to the degree level for which the programs or institution is accredited.

(D) An institution's exemption under subparagraph (A) or (B) of this paragraph continues as long as it is in compliance with subparagraph (A) or (B) of this paragraph. Exempt institutions must also maintain compliance with subparagraph (C) of this paragraph. If an institution is no longer accredited by an accrediting agency recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education or no longer approved by a Texas state agency which authorizes the school's graduates to take a professional or career and technical state licensing examination administered by that agency and/or maintains a physical presence in Texas or if an institution is no longer covered by a reciprocal state exemption agreement, the institution is no longer eligible for an exemption and must receive Board authority to offer distance education to Texas students. The institution would need to either submit an application for a Certificate of Authority as outlined under §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor) or for a Certificate of Authorization as outlined under §7.7 of

this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(2) Nonexempt Institutions.

(A) An institution is not exempt and must receive Board permission to offer distance education programs and courses to Texas students if it fulfills any of the following:

(i) Is accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency and maintains a physical presence in Texas as defined by §7.3 of this chapter; the institution would need to submit an application for a Certificate of Authorization as outlined under §7.7 of this chapter; or

(ii) Is not accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education nor approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency. The institution, whether or not it maintains a physical presence in Texas as defined by §7.3 of this chapter, would need to submit an application for a Certificate of Authority as outlined under §7.8 of this chapter.

(B) An institution that would like to offer a degree program or courses leading to a degree in a religious discipline via distance education is exempt from seeking Board approval. A religious institution that would like to offer a degree program or courses leading to a degree in a non-religious discipline via distance education must follow the requirements outlined in subparagraph (A)(i) and (ii) of this paragraph.

(C) As part of its qualification or continued approval for a Certificate of Authorization or a Certificate of Authority, a nonexempt institution must meet and agree to comply with C-RAC provisions as listed in this section before offering distance education.

(3) Board staff shall utilize the best practices in postsecondary distance education as adopted by the C-RAC as standards for approval of distance education offered in Texas or to Texas residents. C-RAC provisions applicable to all institutions offering distance education under this section include:

(A) Online learning is appropriate to the institution's mission and purposes;

(B) The institution's plans for developing, sustaining, and, if appropriate, expanding online learning offerings are integrated into its regular planning and evaluation processes;

(C) Online learning is incorporated into the institution's systems of governance and academic oversight;

(D) Curricula for the institution's online learning offerings are coherent, cohesive, and comparable in academic rigor to programs offered in traditional instructional formats;

(E) The institution evaluates the effectiveness of its online learning offerings, including the extent to which the online learning goals are achieved, and uses the results of its evaluations to enhance the attainment of the goals;

(F) Faculty responsible for delivering the online learning curricula and evaluating the students' success in achieving the online learning goals are appropriately qualified and effectively supported;

(G) The institution provides effective student and academic services to support students enrolled in online learning offerings;

(H) The institution provides sufficient resources to support and, if appropriate, expand its online learning offerings; and

(I) The institution assures the integrity of its online offerings.

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

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Texas Higher Education Coordinating Board

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



CHAPTER 21. STUDENT SERVICES

SUBCHAPTER B. DETERMINATION OF RESIDENT STATUS

19 TAC §§21.21 - 21.30

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§21.21 - 21.30, concerning Determination of Resident Status, with changes to the proposed text of §21.22 as published in the August 12, 2016, issue of the *Texas Register* (41 TexReg 5898). Section 21.21 and §§21.23 - 21.30 are adopted without change and will not be re-published.

The amended §21.21 specifies Chapter 54 of the Texas Education Code (TEC) as the chapter requiring the Board to adopt these rules.

The amended §21.22 removes outdated language and terms that are not used in Subchapter B, Determination of Resident Status, and to clarify certain definitions. This section is also amended to add a definition for deferred action.

The amended §21.23 clarifies that the rules adopted by the Board in October 2016 are effective beginning with residency decisions made after the census date of the 2017 fall semester.

The amended §21.24 adds a new subsection (b), Texas Residency, to list required documentation to support a physical presence in the state. This language was formerly in Chart II, which is proposed for repeal. The following subsections are renumbered accordingly. Renumbered §21.24(c) removes the term "residence." For those persons trying to establish domicile under §21.24(a)(2) and (3), domicile is the defining factor in establishing whether a person may pay in-state tuition and a residence in this state merely lends support to the establishment and maintenance of domicile in Texas. Renumbered §21.24(d)(3) is amended to clarify that certain nonresident classifications are eligible to maintain domicile. Renumbered new §21.24(d)(5) is amended to delete "special agricultural worker" as that category was repealed by §219(ee)(1) of the Immigration and Nationality Act of 1994 (Pub. L. 103-416, 108 Stat. 4319, Oct. 25, 1994). Current subsection (e) is being re-designated as subsection (f),

which is amended to clarify how a person who qualifies as a resident under §21.24(a)(2) and (a)(3) may establish and maintain a Texas domicile for the requisite number of months. Current §21.24(e)(1) through (e)(4) are proposed for repeal. New §21.24(f)(1) and (f)(2) contain language from Chart II to provide more detailed information about how to establish and maintain domicile.

The amended §21.25(b) is amended to delete the Attached Graphic titled, "Chart II, Documentation to Support Establishing and Maintaining Domicile in Texas," and the chart's key elements are integrated into §21.24(b) and (f) in order to better tie the bases for establishing and maintaining domicile to relevant documentation. (Chart I will no longer be referred to as such since Chart II has been deleted. Rather, it will be referred to as Figure: 19 TAC §21.25(a)(1)(B), Affidavit.)

The amended §21.26 more clearly states the instances when a student is entitled to remain classified as a resident of this state and when a student must provide updated information to prove he or she is entitled to resident tuition.

The amended §21.27 is amended to remove the reference to Chart II and because the language in repealed Chart II is now in §21.24 and §21.25, adds a reference to §21.24.

The amended §21.28 more closely aligns with the language of TEC §54.056. In accordance with this statutory provision, regardless of the reason, if an institution of higher education erroneously classifies a person as a nonresident of this state, the institution must refund to the person the amount of tuition the person paid in excess of resident tuition.

The amended §21.29 clarifies that an institution's Residence Determination Official is responsible for residency determinations for the institution.

The amended §21.30 clarifies that an institution must retain documentation proving that the person is a resident of this state for those individuals described in §21.25(a)(1)(B).

Corrections to rule structure and terminology were made throughout Subchapter B, as appropriate.

The following comments were received regarding the amendments:

Comment: Texas State University suggested the addition of language to §21.21 to bolster the weight of Residency Determination Officials' decisions as their "judgment has always been implied, but needs to be put in the code to answer challenges."

Staff Response: Staff does not agree that additional language to §21.21 is necessary as this issue has been addressed in proposed 19 Texas Administrative Code (TAC) §21.29, which clarifies the role of the Residency Determination Official. No change was made in the rules as a result of this comment.

Comment: Texas State University suggests the addition of the following language to the definition of "gainful employment" in proposed §21.22(11) to clarify what documentation may be considered earnings to support a claim of gainful employment: pensions, veterans' benefits, social security, and savings from previous earnings.

Staff Response: Staff agrees with the institution's comment and has amended the definition of "gainful employment" to include pensions, veterans' benefits, social security, and savings from previous earnings as examples of what may constitute earnings for the purpose of determining gainful employment.

Comment: Texas State University suggests the addition of language to the definition of "temporary absence" in proposed §21.22(29) to expand its applicability to anyone who has established residency in this state. Currently, it's limited to those who have established domicile and excludes those who have met the criteria for in-state residency through the 36-month approach.

Staff Response: Staff agrees with the institution's suggestion and has amended the definition of "temporary absence" to indicate the definition applies to those who have previously met the criteria for in-state residency.

Comment: Texas State University suggests a change to the example of what is considered a short duration from 30 days to one year since a person must generally live in Texas for a year to establish residency.

Staff Response: Staff agrees with the institution's suggestion and has amended the definition of "temporary absence" to change the example of what is considered a short duration from 30 days to one year.

Comment: Texas State University suggests staff clarify whether a person granted Deferred Action for Childhood Arrival (DACA) status is able to establish and maintain domicile as is indicated in proposed §21.24(d)(5) ("a person granted deferred action status by USCIS").

Staff Response: Staff agrees with the institution's comment. The definition of a person granted deferred action status by USCIS as described in §21.24(d)(5) could be clearer. Therefore, staff has added a definition of "deferred action status" to §21.22, Definitions.

Comment: Texas State University suggests adding language to §21.24(f)(1)(A)(i) to specify what may be considered earnings to support a claim of gainful employment for purposes of establishing residency.

Staff Response: Staff agrees with the institution's suggestion and has added additional examples of what constitutes earnings to proposed §21.24(f)(1)(A)(i).

Comment: Texas State University commented that the proposed change to §21.30 implies the new rule requires retention of ALL residency-related documentation, but the actual rule language seems to only address the affidavit.

Staff Response: Staff believes the proposed rule is clear as to which documentation must be retained. §21.30 references §21.25(a)(1)(B), which only refers to a student's submission of an affidavit if the person qualifies for residency under §21.24(a)(1). No change was made in the rules as a result of this comment.

Comment: Texas State University suggest the proposed rule should also specify institutions retain records until students who establish domicile under §21.24 have actually achieved permanent resident status (whether via green card, or I-797 receipt for I-485 application).

Staff Response: TEC §54.053(3)(B), establishes the requirement for persons who are not citizens or permanent residents to submit an affidavit to their institutions if they are trying to establish a claim to residency under TEC §54.052(a)(3). It further indicates that the affidavit is to state, "that the person will apply to become a permanent resident of the United States as soon as the person becomes eligible to apply." Staff believes the institution's obligation is met once the student submits an application

for Permanent Resident status. No change was made to the rules as a result of this comment.

Comment: The University of Texas (UT) System expressed its objection to the repeal of the definition in §21.22 of "Erroneously classifies a person as a nonresident" as it believes the applicable statute requiring the refund of excess tuition charged a student who the institution classifies as a nonresident and who should have been classified as a resident "pertains only when 'an institution of higher education erroneously classifies a person as a nonresident of the state,' not when the student is the source of the error."

Staff Response: The proposed rule change will align residency rules with TEC §54.056(b), which states that "[r]egardless of the reason for the error," an institution must refund a student erroneously charged nonresident tuition. No change was made in the rules as a result of this comment.

Comment: The UT System expressed its objection to the proposed change to the existing definition of "temporary absence" in §21.22(29). UT System believes the proposed change "will introduce ambiguity likely to make the rule more difficult to administer."

Staff Response: Staff believes that five years is too long a period of absence to be considered "temporary," however, staff is in agreement with another stakeholders' suggestion that one year is a more appropriate timeframe than 30 days. Therefore, although the agency recognizes there may be circumstances in which a longer term may be considered temporary, staff has amended the proposed language in this definition to one year.

The amendments are adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules for the Determination of Resident Status.

§21.22. *Definitions.*

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

- (1) **Census date**--The date in an academic term for which an institution is required to certify a person's enrollment in the institution for the purposes of determining formula funding for the institution.
- (2) **Clear and Convincing Evidence**--That degree of proof that will produce a firm conviction or a firm belief as to the facts sought to be established. The evidence must justify the claim both clearly and convincingly.
- (3) **Coordinating Board or Board**--The Texas Higher Education Coordinating Board.
- (4) **Core Residency Questions**--The questions promulgated by the Board to be completed by a person and used by an institution as a significant aid in determining if the person is a Texas resident. The core questions shall be those set forth in the ApplyTexas Application or posted on the Board web site.
- (5) **Deferred action**--Discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. An individual who has received deferred action is authorized by Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.
- (6) **Dependent**--A person who:
 - (A) is less than 18 years of age and has not been emancipated by marriage or court order; or

(B) is eligible to be claimed as a dependent of a parent of the person for purposes of determining the parent's income tax liability under the Internal Revenue Code of 1986.

(7) **Domicile**--A person's principal, permanent residence to which the person intends to return after any temporary absence.

(8) **Eligible for Permanent Resident Status**--A person who has filed an I-485 application for permanent residency and has been issued a fee/filing receipt or notice of action by the United States Citizenship and Immigration Services (USCIS) showing that his or her I-485 has been reviewed and has not been rejected.

(9) **Eligible Nonimmigrant**--A person who has been issued a type of nonimmigrant visa by the USCIS that permits the person to establish and maintain domicile in the United States.

