

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

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

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

The Texas Education Agency (TEA) proposes amendments to §§89.1050, 89.1055, and 89.1195, concerning special education services. The proposed amendments would modify procedures related to students' individualized education programs (IEPs), the content of students' IEPs, and special education complaints.

Senate Bill (SB) 1259, 84th Texas Legislature, Regular Session, 2015, amended special education requirements in the Texas Education Code (TEC), §29.005, Individualized Education Program. The changes specify that if a committee established under TEC, §29.005, is required to include a regular education teacher, the regular education teacher included must, to the extent practicable, be a teacher who is responsible for implementing a portion of the child's IEP. In addition, SB 1259 required that the written statement of the IEP must document the decisions of the committee with respect to issues discussed at each committee meeting and must include the date of the meeting; the name, position, and signature of each member participating in the meeting; and an indication of whether the child's parents, the adult student, if applicable, and the administrator agreed or disagreed with the decisions of the committee. Finally, SB 1259 added language to specify that each member of the committee who disagrees with the IEP developed by the committee is entitled to include a statement of disagreement in the written statement of the program.

The proposed amendments to 19 TAC Chapter 89, Subchapter AA, Division 2, would implement the requirements of TEC, §29.005, as follows.

Section 89.1050, The Admission, Review, and Dismissal (ARD) Committee, would be amended to address the procedures when a member of a student's ARD committee disagrees with the proposed IEP.

Section 89.1055, Content of the Individualized Education Program (IEP), would be amended to include the new content requirements for a student's IEP as added by SB 1259.

The proposed amendment to 19 TAC Chapter 89, Subchapter AA, Division 7, would provide clarity and update the rule to comply with the requirements of the Individuals with Disabilities Education Act. Specifically, §89.1195, Special Education Complaint

Resolution, would be amended to clarify timelines for TEA's receipt of a special education complaint.

The proposed amendments would have no procedural and reporting implications. The proposed amendments would have no new locally maintained paperwork requirements.

FISCAL NOTE. Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Ms. Martinez has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to provide constituents with clear and aligned state and federal requirements related to special education services. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

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

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov.

Public hearings to solicit testimony and input on the proposed rules will be held at 8:30 a.m. on December 8 and December 9, 2016, in Room 1-100, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at one of the hearings must sign in between 8:15 a.m. and 9:00 a.m. on the day of the respective hearing. Each hearing will conclude once all who have signed in have been given the opportunity to comment. Questions about the hearings should be directed to the Division of IDEA Support at (512) 463-9414.

DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS AND STATE LAW

19 TAC §§89.1050, §89.1055

STATUTORY AUTHORITY. The amendments are proposed under the Texas Education Code (TEC), §29.001, which requires the Texas Education Agency to develop and modify as necessary a statewide plan that includes rules for the administration and funding of the delivery of services to children with disabilities in the state of Texas so that a free appropriate public education is available to all of those children between the ages of 3 and 21; and TEC, §29.005, as amended by Senate Bill 1259, 84th Texas Legislature, Regular Session, 2015, which requires a school district, before a child is enrolled in a special education program, to establish a committee composed of the persons required under 20 U.S.C. §1414(d), to develop the child's individualized education program (IEP) and establishes procedures for the committee and required components of the IEP.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §29.001 and §29.005, as amended by Senate Bill 1259, 84th Texas Legislature, Regular Session, 2015.

§89.1050. *The Admission, Review, and Dismissal Committee.*

(a) Each school district must establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full individual and initial evaluation is conducted pursuant to §89.1011 of this title (relating to Full Individual and Initial Evaluation). The ARD committee is the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.321. The school district is responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including the following:

- (1) 34 CFR, §§300.320-300.325, and Texas Education Code (TEC), §29.005 (individualized education programs);
- (2) 34 CFR, §§300.145-300.147 (relating to placement of eligible students in private schools by a school district);
- (3) 34 CFR, §§300.132, 300.138, and 300.139 (relating to the development and implementation of service plans for eligible students placed by parents in private school who have been designated to receive special education and related services);
- (4) 34 CFR, §300.530 and §300.531, and TEC, §37.004 (disciplinary placement of students with disabilities);
- (5) 34 CFR, §§300.302-300.306 (relating to evaluations, re-evaluations, and determination of eligibility);
- (6) 34 CFR, §§300.114-300.117 (relating to least restrictive environment);
- (7) TEC, §28.006 (Reading Diagnosis);
- (8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);
- (9) TEC, §28.0212 (Junior High or Middle School Personal Graduation Plan);
- (10) TEC, §28.0213 (Intensive Program of Instruction);
- (11) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);
- (12) TEC, §30.002 (Education for Children with Visual Impairments);
- (13) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);

(14) TEC, §33.081 (Extracurricular Activities);

(15) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and

(16) TEC, §42.151 (Special Education).