(10) **Established domicile in Texas**--Physically residing in Texas, with the intent to maintain domicile in Texas, for at least the 12 consecutive months immediately preceding the census date of the term of enrollment, allowing for documented temporary absences.

(11) **Gainful employment**--Employment intended to provide an income to a person or allow a person to avoid the expense of paying another person to perform the tasks (as in child care) that is sufficient to provide at least one-half of the individual's tuition, fees and living expenses as determined in keeping with the institution's student financial aid budget or that represents an average of at least twenty hours of employment per week. A person who is self-employed or who is living off his/her earnings (present or past - such as pensions, veterans' benefits, social security, and savings from previous earnings) may be considered gainfully employed for purposes of establishing residency, as may a person whose primary support is public assistance. Employment conditioned on student status, such as work study, the receipt of stipends, fellowships, or research or teaching assistantships does not constitute gainful employment for purposes of residency determination.

(12) **General Academic Teaching Institution**--As defined in Texas Education Code §61.003(3).

(13) **Independent institution**--As defined in Texas Education Code §61.003(15).

(14) **Institution or institution of higher education**--Any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in Texas Education Code §61.003(8).

(15) **Legal guardian**--A person who is appointed guardian under the Texas Probate Code, Chapter 693, or a temporary or successor guardian.

(16) **Maintain domicile**--Physically residing in Texas such that the person always intends to return to the state after a temporary absence. The maintenance of domicile is not interrupted by a temporary absence from the state.

(17) **Managing conservator**--A parent, a competent adult, an authorized agency, or a licensed child-placing agency appointed by court order issued under the Texas Family Code, Title 5.

(18) **Nonresident tuition**--The amount of tuition paid by a person who is not a Texas resident and who is not entitled or permitted to pay resident tuition under this subchapter.

(19) **Nontraditional secondary education**--A course of study at the secondary school level in a nonaccredited private school setting, including a home school.

(20) Parent--A natural or adoptive parent, managing or possessory conservator, or legal guardian of a person. The term would not otherwise include a step-parent.

(21) Possessory conservator--A natural or adoptive parent appointed by court order issued under the Texas Family Code, Title 5.

(22) Private high school--A private or parochial school in Texas.

(23) Public technical institute--As defined in Texas Education Code §61.003(7).

(24) Regular semester--A fall or spring semester, typically consisting of 16 weeks.

(25) Residence--A person's home or other dwelling place; where a person resides.

(26) Residence Determination Official--The primary individual at each institution who is responsible for the accurate application of state statutes and rules to individual student cases.

(27) Resident tuition--The amount of tuition paid by a person who qualifies as a Texas resident under this subchapter.

(28) Residential real property--Real property on which a dwelling fit for long-term human habitation is located.

(29) Temporary absence--Absence from the State of Texas by a person who previously met the criteria for in-state residency, with the intention to return, generally for a period of short duration (i.e., less than one year). However, in some situations, the absence can be significantly longer. For example, the temporary absence of a person or a dependent's parent from the state for the purpose of service in the U. S. Armed Forces, U. S. Public Health Service, U. S. Department of Defense, U. S. Department of State, as a result of an employment assignment, or for educational purposes, shall not affect a person's ability to continue to claim that Texas is his permanent residence.

(30) United States Citizenship and Immigration Services (USCIS)--The bureau of the U.S. Department of Homeland Security that is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities.

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

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Bill Franz

General Counsel

Texas Higher Education Coordinating Board

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 323. POWERS AND DUTIES OF THE BOARD

22 TAC §323.4

The Texas Board of Physical Therapy Examiners adopts new §323.4, concerning Request for Proposals for Outsourced Services without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6915).

The new rule will allow the Board to develop a process for outsourcing services through a request for proposal (RFP) method to ensure fairness and transparency.

No comments were received regarding the proposal.

The new rule is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

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

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John P. Maline

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.80

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §573.80, concerning Definitions. The amendments are adopted without changes to the proposed text published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6917).

The purpose of the amendment is to remove the definition of "designated caretaker." The Third Court of Appeals upheld a district court's determination that the definition was invalid.

No comments were received regarding the adoption of the amendments to the rule.

The amendments are adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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

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

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

22 TAC §577.5

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §577.5, concerning Advisory Committees. The amendments are adopted without changes to the proposed text published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6918). The adopted rule therefore will not be republished.

The purpose of the amendment is to comply with Texas Occupations Code §801.163, which requires the Board to adopt rules regarding training requirements for advisory committee members, if training is deemed necessary.

No comments were received regarding the adoption of the amendments to the rule.

The amendments are adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; and §801.163(c)(7) which states that the Board shall adopt rules regarding the purpose, structure, and use of an advisory committee, including rules on the training requirements for advisory committee members, if necessary.

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

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SUBCHAPTER B. STAFF

22 TAC §577.18

The Texas Board of Veterinary Medical Examiners (Board) adopts the repeal of §577.18, concerning Historically Underutilized Businesses without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6919) and will not be republished.

The rule references the Texas Building and Procurement Commission, an agency that has become inactive since the rule was last amended, and references rule sections that are no longer correct. In conjunction with this repeal, the Board proposed new §577.18 to replace the repealed language.

No comments were received regarding the adoption of the repeal.

The repeal is adopted under the authority of Texas Government Code §2161.003, which requires the agency to adopt rules relating to historically underutilized businesses, and Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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

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

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22 TAC §577.18

The Texas Board of Veterinary Medical Examiners (Board) adopts new §577.18, concerning Historically Underutilized Businesses without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6919) and will not be republished.

Texas Government Code requires a state agency to adopt rules regarding the use of historically underutilized businesses. The current rule references an agency that has become inactive since the rule was last amended, and references rule sections that are no longer correct. The proposed new rule references the Comptroller of Public Account's rules regarding historically underutilized businesses.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under the authority of Texas Government Code §2161.003, which requires the agency to adopt rules relating to historically underutilized businesses, and Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

No other statutes, articles or codes are affected by the adoption

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

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

The Texas Board of Professional Geoscientists (TBPG) adopts amendments to 22 TAC §§851.29, 851.31, and 851.32, and adopts new rules §§851.35, 851.113, 851.203 and 851.204, concerning the licensure and regulation of Professional Geoscientists. The new rules and amendments in 22 TAC §§851.29, 851.31, 851.32, 851.35, 851.203 and 851.204 are adopted without changes from the proposed text as published in the September 16, 2016, issue of the *Texas Register* (41 TexReg 7246). New rule 22 TAC §851.113 is adopted with changes.

Adopted amendments to 22 TAC §851.29 clarify the requirements regarding Endorsement and Reciprocal Licensure. Adopted amendments clarify language to show that a licensing qualification can be endorsed by another licensing board for an applicant for P.G. licensure who is currently or has been licensed in the last ten years to practice a discipline of geoscience in Texas or another U.S. jurisdiction. Adopted amendments also clarify under "Licensure by similar examination" that an individual who has applied for licensure as a Professional Geoscientist in Texas may meet the licensing examination requirement by submitting proof of passage of examinations that are substantially similar to the applicable examination(s) as specified in §851.21.

Adopted amendments to 22 TAC §851.31 clarify the process of obtaining a temporary license and to be consistent with the requirements of temporary licensure authorized in Texas Occupations Code 1002.258. Adopted amendments clarify and simplify the process for obtaining a temporary P.G. license in Texas.

Adopted amendments to 22 TAC §851.32 clarify a licensee's duty to comply with continuing education (CE) program requirements, adding a specific 30-day deadline for when a licensee must respond and produce a CE activity log and supporting records. Adopted amendments also clarify that a licensee is subject to disciplinary action for failure to satisfy CE program requirements during the applicable period, and that it is a separate violation to falsely report CE requirements for a renewal period. Board rules already provide that these actions are violations and are subject to disciplinary action, but the language is added in this section of the rules for ease of reference.

Adopted new rule 22 TAC §851.35 outlines the process for voluntary surrender of a license, registration, or certification.

Adopted new rule 22 TAC §851.113 requires all persons who are the subject of a Board order to abide by the terms of that order, and that failure to abide by the terms of a Board order is grounds for disciplinary action. Additionally, the adopted new rule adds that the Board may deny a person's request for a license, registration or certification, or deny renewal of a license, registration or certification if the person has failed to timely pay an administrative penalty. This rule also allows the Board to apply money received from an individual to outstanding administrative penalties owed by that individual before applying it to any other fee or cost.

Adopted new rule 22 TAC §851.203 clarifies that the Board may serve a notice of hearing on a respondent by sending it to his or her last known address as shown by the Board's records. The adopted rule also outlines the procedures for default cases, and details a procedure for informal disposition of cases in accordance with §2001.056 of the Texas Government Code. The adopted rule also addresses the process taken when an applicant with a criminal history applies for a license and does not show up at the hearing at the State Office of Administrative Hearings.

Adopted new rule 22 TAC §851.204 provides that the costs of an administrative hearing shall be borne by the licensee who chooses to appeal a Board Order. Specifically, the cost of transcribing the contested-case hearing and the cost of preparing the record shall be assessed to the person appealing the Board's order. This rule also outlines how these costs may be recovered.

Adopted amendment to 22 TAC §851.29 adds language in (a)(2) regarding the licensure endorsement process to show that an applicant for a P.G. license who is currently or has been licensed or registered "in the last ten years" to practice a discipline of geoscience in "Texas or" another U.S. jurisdiction or another country may be eligible to demonstrate having met all or some of the qualifications for licensure through endorsement. It adds language in (a)(4) to show that the Board staff considers evidence "supporting the endorsement of a licensing qualification" of an applicant, and adds language in (a)(4)(A) to show that verification may be provided if the license is current or "was held in the past ten years from the date of application." In subsection (b)(2), regarding licensure by similar examination, words are added to show that an individual who is licensed or registered to practice a discipline of geoscience in another United States jurisdiction, or another country, "...who has applied for licensure as a Professional Geoscientist" under this subsection "may meet the licensing examination requirement by submitting" proof of passage of examination(s) that is/are substantially similar to the applicable examination(s) as specified in §851.21.

Adopted amendment to 22 TAC §851.31 removes subsections (b), (c), and (d), which were redundant of language already in statute, to clarify that "TBPG may issue a temporary license to an applicant as described in §1002.258(a) of the Act."

Adopted amendment to 22 TAC §851.32 adds language in subsection (p)(2) regarding noncompliance with the continuing education program (CEP) to show that "a licensee must submit the CEP certification log and supporting records for credits claimed not later than 30 days after the Board sends by certified mail an audit notification and request for a log and supporting documentation to the licensee's last known address as shown by the Board's records. Failure to timely submit a CEP certification log

and supporting records for credits claimed is grounds for disciplinary action." New subsection (p)(3) adds that "A licensee must satisfy CEP requirements. Failure to satisfy CEP requirements during the applicable period is grounds for disciplinary action." A sentence previously located in (p)(2) is moved to new subsection (p)(4) and is reworded to state, "Falsely reporting that CEP requirements have been met for a renewal period is misconduct and will subject the licensee to disciplinary action."

Adopted new rule 22 TAC §851.35, entitled, "Voluntary Surrender of a License, Registration or Certification" adds language to outline the process for voluntary surrender of a license, registration, or certification. New subsection (a) states, "A license holder who does not wish to maintain a license, registration, or certification may voluntarily surrender the license, registration, or certification by submitting a request in writing on a form prescribed by the TBPG, provided that the license holder: (1) has a current license, registration, or certification; (2) is not out of compliance with a disciplinary order; (3) does not have a complaint pending; and (4) is not under a continuing education audit." New subsection (b) states, "The effective date of a voluntary surrender of a license shall be the date that the Board accepts the surrender and will mark the termination of the licensee's license, registration, or certification." New subsection (c) states, "Any fees paid on the license, registration, or certification shall not be refunded upon surrender." New subsection (d) states, "A license, registration, or certification that has been voluntarily surrendered may not be renewed. A licensee who has voluntarily surrendered a license, registration, or certification may apply for a new license, registration, or certification." New subsection (e) states, "The Board maintains jurisdiction over a complaint filed against a licensee alleging violation of the TBPG's Code of Professional Conduct that occurred prior to the date of surrender of the license, registration, or certification."

Adopted new rule 22 TAC §851.113, entitled "Duty to Abide by Board Order and Timely Pay Administrative Penalty" adds new subsection (a) which states, "All persons who are the subject of a Board order shall abide by the terms of that order. Failure to abide by the terms of a Board order is grounds for disciplinary action." New subsection (b) adds, "All persons who are assessed an administrative penalty must pay the administrative penalty not later than the 30th day after the date the Board's order becomes final or timely satisfy section 1002.454(b) of the Texas Occupations Code." New subsection (c) states, "Failure to timely pay an administrative penalty is grounds for disciplinary action. This subsection does not apply if a person timely complies with section 1002.454(b) of the Texas Occupations Code regarding staying the enforcement of the administrative penalty at issue." New subsection (d) is changed to read, "The Board may deny a person's request for a license, registration or certification, or the renewal of a license, registration, or certification if the person has failed to timely pay an administrative penalty." New subsection (e) adds, "When a person pays money to the Board, the Board may first apply that money to outstanding administrative penalties owed by that person before applying it to any other fee or cost."

Adopted new rule 22 TAC §851.203 entitled "Defaults" adds new subsection (a) which states, "The Board may serve the notice of hearing on the respondent by sending it to his or her last known address as shown by the Board's records." New subsection (b) adds, "Default. If the party who does not have the burden of proof fails to appear at a contested-case hearing at the State Office of Administrative Hearings, the administrative law judge may issue a default proposal for decision that can be adopted by the Board."

New subsection (c) adds, "Failure to issue default proposal for decision. If the administrative law judge grants a default but does not issue a default proposal for decision and instead issues an order dismissing the case and returning the file to the Board for informal disposition on a default basis in accordance with section 2001.056 of the Texas Government Code, the allegations in the notice of hearing will be deemed as true and proven and the Board will issue a final order imposing a sanction requested in the notice of hearing." New subsection (d) adds, "Contesting a final order issued following a default. In the event that the respondent wishes to contest a final order issued following a default, the respondent must timely file a motion for rehearing as provided by Chapter 2001 of the Texas Government Code, and the motion for rehearing must show the following: (1) the default was neither intentional nor the result of conscious indifference; (2) the respondent has a meritorious defense; (3) a new hearing will not cause delay or otherwise injure the Board; and (4) the motion for rehearing must be supported by affidavits and documentary evidence of the above and show a prima facie case for meritorious defense." New subsection (e) adds, "Failure to prosecute. If a party who does not represent TBPG Board or staff and who has the burden of proof fails to appear at a contested case hearing at the state Office of Administrative Hearings, the administrative law judge must dismiss the case for want of prosecution, any relevant application will be withdrawn, and the Board may not consider a subsequent petition from the party until the first anniversary of the date of dismissal of the case." New subsection (f) adds, "Applicants for licensure bear the burden to prove fitness for licensure."

Adopted new rule 22 TAC §851.204 outlines TBPG's policies regarding the costs of administrative hearings. New subsection (a) adds, "If a person files a suit for judicial review of an agency decision in a contested case, the Board shall request that the contested-case hearing be transcribed." New subsection (b) adds, "Costs. The costs of transcribing the contested-case hearing and preparing the record for appeal in a suit for judicial review shall be paid by the party who appeals to district court." New subsection (c) adds, "Documentation of costs. Documentation supporting the costs of transcribing the testimony in a contested-case proceeding and preparing the record for appeal shall be included in the administrative record or filed with the court." New subsection (d) adds, "Recovery as court costs. The costs of transcribing the testimony in a contested-case proceeding and preparing the record for appeal in a suit for judicial review may be recovered as court costs." New subsection (e) adds, "Additionally and alternatively, failure to timely pay the cost of transcribing the contested-case hearing is grounds for disciplinary action, and payment of the cost of transcribing the contested-case hearing is due no later than 60 days after the Board sends a request for payment and copy of the documentation of costs to the respondent's last known address as shown by the Board's records or to the respondent's attorney if any." New subsection (f) adds, "The Board may deny a person's request to issue or renew a license, registration, or certification if the person has failed to pay the cost of transcribing the contested-case hearing." New subsection (g) adds, "When a person pays money to the Board, the Board may first apply that money to outstanding transcript costs owed by that person before applying it to any other fee or cost."

No comments were received regarding the proposed amendments and new rule.

SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §§851.29, 851.31, 851.32, 851.35

Adopted amendments and new rule are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.154 which provides that Board shall enforce the Act; by Occupations Code §1002.255, which defines license eligibility; by Occupations Code §1002.257, which allows for reciprocity of licensure; by Occupations Code §1002.258, which authorizes temporary licenses.

Adopted amendments implement the Texas Occupations Code, §§1002.151, 1002.154, 1002.255, 1002.257, and 1002.258.

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

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Charles Horton
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Texas Board of Professional Geoscientists
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SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §851.113

Adopted new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.153 which provides that the Board shall adopt a code of professional conduct that is binding on all license holders; by Occupations Code §1002.154 which provides that Board shall enforce the Act; and by Occupations Code §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation.

Adopted new rules implement the Texas Occupations Code, §§1002.151, 1002.153, 1002.154, and 1002.351.

§851.113. *Duty to abide by Board order and timely pay administrative penalty.*

(a) All persons who are the subject of a Board order shall abide by the terms of that order. Failure to abide by the terms of a Board order is grounds for disciplinary action.

(b) All persons who are assessed an administrative penalty must pay the administrative penalty not later than the 30th day after the date the Board's order becomes final or timely satisfy section 1002.454(b) of the Texas Occupations Code.

(c) Failure to timely pay an administrative penalty is grounds for disciplinary action. This subsection does not apply if a person timely complies with section 1002.454(b) of the Texas Occupations Code regarding staying the enforcement of the administrative penalty at issue.

(d) The Board may deny a person's request for a license, registration or certification, or the renewal of a license, registration, or certification if the person has failed to timely pay an administrative penalty.

(e) When a person pays money to the Board, the Board may first apply that money to outstanding administrative penalties owed by that person before applying it to any other fee or cost.

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SUBCHAPTER E. HEARINGS--CONTESTED CASES

22 TAC §851.203, §851.204

Adopted new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.154 which provides that Board shall enforce the Act; by Occupations Code §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; and by 1002.453, which provides that the Board adopt rules of procedure for the imposition of an administrative penalty, and that such rules must conform to the requirements of Chapter 2001, Government Code.

Adopted new rules implement the Texas Occupations Code, §§1002.151, 1002.154, 1002.351, and 1002.453.

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

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4401



**TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

CHAPTER 9. TRAINING

SUBCHAPTER B. EMPLOYEE TRAINING AND EDUCATION

30 TAC §§9.11 - 9.13, 9.15 - 9.17

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amended §§9.11 - 9.13 and 9.15 - 9.17.

Sections 9.11 - 9.13, 9.16, and 9.17 are adopted *without changes* to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4947) and, therefore, will not be republished. Section 9.15 is adopted *with change* to the proposed text and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

House Bill (HB) 3337, 84th Texas Legislature, 2015, requires the commission to adopt rules requiring that before an agency administrator or employee may be reimbursed for tuition expenses, the executive director must authorize the tuition reimbursement payment (Texas Government Code, §656.048). HB 3337, which became effective September 1, 2015, was intended to provide the appropriate executive-level oversight for authorizing payments for potentially costly reimbursements. Along with revisions to agency policy, Chapter 9, Subchapter B, Employee Training and Education, will also need to be updated to reflect the changes of HB 3337.

In addition to updating §9.15, Reimbursement, revisions are adopted to other areas of Chapter 9, to improve clarity and reflect current TCEQ training practices.

Section by Section Discussion

The commission adopts amended §9.11, Definitions, in order to reduce repetition in the existing rule. Additionally, the commission adopts amending the title of §9.11 from "Definition" to "Definition of Training."

The commission adopts amended §9.12, Scope, in order to reduce repetition in the existing rule. Additionally, the commission adopts amending the title of §9.12 from "Scope" to "Training Components."

The commission adopts amended §9.13, Eligibility, to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission adopts amended §9.15, Reimbursement, to implement HB 3337, which requires the commission to adopt rules requiring that before an agency administrator or employee may be reimbursed for tuition expenses, the executive director must authorize the tuition reimbursement payment (Texas Government Code, §656.048). Additionally, the commission adopts amended §9.15 to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission adopts amended §9.16, Training Records, to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission adopts amended §9.17, At-Will Employment Status, to clarify that participation in the agency's training and

education programs does not affect an employee's at-will status.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the adopted rulemaking is procedural in nature and revises procedures concerning how training reimbursements are approved, the rulemaking does not meet the definition of a "major environmental rule."

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received during the public comment period.

Takings Impact Assessment

The commission evaluated this adopted rulemaking action and performed a preliminary analysis of whether the adopted rulemaking is subject to Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to revise TCEQ rules regarding the approval process for reimbursing trainings and to reflect current changes to how TCEQ conducts training. Promulgation and enforcement of the rules will not burden private real property. Further, the adopted rulemaking does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the adopted rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The commission offered a public hearing on August 2, 2016. The comment period closed on August 8, 2016. The commission did not receive any comments on this rulemaking.

Statutory Authority

The amendments are adopted under the authority of the Texas Government Code, §656.048, concerning Rules Relating to Training and Education, which provides the commission au-

thority to adopt rules requiring that before an administrator or employee of the agency may be reimbursed under Texas Government Code, §656.047(b), the executive head of the agency must authorize the tuition reimbursement payment; and Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules.

Additionally, the amendments are adopted under the Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission.

The adopted amendments implement House Bill 3337, Texas Government Code, §656.041 *et seq.* (State Employee's Training Act), and TWC, §5.103, Rules.

§9.15. *Reimbursement.*

(a) Employee training opportunities.

(1) Funding for employee training is provided by the Human Resources and Staff Services Division or the employee's division.

(2) The employee's division also funds travel-related expenses for training participation.

(b) Education assistance program. Upon the recommendation of the employee's division director and with approval of the executive director, the employee's respective division funds may be used to reimburse the employee for specific tuition-related expenses. To qualify for reimbursement, the employee must successfully complete the requested course at an accredited institution of higher education, and the course must be:

(1) directly related to improving specific knowledge and skills pertinent to essential job functions of the current or prospective position;

(2) needed for a special job assignment; or

(3) required for a career ladder promotion.

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

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Director, General Law Division

Texas Commission on Environmental Quality

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CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER F. EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 3. OPERATIONAL REQUIREMENTS, DEMONSTRATIONS, AND ACTIONS TO REDUCE EXCESSIVE EMISSIONS

30 TAC §101.222

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §101.222, concerning Demonstrations.

The amendment to §101.222 is adopted *with change* to the proposed text as published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5343) and will be republished.

The adoption of §101.222(k) and (l) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rule

Texas Rules'

In 2003, TCEQ established an affirmative defense rule for "certain emissions events." The rule sets forth criteria that incentivize good operation and maintenance practices to minimize or avoid excess emissions and, if met, allow an owner or operator to avail itself of the affirmative defense.

The affirmative defense in §101.222(b) - (e) is available only for certain types of excess emissions, specifically from non-excessive upset events and unplanned maintenance, startup, and shutdown (MSS) activities. To be eligible for the affirmative defense, these events must have been unplanned and unavoidable, and properly reported.

The affirmative defense rules were last amended in 2005 and approved by EPA in 2010 (75 FR 68989 (November 10, 2010)). When EPA approved the Texas affirmative defense criteria as part of the Texas SIP in 2010, EPA acknowledged that there may be times when a source may not be able to meet emission limitations during periods of startup, shutdown, or malfunction (SSM). In this approval, EPA referenced its 1999 policy, stating "in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment."

EPA defended its 2010 SIP approval of §101.222(b) - (e) when this approval was challenged, and ultimately upheld by the United States Circuit Court of Appeals for the Fifth Circuit (Fifth Circuit) in 2013. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013))

Petition to EPA

On June 30, 2011, Sierra Club filed a petition for rulemaking with the EPA Administrator regarding, among other things, how state and local air agencies' rules in EPA-approved SIPs treat excess emissions during periods of SSM. In response, on February 12, 2013, EPA proposed its finding that numerous SIPs across the country were approved with "broad and loosely defined provisions to control excess emissions." Although Texas was not included in the Sierra Club's petition nor subject to the 2013 proposal, on September 17, 2014 (79 FR 55945), EPA supplemented its original proposal to add the Texas SIP, specifically finding that §101.222(b) - (e) is substantially inadequate to meet

Federal Clean Air Act (FCAA) requirements, and adopted this position in its final rulemaking. On June 12, 2015, EPA published its final action on the petition (80 FR 33839). In that notice, EPA stated it was clarifying, restating, and revising its guidance concerning its interpretation of the FCAA requirements with respect to treatment in SIPs of excess emissions during periods of SSM.

Specifically, EPA rescinded its interpretation that the FCAA allows states to elect to create narrowly tailored affirmative defense provisions in SIPs. Instead, EPA promulgated its new interpretation of the FCAA as prohibiting affirmative defense provisions in SIPs based on EPA's conclusion that the enforcement structure in FCAA, §113 and §304 precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. As a result, in the final rule, EPA issued a SIP Call for 36 states, including Texas, finding that certain SIP provisions regarding excess emissions due to SSM are substantially inadequate to meet FCAA requirements and established a due date of November 22, 2016, for submittal of SIP revisions to address this finding. EPA based its final rule position on the decision in *NRDC v. EPA*, 749 F.3d (District of Columbia Circuit (D.C. Circuit) 2014), regarding an EPA National Emission Standards for Hazardous Air Pollutants rule.

TCEQs Response to EPAs SSM SIP Call"

The commission disagrees with EPA's interpretation that an affirmative defense as to penalties is not available for enforcement of SIP violations. EPA's SSM SIP Call has been challenged, and is pending in the United States Court of Appeals for the District of Columbia (D.C. Circuit), by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

While the commission's rule adoption is not removing its affirmative defense rule from the Texas SIP, the commission is adding §102.222(k) to address EPA's SSM SIP Call. EPA's SSM SIP Call states, "the EPA has now concluded that the enforcement structure of the (f)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 33851 (June 12, 2015)) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

Adopted subsection (l) provides that adopted subsection (k) will not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have ended and there is a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

Subsections (k) and (l) are not severable and are adopted to be submitted to EPA for approval of both subsections as part of the Texas SIP.

Section Discussion

§101.222, Demonstrations

Adopted §101.222(k) states that the use of the affirmative defenses in subsections (b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Adopted §101.222(l) delays the applicability of §101.222(k) until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) and (e), have ended and there is a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

The commission is not adopting and does not intend to amend or remove subsections (a) - (j) and, therefore, did not solicit comment on those subsections. The references to "the effective date of this section" in subsection (h) was adopted by the commission on December 14, 2005, and because those deadlines have expired, the commission is not extending those deadlines with the new effective date of the rule due to the addition of subsections (k) and (l).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare an RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

Additionally, even if the rule met the definition of a "major environmental rule," the rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a

state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) is not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633 or bill) during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and, in fact, creates no additional impacts since the adopted rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the adopted rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with *per curiam* opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ); Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins.*

Co., 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978))

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call. The adopted rule was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this adopted rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the RIA determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call. The adopted rule does not create any additional burden on private real property. The adopted rule does not

affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption does not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rulemaking does not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201, *et seq.*), and commission rules in 30 TAC Chapter 281, relating to Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this adopted rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rule complies with this goal by ensuring that the rule meets applicable federal and state requirements for regulation of air quality in these areas. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Section 101.222 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must revise their operating permit consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking.

Public Comment

The commission held a public hearing on August 8, 2016. The comment period closed on August 8, 2016. The commission received comments from Association of Electric Companies of Texas (AECT), Environment Texas and Lone Star Chapter of the Sierra Club (Environment Texas and LSCSC), Environmental Integrity Project (EIP), EPA, Luminant, Sierra Club, Texas Chemical Council (TCC), Texas Industry Project (TIP), and Texas Oil & Gas Association (TXOGA).

Response to Comments

General Comments Regarding §101.222

Comment

AECT commented that it strongly supports the affirmative defenses in §101.222(b) - (e) for upsets or unplanned MSS activities, because the affirmative defenses are necessary and critical to the air quality regulatory program in Texas. TCEQ's affirmative defenses establish stringent criteria that incent operational and maintenance practices that help minimize and avoid emissions from upsets and unplanned MSS activities. These affirmative defenses were developed at EPA's request and were approved as part of the Texas SIP. Therefore, AECT, strongly supports retaining the affirmative defenses as proposed.

Response

The commission agrees that the stringent criteria of the affirmative defense incentivize good operational and maintenance practices. EPA's comments in response to this rulemaking also acknowledge that the TCEQ's affirmative defenses are "narrowly drawn," thus supporting the TCEQ's position that these affirmative defenses are appropriate for minimizing adverse impacts from emissions.

TCEQ continues to maintain that an affirmative defense is appropriate for violations that are excess emissions due to emissions events (which are upsets and unscheduled MSS activities); unplanned MSS activities; opacity events; and opacity events resulting from unplanned MSS activities, as long as the criteria for an affirmative defense are rigorous and narrowly tailored for consistent and meaningful enforcement while protecting air quality, as are those in TCEQ's affirmative defense rule.

Comment

TXOGA commented that the TCEQ has an extensive base of experience applying EPA- and court-approved criteria to evaluate these unavoidable air emissions, and the regulated community likewise understands the framework and its obligations under this program. TXOGA is supportive of the TCEQ's efforts in the rule proposal to uphold the law as it specifically applies to Texas.

Response

The commission appreciates the support and agrees that with more than ten years of applying these particular criteria, TCEQ's experience is extensive. TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions. Scheduling MSS activities in an expedited manner prevents greater emissions from malfunctions in the future. For upsets (malfunctions), these must be unavoidable to be eligible for an affirmative defense.

Use of Affirmative Defense

Comment

TCC commented that the proposed rule does not alter or restrict the authority of federal courts to impose liability, and that the Fifth Circuit agrees with this position.

Response

The commission agrees that §101.222(k) addresses EPA's concern. In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative de-

fense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351 (June 12, 2015)). Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas. Further, the commission agrees that the Fifth Circuit agrees with this position. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013))

Comment

TCC commented that the current Texas affirmative defenses for excess emissions due to unplanned MSS activities, upsets, or excess opacity events resulting from upsets or MSS activities are federally enforceable and operative in federal district court. TCC will continue to support TCEQ's efforts to uphold the current case law as it specifically applies to Texas through this rule proposal.

Response

The commission agrees that the affirmative defense rule is federally enforceable as an applicable requirement in the Title V program, and as part of the SIP. To the extent which some have argued that a court or an administering permit authority did not have discretion to allow an affirmative defense, enforcement discretion and use of an affirmative defense remains within their authority, which is appropriate under FCAA, §113 and §304, as well as separation of powers principles. In *Luminant Generation Co. LLC v. EPA*, the Fifth Circuit held, contrary to EPA's new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013))

Comment

Environment Texas and LSCSC, EIP, and the Sierra Club commented that the substantive questions regarding the availability of an affirmative defense for violations resulting from upsets has been largely resolved by federal courts, and by EPA's revised policy. The commenters noted that while the affirmative defense applied only to penalties and not to injunctive relief, nothing in TCEQ's rules trumps the wide discretion that federal courts have to adjudicate federal actions.

Response

The commission does not agree that the availability of an affirmative defense for violations resulting from upsets has largely been resolved by federal courts and by EPA's revised policy with regard to use of affirmative defense for excess emissions from limits in a state's SIP. Rather, EPA erroneously applied the opinion of the D.C. Circuit stating that EPA could not include an affirmative defense in its Portland Cement National Emission Standards for Hazardous Air Pollutants (NESHAP) rules, which specifically noted that the opinion was not a determination for violations of SIP limits under FCAA, §110, referencing the *Luminant Generation Co. LLC v. EPA* opinion. (*NRDC v. EPA*, 749 F.3d 1055, 1064, n.2 (D.C. Circuit 2014))

The commission agrees that the TCEQ's current affirmative defense rule does not apply to administrative technical orders and actions for injunctive relief. TCEQ has not and does not dispute that the federal courts have the discretion and authority to allow an affirmative defense, and that is appropriate under FCAA, §113 and §304, as well as under separation of powers principles.

In *Luminant Generation Co. LLC v. EPA*, the Fifth Circuit held, contrary to EPA's new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013)) In the *Luminant Generation Co. LLC v. EPA* case, TCEQ's amicus curie brief stated that, as EPA recognized in its approval of TCEQ's affirmative defense rule, "...it is the court that determines whether an operator has proved its affirmative defense. And if not, it is the court that determines the amount of the penalty. 75 Fed. Reg. at 68999 ('(I)f the affirmative defense is rejected by the court, a judge is still required to determine the appropriate penalties in a given case.'). Thus, the availability of the affirmative defense in certain limited cases does not tread on the courts' jurisdiction to determine-consistent with EPA's interpretation of the Act and the special regime for MSS emissions-whether a penalty is appropriate, and, if so, to determine the appropriate amount of that penalty. Accordingly, the approved affirmative defense rules are entirely consistent with the Clean Air Act's enforcement and penalty assessment criteria."

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that violations of the FCAA are subject to federal civil judicial enforcement actions and citizen suits and that, in such suits, federal district courts have jurisdiction to assess penalties for each violation. Commenters noted that, specifically, FCAA, §113(e) lists the criteria the district court must consider in assessing penalties, and because assessing penalties is expressly reserved to the federal district courts, neither EPA nor the states have the authority under the FCAA to alter the jurisdiction of federal courts by adopting rules limiting the district courts' penalty assessment authority. They further commented that the D.C. Circuit agreed with this reasoning, holding that an affirmative defense for private civil suits exceeds EPA's statutory authority because, under FCAA, §113(e)(1) and §304(a), the decision whether to award penalties is for a court, citing *NRDC v. EPA*, 749 F.3d 1055 (D.C. Circuit 2014). The commenters noted that they agreed with EPA that the reasoning of this opinion applies squarely to the question of whether the FCAA allows states to establish affirmative defenses in their regulations through the SIP process.

Response

The commission agrees that FCAA violations are subject to enforcement actions by EPA and citizens in federal district court.

The current affirmative defense criteria are used by the TCEQ in making its own enforcement decisions and were never intended to restrict the authority of federal courts. The commission does not agree that the *NRDC v. EPA* opinion applies to affirmative defenses in SIPs. The D.C. Circuit held that EPA improperly allowed an affirmative defense in its Portland Cement NESHAP rule. The court specifically noted that the opinion was not a determination for violations of SIP limits under FCAA, §110, referencing the Fifth Circuit's *Luminant Generation Co. LLC v. EPA* opinion. (*NRDC v. EPA*, 749 F.3d 1055, 1064, n.2 (D.C. Circuit 2014)) Further, EPA's revised policy is not consistent with the opinion of the Fifth Circuit, which held that TCEQ's affirmative defenses are and were never intended to bind a federal court.

Comment

AECT commented that any comments suggesting that the affirmative defenses in §101.222(b) - (e) interfere with the rights of

citizens, such as environmental groups, to pursue enforcement under the citizen suit provision of FCAA, §304 are baseless because AECT is aware of at least four instances in the last few years in which environmental groups were allowed to pursue citizen suits against Texas companies based on alleged upsets or unplanned MSS activities (including at least two suits that continued through trial).

AECT further commented that a defendant company's claim of an affirmative defense does not place any additional burden on an environmental group plaintiff in a citizen suit because it is clear that the defendant company carries the burden to demonstrate that all of the conditions of the claimed affirmative defense are met, citing *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 855 (5th Cir. 2013); and, went on to comment that even when a defendant company claims one of the affirmative defenses in §101.222(b) - (e) in a citizen suit (or an EPA enforcement action in federal district court), the court has the ability to determine whether each of the stringent conditions of the affirmative defense is met. The commenter also noted that if the court determines that any one of those conditions is not met, the court should reject the affirmative defense claim.

Response

The commission agrees that a party asserting an affirmative defense has the burden of proving to the court that it has met all of the elements of the defense. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013)) To the extent which some have argued that a court or an administering permit authority did not have discretion to allow an affirmative defense, enforcement discretion and use of an affirmative defense remains within their authority, which is appropriate under FCAA, §113 and §304, as well as separation of powers principles. In *Luminant Generation Co. LLC v. EPA* the Fifth Circuit held, contrary to EPA's new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013))

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that while it appeared clear to EPA and to the Fifth Circuit that the TCEQ's affirmative defense rules are limited to penalties and would not thwart citizen enforcement, TCEQ's practices allow industries to treat the narrow defense to penalties as a blanket exemption. The commenters noted that in practice, as long as a Texas source reports the excess emissions, state regulators typically "determine," without on-site investigations, that all of the affirmative defense criteria are met and that, therefore, there were "no violations." The commenters noted that in doing so, the State has effectively, and improperly, treated the affirmative defense as a blanket exemption. In addition, the commenters noted that the affirmative defense as it currently exists is also subject to misinterpretation by courts.

Response

TCEQ disagrees with the commenters' assertion that its practices are the equivalent of a blanket exemption from compliance with emission limits. The commission reaffirms its position that emissions events are violations. As part of the most recent amendment to §101.222, effective January 5, 2006, the commission agreed with EPA's comment that assertion of an affirmative defense to an enforcement action does not relieve the source from liability for a violation of the SIP, but instead allows

the source to avoid civil penalties when certain criteria are met in a judicial or administrative enforcement action. (30 TexReg 8884, 8922 - 8923 (December 30, 2005))

TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not indiscriminately allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions). When a source reports excess emissions, each report is reviewed by an investigator. Although most investigations occur in-house, the investigations include a thorough review of the incident. Investigators may ask questions pertaining to, for example, the number of previous events in order to assess whether there is a pattern of excess emissions. Investigators may ask for further information regarding how the event could have been avoided by good design, maintenance, and operation. At the conclusion of the investigation, if the regulated entity meets all criteria, and provides sufficient documentation in response to agency requests, then the investigator may not penalize the regulated entity for the violation. The determination does not limit enforcement actions taken by other parties for that violation. Further, in Fiscal Year 2015, the TCEQ assessed \$2,875,661 in administrative penalties related to emissions events.

Comment

Sierra Club commented that power plants and other facilities can emit massive amounts of dangerous pollution during periods of SSM. Specifically, Sierra Club mentioned that the TCEQ issued ten permits in 2011 which authorize particulate matter emissions from coal-fired power plants during SSM periods up to 7,616 pounds per hour, which is far higher than allowable emission rates during normal operations, and these permits do not restrict the number of SSM events or hours during which the higher limits apply. Further, the commenter noted that based on its' review of 2012 emission inventory data, if a plant were to release the amount of particulate pollution allowed during SSM periods, those emissions would be so high that the emissions would account for between 15% and 66% of what is normally emitted during an entire year of operations, and these emissions have serious, day-to-day impacts on ordinary Texans. The commenter noted that the TCEQ's proposal turns a blind eye to these impacts and will only preserve the status quo.

Response

In 2005, the TCEQ amended §101.222 by including an enforcement-based strategy for permitting planned MSS emissions. The rule includes a seven-year schedule, for owners and operators to obtain authorization of MSS activities for their facilities. In response, the regulated community sought and obtained authorization, either through a Permit by Rule, Standard Permit, or a case-by-case permit. During the schedule provided for in the rule, which has now expired, the regulated community overwhelmingly responded by seeking authorization of MSS activities. The authorizations include specific emission limitations and durations for planned MSS activities or require certain work practices be followed. Furthermore, TCEQ reviews maintenance activity emissions for Best Available Control Technology, ensures an off-property impacts analysis is performed, and the results are protective emissions limits on the Maximum Allowable Emission Rates Table. Texas is one of very few states that has extensively authorized planned MSS emissions to be permitted in a

collaborative effort to control emissions during these operating scenarios.

With regard to power plants, owners and operators of all of the electric generating facilities in Texas applied for and were issued permit amendments that authorized MSS activities. When these authorizations for MSS activities were sought, increases in annual emission rates for the boilers were not requested, because the owners and operators were able to include the emissions from these additional activities as part of their current allowable emission rates. TCEQ disagrees that these authorized emissions are inappropriate and that the proposed amendments to the affirmative defense rule ignores impacts from unauthorized emissions because they were subject to the permit review process described earlier.

Any planned maintenance activities that TCEQ determines are not in compliance with the applicable permit are not authorized and may result in additional requirements through enforcement actions. Emissions from upsets (also commonly referred to as malfunctions) are not authorized and are subject to enforcement.

As discussed elsewhere, TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions).

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that the EPA's SSM SIP Call to eliminate Texas' affirmative defense will deter massive and avoidable emissions by driving industries to fix problems rather than hiding behind affirmative defenses. The commenters also included a discussion regarding a number of specific examples of upsets reported by specific companies.

Response

TCEQ disagrees that the EPA's SSM SIP Call to eliminate the TCEQ's rule regarding affirmative defenses will deter massive and avoidable emissions. This is because the affirmative defense rule is applicable only to emissions that were unavoidable, among other criteria. Emissions that are avoidable are subject to administrative enforcement without an opportunity to claim an affirmative defense. The availability of an affirmative defense in civil actions will be at the discretion of the court. In addition, the criteria used to determine eligibility for the affirmative defense require that regulated entities properly operate and maintain pollution control equipment, take prompt action, and minimize emissions. The criteria also require that emissions are not part of a recurring pattern and that the percentage of a facility's total annual operating hours during which unauthorized emissions occurred are not unreasonably high. This program of evaluation and oversight as implemented by TCEQ drives industries to fix problems in order to be eligible for the affirmative defense, not the converse. As stated elsewhere in this preamble, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions). When a source reports excess emissions, each report is reviewed by an investigator. TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework.

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that the actual volatile organic compound (VOC) and nitrogen oxide (NO_x) emissions for flares during SSM events are likely significantly higher than what is reported based on EPA's recent finding that current VOC and NO_x "AP-42" emission factors grossly underestimate releases by a factor of 4 and 42 respectively.

Response

The commission disagrees with the commenters' assertion that NO_x and VOC emissions from flares during SSM events are likely much greater than reported based on the EPA's recent finding concerning AP-42 emission factors for flares. The EPA did not finalize the proposed AP-42 NO_x emission factor for flares that were 42 times higher than the current factor due to data quality issues associated with the NO_x data. Information regarding the EPA's finalized AP-42 emission factors for industrial flares and details regarding the data quality issues with the EPA's NO_x data are available at https://www3.epa.gov/ttn/chieff/consentdecree/index_consent_decree.html.

While the EPA's new VOC emission factor for industrial flares in AP-42, Section 13.5, is approximately four times higher than the previous total hydrocarbon emission factor, the commission notes that the TCEQ's emissions inventory guidance (TCEQ Publication RG-360/15, January 2016, page A-47) specifies that emission factors cannot be used to determine uncombusted flared gas emissions and specifically states that the total hydrocarbon and VOC emission factors from AP-42, Section 13.5 should not be used. According to the emissions inventory guidance, flare VOC emissions should be calculated using the flared gas flow rate, composition, and permitted destruction and removal efficiency (DRE). Additionally, the commission expects that during SSM events a flare would be likely receiving gas streams that are high heat content, i.e., the British thermal units per cubic foot of the gas stream is much higher than during normal operations. If the flare is operated properly, the DRE would be expected to be higher than normal while receiving a gas stream that is high in heat content.

Response to the EPA's SSM SIP Call

Comment

EPA commented that the SIP submittal letter should state that the submission of the proposed SIP revisions by Texas is being made in response to the EPA's SSM SIP Call 80 FR 33839, at 33968, 33969 (June 12, 2015).

Response

The commission's SIP submittal letter states that the submission of the proposed SIP revisions by Texas is being made in response to the EPA's SSM SIP Call.

Comment

Luminant commented that each of its lignite and subbituminous coal-fired facilities, to varying degrees of significance and along with most other sources of air emissions in Texas, are affected by EPA's June 12, 2015, EPA's SSM SIP Call, which seeks to eliminate the affirmative defenses in §101.222(b) - (e). Thus, the TCEQ's response to the EPA's SSM SIP Call directly affects Luminant and, in no small measure, the future viability of some of its facilities, specifically those that use electrostatic precipitators to control particulate matter emissions and opacity.

Response

The commission agrees that, given the broad definition of "emissions event," which applies to all facilities owned or operated by regulated entities in Texas, the impact of any rule change is also broad.

Comment

Luminant commented that EPA's reinterpretation of FCAA requirements that underpin the EPA's SSM SIP Call is just the latest flip in a decades-long series of EPA interpretations that it seeks to impose on Texas. The commenter noted that from a regulated entity perspective, it seems that just as Texas comes into compliance with an EPA pronouncement as to the proper handling of emissions events, EPA pivots and instructs the State to redo its SIP, and Texas, in good faith, tries to comply.

Response

Luminant is correct that this rulemaking is the TCEQ's latest response to EPA's policy changes over more than 40 years regarding emissions from MSS activities and upsets (or malfunctions), following EPA's 1972 approval of the original Texas SIP. (37 FR 10842, 10895 (May 31, 1972))

Until planned MSS emissions began to be authorized by permit on a wide-scale basis in 2007, SIP-approved regulation of all MSS activities and upsets generally involved 1) notification of an MSS activity or upset to TCEQ (or its predecessor agency); and 2) a determination by TCEQ whether the emissions occurring during the MSS activities or upsets were exempted from complying with any applicable emissions limits.

In 2000, the commission amended its rules, in response to EPA's review of rule amendments made in 1991 and 1997 by TCEQ's predecessor agencies, by adding criteria that an owner or operator was required to satisfy before the TCEQ's executive director would determine that the exemption applied to emissions from MSS activities not authorized by a permit (25 TexReg 6750 - 6751 (Jul. 14, 2000)) EPA approved the exemption language that included the more stringent criteria as part of the Texas SIP. (65 FR 70729 (Nov. 28, 2000)) Because the criteria must be satisfied before the exemption would apply to emissions from MSS activities, the exemption was not automatic, and, instead, it was effectively an affirmative defense. (25 TexReg 6750 - 6751 (Jul. 14, 2000))

In response to legislation amending the TCAA, the commission's rules were amended to distinguish between "planned" MSS activities and "unplanned" MSS activities, as well as adopting associated specific definitions, including one for "Emissions event." That distinction was important for both authorizing MSS activities and reporting, and possible enforcement of, emissions from these activities. TCEQ rules do not define "planned MSS activity," but define "Unplanned maintenance, startup, or shutdown activity" in §101.1(109); "planned" generally means "authorized" emissions. It should be noted that "planned" is not the equivalent of "scheduled." The use of the term "Scheduled maintenance, startup, or shutdown activities" is related to the TCEQ reporting requirements for unauthorized emissions, as required by the TCAA, THSC, §382.0215; and §101.1(91) and §101.221 of the commission's rules.

In 2003, in response to a subsequent EPA request, TCEQ amended language in its rules to replace "exempt from compliance" with applicable limits to "subject to an 'affirmative defense'" to enforcement penalties for planned MSS activities.

(28 TexReg 118 (Jan. 2, 2004)) This affirmative defense for emissions from planned MSS activities was temporary.

In 2005, TCEQ adopted a schedule for phasing out the use of that affirmative defense as an incentive for owners and operators to obtain permit authorization for their planned MSS activities, codified in §101.222(h)(1). (30 TexReg 8956 (Dec. 30, 2005)) EPA approved the commissions' affirmative defense rule, §101.222(b) - (e) in 2010. (75 FR 68989 (Nov. 10, 2010)) The benefit of authorizing planned MSS activities is broad. Specifying controls or work practices for emissions, as well as including monitoring, recordkeeping, and reporting requirements in a permit results in greater environmental benefit and is a more streamlined approach to compliance for regulated entities.

With its SSM SIP Call, EPA is changing its interpretation of the FCAA and its policies, requiring yet another change in regulatory oversight of emissions from emissions events and unplanned MSS activities.

Comment

EPA acknowledged that this rulemaking is TCEQ's response to the EPA's SSM SIP Call. Sierra Club commented that the proposed rule fails to satisfy the requirements of the FCAA or EPA's final policy expressed in the EPA's SSM SIP Call and should not be approved.

TIP supports the TCEQ's proposed changes to §101.222, which constitute a response to EPA's SSM SIP Call that is consistent with the legal basis for pending judicial challenges to the EPA's SSM SIP Call. AECT strongly supports TCEQ's plan to respond to the SIP Call by revising §101.222 to explicitly address EPA's purported, and recently developed, basis for the SIP Call, which is not legally supportable.

Response

As stated elsewhere in this preamble, in its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that while Texas is well within its right to challenge the EPA's SSM SIP Call in federal court, Texas cannot unilaterally choose to ignore the EPA's SSM SIP Call, as it is doing with this proposed rule. Rather than following the law, which requires compliance with a duly adopted federal rule, Texas is refusing to make any changes to its rules unless and until a court makes Texas do it. The commenters noted that the proper avenue would be for Texas to seek a stay in federal court. The commenter also noted that absent a stay, Texas must comply with the EPA's SSM SIP Call.

Response

The commission initiated this rulemaking in response to EPA's SSM SIP Call and §101.222(k) addresses EPA's concern. As stated elsewhere in this preamble, in its final rulemaking for the EPA's SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would

operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Therefore, subsection (k) directly responds to EPA's SSM SIP Call.

As the commenters state, Texas is well within its rights to challenge the EPA's SSM SIP Call. However, revising its SIP to remove the affirmative defense rule during the pending litigation could be perceived that TCEQ is waiving its position in the litigation. While EPA calls for removal of the affirmative defense rule, its notice in the *Federal Register*, as quoted earlier, supports the rule amendment the commission is adopting in §101.222(k). Although Texas is challenging the EPA's SSM SIP Call, the commission is not ignoring the requirement that Texas submit a revision to its affirmative defense rule. This adopted rule satisfies the requirement that TCEQ submit a SIP revision by November 22, 2016. The adopted amendments will address EPA's concern whether Texas and other petitioners prevail, or if EPA prevails.

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that it seems almost absurd that TCEQ should choose to fight EPA on this SIP Call when making a small rule change would allow it to continue its current administrative enforcement policies without violating federal law.

EPA commented that it strongly recommends that the TCEQ submit a SIP revision that will simply remove §101.222(b) - (e) from the Texas SIP. The EPA added that such a SIP revision would meet the requirements of the EPA's SSM SIP Call and bring the Texas SIP into compliance with FCAA requirements on this issue.

Response

The commission has made no change to the rule in response to these comments. Environment Texas and LSCSC, EIP, and Sierra Club characterize the response required by EPA in the EPA's SSM SIP Call as "making a small rule change." Presumably, based on their comments, and the fact that EPA "strongly recommends" removal of the affirmative defense, these commenters are referring to removing the affirmative defense or revising it to be a state-only enforcement option. The affirmative defense provisions in §101.222(b) - (e) are an important component in the SIP to maintain air quality. When sources exceed permitted limits due to unplanned MSS activities or malfunctions, TCEQ reviews these events against these criteria to determine if the event was avoidable and assesses whether or not operators took measures to minimize emissions. TCEQ has extensive reporting requirements for these types of events, and every incident reported to the agency is reviewed. Once a report is received, investigators first determine whether the event was excessive. This determination hinges on six criteria relating to the frequency, cause, quantity and impact of emissions, duration, percentage of annual operating hours during which the emissions event occurred, and the need for MSS activities. In order to assess the quantity and impact on human health or the environment for excessive emissions events, air modeling of the emissions is conducted. The results are compared to state and federal standards such as the NAAQS and may also be evaluated by TCEQ toxicologists. The commission seeks to maintain the affirmative defense provisions as an integral part of the SIP and the air quality program.

Although the commission is not removing the affirmative defenses in §101.222(b) - (e), this rulemaking is in response to the

EPA's SSM SIP Call by adoption of rule text that incorporates EPA's own language that expresses the EPA's basis for the SIP Call. EPA's notice in the *Federal Register* supports the rule amendment the commission is adopting in §101.222(k). The EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) As some commenters for this §101.222(k) rulemaking acknowledge, Texas is well within its rights to challenge the EPA's SSM SIP Call. Revising the Texas SIP to remove the affirmative defense rule during the pending litigation could be perceived that TCEQ is waiving its position in the litigation.

Comment

Environment Texas and LSCSC, EIP, and Sierra Club commented that TCEQ could remove the affirmative defense provisions, as EPA has recommended. The commenters noted that this change would give the state maximum enforcement discretion while allowing the FCAA, and not state rules, to guide enforcement in federal actions by EPA and citizens. Alternatively, the commenters noted that TCEQ could retain the affirmative defense provisions and explicitly make them state-only rules. The commenters noted that this change would mean that federal courts would not be bound by the TCEQ's affirmative defense rules or decisions, but that state regulators would continue to be guided by the affirmative defense criteria when deciding whether to pursue enforcement.

EPA commented that the existing affirmative defenses in §101.222(b) - (e) are narrowly drawn and the EPA does not believe that the affirmative defenses would interfere with the state's required enforcement authority to meet other applicable FCAA requirements if TCEQ chooses to retain the affirmative defenses for state law purposes.

Response

It is the commission's position that the current affirmative defense rule does not limit EPA or citizens from taking enforcement action, nor the federal district courts in which the enforcement case is brought. The commission recognizes that even with good operation and maintenance, mechanical failures occur. When these unavoidable events happen, the affirmative defense provisions serve in concert with other program requirements to create an incentive for prompt corrective action to minimize emissions. As discussed elsewhere, the affirmative defense is an important component of the SIP, and therefore, the commission chooses to maintain the integrity of the state's plan to control the quality of the state's air. However, this rulemaking is performed in response to EPA's SSM SIP Call to clarify the intent of the applicability and use of an affirmative defense in federal court. The commission appreciates EPA's acknowledgement that the previously approved affirmative defense provisions are narrowly tailored, and do not interfere with the state's enforcement authority. The TCEQ enforces against emissions events on a regular basis.

With regard to any SIP inadequacy regarding lack of continuous compliance requirements, EPA has failed to actually identify a legally sufficient basis for the alleged inadequacies (beyond inclusion of an affirmative defense) so that TCEQ can appropriately respond.

Comment

EPA commented that the EPA does not agree that states may include affirmative defenses in SIP provisions, because such provisions are by design created to alter or eliminate the statutory jurisdiction of the federal courts to determine liability and to impose the full range of remedies provided in the FCAA. The commenter also noted that to the extent that a state elects to have such affirmative defense provisions for purposes of state law only, such provisions may be appropriate but should not be included in the SIP.

Response

In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) This statement is from the portion of the EPA's SSM SIP Call notice regarding EPA's change in policy. The commission understands this statement means that EPA is not opposed to affirmative defenses in SIPs, but rather affirmative defenses that operate to limit a court's jurisdiction. Because adopted §101.222(k) clarifies that §101.222(b) - (e) does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

Possible EPA Action

Comment

Luminant commented that EPA fails to recognize and acknowledge that Texas has always had a complementary set of rules to address SSM in its SIP and many, if not all, of the present Texas SIP emissions limits were developed and exist in parallel with provisions that applied during these specific phases of operation. Therefore, Luminant expressed concern that the EPA intends to act in Texas before judicial review is complete and that EPA is attempting to justify that action based on its mistaken belief or intentional mischaracterization that its SSM SIP Call is requiring Texas to remove a provision that it has only had for a few years, as EPA expresses in its initial brief to the D.C. Circuit in the EPA's SSM SIP Call litigation.

Luminant further commented that EPA should exercise restraint, accept the proposed rules and not proceed with a Federal Implementation Plan (FIP) until its latest reinterpretation of the FCAA is vetted by the courts. The commenter noted that this is particularly true for Texas, which is in the enviable position of having a decision of the Fifth Circuit that upholds the Texas affirmative defense provisions. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013))

AECT commented that without this rulemaking by TCEQ, EPA could immediately act to issue a FIP to remove §101.222(b) - (e) from the SIP prior to a ruling by the Circuit Court for the District of Columbia on the litigation challenging the EPA's SSM SIP Call.

Response

The commission agrees that the affirmative defense provisions are longstanding, and have been effective since 2005. As previously discussed, the affirmative defense rule is the latest applicable regulatory response to emissions from MSS activities and upsets.

The commission acknowledges that EPA may elect to issue a FIP prior to the conclusion of the litigation challenging the EPA's SSM SIP Call, but supports EPA exercising restraint in doing so until the EPA's SSM SIP Call litigation is complete and acting to

issue a FIP only if the judicial opinions support such an action by EPA. Although Texas is challenging the EPA's SSM SIP Call, the commission is not ignoring the requirement that Texas submit a revision to its affirmative defense rule. This adopted rule satisfies the requirement that TCEQ submit a SIP revision by November 22, 2016. The adopted amendment addresses EPA's concern whether Texas and other petitioners prevail, or if EPA prevails. However, if EPA issues a FIP prior to the conclusion of all of the litigation regarding the EPA's SSM SIP Call with regard to Texas, the commission will review EPA's action and determine what its response will be, which may include challenging any final action brought by EPA to remove §101.222(b) - (e) from the Texas SIP.

§101.222(k) and (l)

Comment

Luminant commented that proposed §101.222(k) clearly indicates TCEQ's intent to accommodate EPA's concerns if the outcome of the litigation challenging the EPA's SSM SIP Call is resolved in favor of EPA. TIP supports the combination of proposed §101.222(k) and (l), which would provide that if the existing affirmative defense becomes prohibited based on the pending judicial challenges to the EPA's SSM SIP Call, then the affirmative defense will not limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Luminant further commented that it is a petitioner alongside the State of Texas and other states challenging EPA's SSM SIP Call in the D. C. Circuit. (*Walter Coke, Inc. v EPA*, Case No. 15-1166 (D.C. Circuit)) Luminant appreciates that implementation of the proposed revision in this rulemaking to address EPA's SSM SIP Call concerns is made directly dependent on the completion and outcome of that litigation.

Response

The commission agrees that this rulemaking is to respond to EPA and also allow for the resolution of the pending litigation.

§101.222(k)

Comment

AECT commented that the current affirmative defenses in §101.222(b) - (e) does not limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement act, and no federal court has interpreted the rule in that way. Therefore, the commenter notes that proposed §101.222(k) addresses EPA's concern that formed the basis for the EPA's SSM SIP Call.

Response

The commission agrees that §101.222(k) addresses EPA's concern. In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

In addition, in response to a comment regarding the effect of the commission's affirmative defense rules on EPA or citizen enforcement, the TCEQ responded, and has since maintained the position, that there is no intent to affect those cases, which are required to be brought in federal district court.

Comment

EPA commented that merely adding a statement to the SIP that the existing affirmative defense provisions "are not intended" to affect the federal courts is insufficient because the provisions will be perceived as imposing binding requirements that courts must adhere to, rather than exercising the full range of authority conferred upon the federal courts in the FCAA. The commenter noted that to retain such provisions would, at a minimum, lead to confusion on the part of regulated entities, regulators, the public, and the courts. The commenter noted that in the EPA's SSM SIP Call, the EPA has directed states to remove existing affirmative defense provisions from SIPs, including those in §101.222(b) - (e). Thus, the commenter noted that the proposed revisions to add §101.222(k) will not meet the requirements of the EPA's SSM SIP Call.

Response

As previously discussed, in the EPA's final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351). Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

The commission disagrees that this text would lead to confusion because it would be perceived or applied as a binding requirement on a court. Rather, this rulemaking clarifies that the TCEQ's affirmative defense does not bind a court, and therefore, eliminates EPA's concern about its unsupported perception.

EPA's basis for the SIP call is stated as concern regarding affirmative defenses that could be interpreted to impair a federal court's jurisdiction. Since that basis is not expressly stated in TCEQ's rules, adopted §101.222(k) addresses the basis for the EPA's SSM SIP Call, rendering the alleged confusion moot.

§101.222(l)

Comment

AECT commented that the delay in the effective date of §101.222(k) that would be provided by §101.222(l) is anticipated by EPA. The commenter noted that this is because the EPA's SSM SIP Call states that "EPA notes that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP revision." (80 FR 33849) The commenter noted that EPA's use of the term "most likely" shows that it anticipates that the rule revisions that are in some proposed SIP revisions that states will submit in response to their SIP Calls will not be effective while EPA is reviewing and deciding whether to approve the states' proposed SIP revisions.

Luminant commented that to the extent that EPA may voice concerns about a SIP revision that is made contingent on an external event, such as the outcome of the D.C. Circuit litigation, that concern would not be a lawful basis for EPA to disapprove §101.222(l). Luminant supports establishing a compliance date that is contingent on a final decision of the D.C. Circuit holding that Texas' affirmative defense is contrary to the FCAA.

Response

Adopted §101.222(l) does not establish a requirement contingent on an external event, but rather establishes when the adopted amendments become applicable. The rule amendment in §101.222(k) fully responds to the EPA's SSM SIP Call and is anticipated to become effective on or about November 24, 2016. Although the final, binding outcome of the litigation is likely to be an opinion issued by the D.C. Circuit, that court is not named in the rule because that court's opinion could possibly be appealed to the United States Supreme Court.

Comment

EPA commented that the practical effect of §101.222(l) is that substantially inadequate SIP provisions (§101.222(b) - (e)) would remain in the SIP for an indefinite period of time, perhaps a period of several additional years. The commenter noted that even if §101.222(k) were otherwise valid, the EPA does not agree that states may include provisions that have the effect of deferring a required SIP revision as provided in §101.222(l). The commenter noted that such an approach is inconsistent with the explicit statutory requirement that states make corrective SIP submissions no later than 18 months after the EPA's issuance of a SIP call. Thus, the commenter noted that the revision to add §101.222(l) will not meet the requirements of the EPA's SSM SIP Call.

Response

EPA's SSM SIP Call has been challenged and is pending in the D.C. Circuit by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA. Section 101.222(l) provides that §101.222(k) would not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have ended and the EPA's SSM SIP Call is upheld.

EPA's finding of substantial inadequacy of §101.222(b) - (e) is being challenged and until all challenges, including any challenge of a FIP by EPA, are complete, there is no final determination that the Texas SIP would include any substantially inadequate provisions. The results of this challenge will determine if §101.222(b) - (e) are truly inadequate; therefore what revisions, if any, are needed for the Texas SIP. In addition, EPA's concern that "substantially inadequate SIP provisions (§101.222(b) - (e)) would remain in the SIP for an indefinite period of time, perhaps a period of several additional years" is not supported by any evidence that retaining the affirmative defense in the Texas SIP renders the Texas SIP inadequate to protect air quality.

The commission agrees that the FCAA requires states revise their SIPs in response to a SIP Call. TCEQ is meeting the deadline for the EPA's SSM SIP Call required revision with the adoption of §101.222(k) and (l). EPA's conclusion that disagrees with the commission's response and basis for the response ignores EPA's own SSM SIP Call notice, as previously discussed.

EPA's comment that the §101.222(l) has the effect of deferring a required SIP revision is without merit. However, because the rule amendment responds to the EPA's SSM SIP Call, will be effective as law in the State of Texas, and will be timely submitted to EPA, the requirements for a SIP revision will be met. Therefore, unless EPA is prepared to propose approval and adopt the commission's response to the EPA's SSM SIP Call, the commission urges EPA to exercise restraint in responding to this SIP revision. EPA has 18 months to act on the SIP submittal. The ongoing litigation, and any potential litigation regarding a FIP, if

issued, could be completed within the next 18 months. However, if EPA issues a FIP prior to the conclusion of all of the litigation regarding the EPA's SSM SIP Call with regard to Texas, the commission will review EPA's action and determine what its response will be, which may include challenging any final action brought by EPA to remove §101.222(b) - (e) from the Texas SIP.

Comment

AECT suggested that part of §101.222(l) be revised to state "(p)rovisions Applying..., as it applies to subsections (b) - (e) of this section, (SIP Call) have ended and there is a final and non-appealable court decision that upholds the SIP Call." AECT commented that these changes are necessary because if the affirmative defenses in §101.222(b) - (e) were to be "prohibited," there would be no need for proposed new §101.222(k). The commenter noted that the only scenario in which the affirmative defenses in §101.222(b) - (e) would have any meaning or purpose would be if the court upholds the EPA's SSM SIP Call, which would leave §101.222(b) - (e) in place for TCEQ to address in a proposed SIP revision in response to the EPA's SSM SIP Call.

Response

If the EPA's SSM SIP Call is upheld, the commission can consider a further response to the EPA's SSM SIP Call, and may consider maintaining the affirmative defense provisions in §101.222(b) - (e) outside of the SIP. If the result of the pending litigation results in affirmative defenses not being allowed for SIP violations, then the affirmative provisions would be prohibited in that context. The commission is adopting changes to §101.222(l) in response to this comment.

Work Practices for Certain Activities

Comment

AECT requested that TCEQ be open to considering the future development of rules that would establish work practice standards based on the existing work practice standards that EPA adopted in its rules that apply to MSS activities, such as the work practice standards identified in Table 3 of the Mercury and Air Toxics Standards (MATS) in 40 CFR Part 63, Subpart UUUUU.

Response

The commission acknowledges AECT's request for rules that would establish work practice standards be considered. Because this comment pertains to consideration of a future rule-making, the commission has made no change to §101.222 in response to this comment.

The federal rule, 40 CFR Part 63, Subpart UUUUU, is an applicable requirement for the Title V Federal Operating Permit Program. As with all rules that are applicable requirements, the holder of a Title V permit should evaluate its compliance or permitting obligations.

Comment

Luminant recommended that TCEQ consider the incorporating work practices recently adopted by EPA in its MATS rule as Maximum Achievable Control Technology (MACT) into the TCEQ-issued air permits for these units as emission limits for the startup and shutdown phases of operation, regardless as to whether the startup or shutdown is planned, unplanned, or as a result of a malfunction. The commenter noted that the MATS work practices function to limit emissions during the startup and shutdown phases of operation in a manner that is similar to the elements of

an affirmative defense. The commenter noted that perhaps most important, EPA has determined the steps of the work practices to constitute MACT and it is difficult to imagine how EPA could object to MACT during the startup and shutdown phases of operation for these units. The commenter noted that as recently as July 2016, EPA has defended its final MATS startup and shutdown work practice standards as a FCAA requirement for continuous emission standards. See Denial of Petitions for Reconsideration of Certain Startup/Shutdown Issues: MATS, page 29, as referenced in 81 FR 52347 (August 8, 2016).

Response

The commission already authorizes startups and shutdowns due to planned maintenance in New Source Review permits. The commission acknowledges Luminant's request for New Source Review permit conditions that would establish work practice standards for startup and shutdowns that are due to unplanned circumstances or malfunctions. Because permitting practices and rules regarding permitting are located in 30 TAC Chapters 106, 116, and 122, the commission has made no change to §101.222 regarding incorporating work practices as part of permits.

The federal rule, 40 CFR Part 63, Subpart UUUUU, commonly referred to as the "MATS Rule" is an applicable requirement for the Title V Federal Operating Permit Program, and therefore Title V permittees should evaluate their compliance or permitting obligations.

Statutory Authority

The amended rule is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rule amended is also adopted under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which defines "emissions event," requires owners and operators of regulated entities to meet certain requirements, and requires the commission to centrally track and collect information relating to emissions events, including the use of electronic reporting; and THSC, §382.0216, concerning Regulation of Emissions Events, which establishes and prescribes criteria for and requires responses to excessive emissions events, allows for use of corrective action plans in response to excessive emissions events, and authorizes the commission to establish an affirmative defense to a commission enforcement action for emissions events.

In addition, the amended rule is also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment will implement THSC, §§382.002, 382.011, 382.012, and 382.017.

§101.222. *Demonstrations.*

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

- (1) the frequency of the facility's emissions events;
- (2) the cause of the emissions event;
- (3) the quantity and impact on human health or the environment of the emissions event;
- (4) the duration of the emissions event;
- (5) the percentage of a facility's total annual operating hours during which emissions events occur; and
- (6) the need for startup, shutdown, and maintenance activities.

(b) Non-excessive upset events. Upset events that are determined not to be excessive emissions events are subject to an affirmative defense to all claims in enforcement actions brought for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). In the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (c) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all

possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and

(11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Unplanned maintenance, startup, or shutdown activity. Emissions from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the emissions were from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title (relating to Definitions), and all of the following:

(1) for a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements). For an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting under §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the activity, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the periods of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in an unplanned maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

(d) Excess opacity events. Excess opacity events due to an upset that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, are subject to an affirmative defense to all claims in enforcement actions for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the opacity did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing opacity;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the opacity on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence;

(9) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where there was no emissions event, that result from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the opacity resulted from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title, and all of the following:

(1) for excess opacity events that result from a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title. For excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting pursuant to §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the periods of opacity could not have been prevented through planning and design;

(4) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(5) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(6) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(7) the frequency and duration of operation in a startup or shutdown mode resulting in opacity were minimized;

(8) all emissions monitoring systems were kept in operation if possible;

(9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Obligations. Subsections (b) - (e) and (h) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. Any affirmative defense provided by subsections (b) - (e) and (h) applies only to violations of state implementation plan requirements. An affirmative defense cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded.

(g) Frequent or recurring pattern. Evidence of any past event subject to subsections (b) - (e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.

(h) Planned maintenance, startup, or shutdown activity. Unauthorized emissions or opacity events from a maintenance, startup, or shutdown activity that are not unplanned that have been reported or recorded in compliance with §101.211 of this title are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria listed in subsection (c)(1) - (9) of this section for emissions, or subsection (e)(1) - (9) of this section for opacity events and the following:

(1) the owner or operator has filed an application to authorize the emissions or opacity by the following dates:

(A) for facilities in Standard Industrial Classification (SIC) code 2911 (Petroleum Refining), one year after the effective date of this section;

(B) for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, two years after the effective date of this section;

(C) for facilities in SIC code 2895 (Carbon Black), four years after the effective date of this section;

(D) for facilities in SIC code 4911 (Electric Services), five years after the effective date of this section;

(E) for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), 4923 (Natural Gas Transmission and Distribution), six years after the effective date of this section; and

(F) for all other facilities, seven years after the effective date of this section.

(2) an owner or operator who filed an application listed in paragraph (1) of this subsection has provided prompt response for any requests by the executive director for information regarding that application.

(i) The affirmative defense in subsection (h) of this section will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C) - (F) of this section, or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C) - (F) of this section, or voidance of an application filed under subsection (h)(1)(A) and (C) - (F) of this section. The affirmative defense in subsection (h) of this section will expire upon the earlier of two years after the application deadline in subsection (h)(1)(B) of this section or the issuance or denial of a permit applied for under subsection (h)(1)(B) of this section, or voidance of an application filed under subsection (h)(1)(B) of this section. If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in subsections (c) and (e) of this section, until the issuance or denial of a permit applied for under subsection (h)(1) of this section, or voidance of an application filed under subsection (h)(1) of this section.

(j) The executive director shall process permit applications referenced in subsection (h) of this section in accordance with the schedule set out in §116.114 of this title (relating to Application Review Schedule).

(k) Federal court jurisdiction. Subsections (b) - (e) of this section are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

(l) Delayed applicability. Subsection (k) of this section does not apply until all appeals regarding the United States Environmental Protection Agency's rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published in the *Federal Register* on June 12, 2015, (SIP Call) as it applies to subsections (b) - (e) of this section, have ended, and there is a final and nonappealable court decision that upholds the SIP Call.

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

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2141

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CHAPTER 116. CONTROL OF AIR
POLLUTION BY PERMITS FOR NEW
CONSTRUCTION OR MODIFICATION
SUBCHAPTER B. NEW SOURCE REVIEW
PERMITS
DIVISION 3. PUBLIC NOTIFICATION AND
COMMENT PROCEDURES

30 TAC §§116.130 - 116.134, 116.136, 116.137

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§116.130 - 116.134, 116.136, and 116.137.

The repeal of §§116.130 - 116.134, 116.136, and 116.137 is adopted *without changes* to the proposal as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4950), with a correction on July 22, 2016 (41 TexReg 5458), and will not be republished.

The commission will submit the repeal of §§116.130 - 116.134, 116.136, and 116.137 to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

Sections 116.130 - 116.134, 116.136, and 116.137 were adopted August 27, 1993 (18 TexReg 5746), as public notification and comment procedures for New Source Review air permit applications in a rulemaking action that restructured the existing air quality permit program rules for the Texas Air Control Board. Except for §116.136, these rules were repealed and readopted by the Texas Natural Resource Conservation Commission (TNRCC, predecessor of the TCEQ) on June 17, 1998, and re-submitted to the EPA. With the exception of §116.130(c) (regarding hazardous air pollutants which are not part of the SIP), these rules were approved into the SIP, as published in the September 18, 2002, issue of the *Federal Register* (67 FR 58709).

In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting. TCEQ adopted rules to implement HB 801 (and other bills) that consolidated the public participation rules across the agency as published in the September 24, 1999, issue of the *Texas Register* (24 TexReg 8190). That rulemaking included rules in 30

TAC Chapter 39 (Public Notice), Subchapters H (Applicability and General Provisions) and K (Public Notice of Air Quality Permit Applications), that apply to certain air quality permit applications declared administratively complete on or after September 1, 1999. TCEQ submitted portions of the rulemaking to implement HB 801 to the EPA as revisions to the SIP. The public participation rules in Chapter 116 that were superseded by the rules adopted to implement HB 801 were not repealed at that time because the rules applied to pending applications that were declared administratively complete before September 1, 1999.

In 2010, TCEQ conducted a rulemaking, published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), that clarified the public participation requirements for air quality applications. TCEQ's adoption notice included discussions addressing EPA's concerns about TCEQ's SIP submittal of the 1999 rules to implement HB 801, as well as several TCEQ public participation rulemakings for air quality permit applications adopted from 1999 - 2010, and the final set of rules submitted as SIP revisions in 2010. EPA's approvals of the 2010 submittal were published in the January 6, 2014, issue of the *Federal Register* (79 FR 551); the March 30, 2015, issue of the *Federal Register* (80 FR 16573); and the October 6, 2015, issue of the *Federal Register* (80 FR 60295). In addition, EPA has approved subsequent changes to public participation rules adopted by the commission in 2014, as published in the November 20, 2014, issue of the *Federal Register* (79 FR 66626). At the time of this adoption, no public participation rules remain pending EPA review. Inclusion in the SIP ensures the public participation requirements are federally enforceable.

No applications for which §§116.130 - 116.134, 116.136, and 116.137 are applicable remain pending with the commission. Repealing the obsolete rules and revising the SIP by removing §§116.130 - 116.134, 116.136, and 116.137 will eliminate any possible confusion as to what the applicable public participation requirements are in the SIP. The public's opportunity to participate in the air permitting process will not change nor be affected in any way as a result of this repeal.

Federal Clean Air Act §110(l)

All revisions to the SIP are subject to EPA's finding that the revision will not interfere with any applicable requirement concerning attainment and reasonable further progress of the National Ambient Air Quality Standards, or any other requirement of the Federal Clean Air Act, 42 United States Code (USC), §7410(l). This statute has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA*, 289 Fed. Appx. 745, 2008 WL 3471872 (5th Cir.)). Because procedural rules have no direct nexus with air quality, and because the current applicable public participation rules are approved as part of the Texas SIP, EPA should find that there is no backsliding from the current SIP and that this SIP revision complies with 42 USC, §7410(l).

Section by Section Discussion

The commission adopts the repeal of §116.130 (Applicability); §116.131 (Public Notification Requirements); §116.132 (Public Notice Format); §116.133 (Sign Posting Requirements); §116.134 (Notification of Affected Agencies); §116.136 (Public Comment Procedures); and §116.137 (Notification of Final Action by the Commission), because the rules were superseded

and are obsolete. These rules apply to air permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

Final Regulatory Impact Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking repeals obsolete rules and proposes that EPA remove them from the SIP to ensure there is no confusion regarding the applicable rules for public participation for air quality permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted repeal of §§116.130 - 116.134, 116.136, and 116.137 does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and will not burden private real property. The adopted rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments.

Effect on Sites Subject to the Federal Operating Permits Program

All of the requirements in Chapter 116 are applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program). However, the repealed sections are procedural rules applicants must follow to be issued a New Source Review permit for applications administratively complete prior to September 1, 1999, and would not have been directly referenced in Title V permits. Therefore, no effect on sites subject to the Federal Operating Permits program is expected because the commission adopted the repeal of these rules.

Public Comment

The commission held a public hearing on August 2, 2016. The comment period closed on August 8, 2016. The commission received no comments.

Statutory Authority

The repeal is adopted under Texas Water Code, §5.103, Rules and §5.105, General Policy; Texas Health and Safety Code (THSC), §382.002, Policy and Purpose; THSC, §382.003, Definitions; THSC, §382.011, General Powers and Duties; THSC, §382.012, State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.0511, Permit Consolidation and Amendment; THSC, §382.0518, Preconstruction Permit; THSC, §382.055, Review and Renewal of Preconstruction Permit; THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing; THSC, §382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption; and 42 United States Code (USC), §7401, *et seq.*

The adopted repeal implements TWC, §5.103 and §5.105; THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0518, 382.055, 382.056, and 382.058; and 42 USC, §7401, *et seq.*

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

Filed with the Office of the Secretary of State on November 4, 2016.

TRD-201605719

Robert Martinez

Director, Environmental Law Division
Texas Commission on Environmental Quality

Effective date: November 24, 2016

Proposal publication date: July 8, 2016

For further information, please call: (512) 239-2141

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.598

The Comptroller of Public Accounts adopts amendments to §3.598, concerning margin: tax credit for certified rehabilitation of certified historic structures, without changes to the proposed text as published in the September 30, 2016, issue of the *Texas Register* (41 TexReg 7690). The amendments implement House Bill 3230, 84th Legislature, 2015, and memorialize recent policy determinations made by the comptroller. Additionally, amendments are made to include the titles of statutes referenced in this section.

Subsection (a) is amended to provide that the effective date is January 1, 2015, unless it is otherwise noted.

Subsection (b)(1), which defines the term "audited cost report," is amended to incorporate the definition of "certified public accountant" in the Occupations Code as someone who holds a certificate issued under Occupations Code, Chapter 901 (Accountants) or who is an out-of-state practitioner with substantially equivalent qualifications, rather than simply referencing the definition.

Subsection (b)(2), which defines a "certificate of eligibility," is amended to identify the information contained in the certificate.

Subsection (b)(4) is amended to capitalize the title "Secretary of the Interior."

Subsection (b)(6) is amended to implement House Bill 3230, which expanded the definition of "eligible costs and expenses" in Tax Code, §171.901(4) (Definitions) to include costs and expenses incurred by a nonprofit entity exempt from federal income tax, effective January 1, 2016. Subsection (b)(6) is also amended to remove the reference to the Texas Historical Commission's definition of "eligible costs and expenses" provided in 13 TAC §13.1. The comptroller has determined that the reference is unnecessary. The Commission's definition, which includes a reference to 26 C.F.R. §1.48-12(c) (Definition of Qualified Rehabilitation Expenditures), does not provide any additional information, as the definition of "Internal Revenue Code" in Tax Code, §171.0001(9) (General Definitions) already includes related regulations adopted by the Internal Revenue Service.

Subsection (b)(7) is amended to correct a typographical error.

Subsection (b)(8) is amended to delete the cross-reference to Tax Code, §101.003 (Definitions).

Subsection (h)(2) is amended to provide that a credit for eligible costs and expenses that a pass-through entity allocates to its

partners, members, or shareholders may be further allocated, sold, or assigned. This is based on the comptroller's interpretation of Tax Code, §171.908 (Sale or Assignment of Credit).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.901 (Definitions).

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

Filed with the Office of the Secretary of State on November 2, 2016.

TRD-201605686

Lita Gonzalez

General Counsel

Comptroller of Public Accounts

Effective date: November 22, 2016

Proposal publication date: September 30, 2016

For further information, please call: (512) 475-0389



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.18

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC Chapter 145, §145.18, concerning action upon review; extraordinary vote (HB 1914). The amendments to §145.18 are adopted without changes to the proposed text as published in the August 5, 2016, issue of the *Texas Register* (41 TexReg 5712). The text of the rule will not be republished.

The adopted amendment is to add 36 months to subsection (a)(3)(A).

No public comments were received regarding adoption of these amendments.

The amended rule is adopted under Texas Government Code §§508.036 508.0441, 508.045, 508.141 and 508.149. Section 508.036 requires the board to adopt rules relating to the decision-making processes used by the board and parole panels. Sections 508.0441 and 508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to mandatory supervision and to act on matters of release to mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release. Section 508.149 provides

authority for the discretionary release of offenders on mandatory supervision.

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

Filed with the Office of the Secretary of State on November 4, 2016.

TRD-201605725

Bettie Wells

General Counsel

Texas Board of Pardons and Paroles

Effective date: November 24, 2016

Proposal publication date: August 5, 2016

For further information, please call: (512) 406-5388



PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 423. FIRE SUPPRESSION

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 423, Fire Suppression, Subchapter A, Minimum Standards for Structure Fire Protection Personnel Certification, §423.13, concerning International Fire Service Accreditation Congress (IFSAC) Seal, and Subchapter B, Minimum Standards for Aircraft Rescue Fire Fighting Personnel §423.211, concerning International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5965) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules are in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC)

No comments were received regarding the proposal.

SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.13

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties, and §419.032 which allows the commission to appoint fire protection personnel.

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

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

TRD-201605689

Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §423.211

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



CHAPTER 425. FIRE SERVICE INSTRUCTORS

37 TAC §425.11

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 425, Fire Service Instructors, concerning §425.11, International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5966) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules are in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received from the public regarding adoption of the amendments.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

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

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



CHAPTER 429. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION

37 TAC §429.211

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 429, Minimum Standards for Fire Inspector Certification, concerning §429.211, International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5967) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules will be in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received regarding the proposal.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
Texas Commission on Fire Protection
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CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 431, Fire Investigation, Subchapter A, Minimum Standards for Arson Investigator Certification, §431.13, concerning International Fire Service Accreditation Congress (IFSAC) Seal, and Subchapter B, Minimum Standards for Fire Investigator Certification, §431.211, concerning International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5968) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules will be in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received regarding the proposal.

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.13

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties, and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.211

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
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CHAPTER 433. MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.7

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 433, Minimum Standards for Driver/Operator-Pumper, concerning §433.7, International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5969) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules will be in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received from the public regarding adoption of the amendments.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
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For further information, please call: (512) 936-3812



CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.25

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 435, Fire Fighter Safety, concerning §435.25, Courage to be Safe So Everyone Goes Home Program. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5969) and will not be republished.

The amendments are adopted to delete obsolete language and update ongoing requirements for persons completing the Courage to Be Safe course.

The adopted amendments will ensure that all certified fire protection personnel appointed to duties with regulated entities will be in compliance with the rule requirement.

No comments were received from the public regarding the adoption of the amendments.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 936-3812



CHAPTER 451. FIRE OFFICER

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 451, Fire Officer, Subchapter A, Minimum Standards for Fire Officer I, §451.7, concerning International Fire Service Accreditation Congress (IFSAC) Seal, and Subchapter B, Minimum Standards for Fire Officer II, §451.207, concerning International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5970) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC

seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules will be in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received regarding the proposal.

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE OFFICER I

37 TAC §451.7

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties; and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 936-3812



SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE OFFICER II

37 TAC §451.207

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties, and §419.032, which allows the commission to appoint fire protection personnel.

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

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Tim Rutland
Executive Director
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For further information, please call: (512) 936-3812



CHAPTER 453. HAZARDOUS MATERIALS

SUBCHAPTER A. MINIMUM STANDARDS FOR HAZARDOUS MATERIALS TECHNICIAN

37 TAC §453.7

The Texas Commission on Fire Protection (the commission) adopts amendments to Chapter 453, Hazardous Materials, Subchapter A, Minimum Standards for Hazardous Materials Technician §453.7, concerning International Fire Service Accreditation Congress (IFSAC) Seal. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, *Texas Register* (41 TexReg 5971) and will not be republished.

The amendments are adopted to delete "grandfather" language that allowed persons holding an active certification issued prior to a certain date to automatically qualify for the applicable IFSAC seal(s). New language is added to clarify the requirement that an individual may only apply for an IFSAC seal from an active (non-expired) exam.

The adopted amendments will ensure that agency rules will be in compliance with the recommendations of the International Fire Service Accreditation Congress (IFSAC).

No comments were received regarding the proposal.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to adopt rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

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

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

TRD-201605699

Tim Rutland

Executive Director

Texas Commission on Fire Protection

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Proposal publication date: August 12, 2016

For further information, please call: (512) 936-3812



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 369. DISPLAY OF LICENSES

40 TAC §369.1

The Texas Board of Occupational Therapy Examiners adopts an amendment to §369.1, concerning display of licenses, without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6970). The rule will not be republished.

The amendment will remove the requirement regarding the wallet-sized license and clarify the online verification of a license.

The amendment will clarify the section by removing the provision that the wallet-sized license must be carried by the licensee when in practice settings other than the licensee's principal place of business. The amendment will also clarify in this section that a licensee may provide occupational therapy services according to the terms of the license upon online verification of current licensure and license expiration date from the Board's license verification page by removing language referring only to a new licensee with a regular or temporary license. This change will align this section with other existing sections that refer to additional license types that may be verified online.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

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

Filed with the Office of the Secretary of State on November 7, 2016.

TRD-201605730

John P. Maline

Executive Director

Texas Board of Occupational Therapy Examiners

Effective date: December 1, 2016

Proposal publication date: September 9, 2016

For further information, please call: (512) 305-6900