(b) For a student from birth through two years of age with visual and/or auditory impairments, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§300.320-300.324, and the memorandum of understanding between the Texas Education Agency and the Department of Assistive and Rehabilitative Services. For students three years of age and older, school districts must develop an IEP.

(c) ARD committee membership.

(1) ARD committees must include the following:

(A) the parents of the student;

(B) not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment);

(C) not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;

(D) a representative of the school district who:

(i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(ii) is knowledgeable about the general education curriculum; and

(iii) is knowledgeable about the availability of resources of the school district;

(E) an individual who can interpret the instructional implications of evaluation results, who may be a member of the committee described in subparagraphs (B)-(D) and (F) of this paragraph;

(F) at the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate;

(G) whenever appropriate, the student with a disability;

(H) to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, a representative of any participating agency that is likely to be responsible for providing or paying for transition services;

(I) a representative from career and technical education (CTE), preferably the teacher, when considering initial or continued placement of a student in CTE; and

(J) a professional staff member who is on the language proficiency assessment committee who may be a member of the committee described in subparagraphs (B) and (C) of this paragraph, if the student is identified as an English language learner.

(2) The special education teacher or special education provider that participates in the ARD committee meeting must be appropriately certified or licensed as required by 34 CFR, §300.18 and §300.156.

(3) If the student is:

(A) a student with a suspected or documented visual impairment, the ARD committee must include a teacher who is certified in the education of students with visual impairments;

(B) a student with a suspected or documented auditory impairment, the ARD committee must include a teacher who is certified in the education of students with auditory impairments; or

(C) a student with suspected or documented deaf-blindness, the ARD committee must include a teacher who is certified in the education of students with visual impairments and a teacher who is certified in the education of students with auditory impairments.

(4) An ARD committee member is not required to attend an ARD committee meeting if the conditions of either 34 CFR, §300.321(e)(1), regarding attendance, or 34 CFR, §300.321(e)(2), regarding excusal, have been met.

(d) The school district must take steps to ensure that one or both parents are present at each ARD committee meeting or are afforded the opportunity to participate, including notifying the parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place. Additionally, a school district must allow parents who cannot attend an ARD committee meeting to participate in the meeting through other methods such as through telephone calls or video conferencing. The school district must provide the parents with written notice of the ARD committee meeting that meets the requirements in 34 CFR, §300.322, at least five school days before the meeting unless the parents agree to a shorter timeframe.

(e) Upon receipt of a written request for an ARD committee meeting from a parent, the school district must:

(1) schedule and convene a meeting in accordance with the procedures in subsection (d) of this section; or

(2) within five school days, provide the parent with written notice explaining why the district refuses to convene a meeting.

(f) If the parent is unable to speak English, the school district must provide the parent with a written notice required under subsection (d) or (e)(2) of this section in the parent's native language, unless it is clearly not feasible to do so. If the parent's native language is not a written language, the school district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication so that the parent understands the content of the notice.

(g) All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible. The ARD committee may agree to an annual IEP or an IEP of shorter duration.

(1) When mutual agreement about all required elements of the IEP is not achieved, the parent who disagrees must be offered a single opportunity to recess and reconvene the ARD committee meeting. The period of time for reconvening the ARD committee meeting must not exceed ten school days, unless the parties mutually agree otherwise. The ARD committee must schedule the reconvened meeting at a mutually agreed upon time and place. The opportunity to recess and reconvene is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense that may lead to a placement in a disciplinary alternative education program. The requirements of this subsection do not prohibit the ARD committee from recessing an ARD committee meeting for reasons other than the failure to reach mutual agreement about all required elements of an IEP.

(2) During the recess, the ARD committee members must consider alternatives, gather additional data, prepare further documen-

tation, and/or obtain additional resource persons who may assist in enabling the ARD committee to reach mutual agreement.

(3) If a recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the school district must implement the IEP that it has determined to be appropriate for the student.

(4) Each member of the ARD committee who disagrees with the IEP developed by the ARD committee is entitled to include a statement of disagreement in the IEP. [When mutual agreement is not reached, a written statement of the basis for the disagreement must be included in the IEP. The parent who disagrees must be offered the opportunity to write his or her own statement of disagreement.]

(h) Whenever a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education to the student, the school district must provide prior written notice as required in 34 CFR, §300.503, including providing the notice in the parent's native language or other mode of communication. This notice must be provided to the parent at least five school days before the school district proposes or refuses the action unless the parent agrees to a shorter timeframe.

(i) If the student's parent is unable to speak English and the parent's native language is Spanish, the school district must provide a written copy or audio recording of the student's IEP translated into Spanish. If the student's parent is unable to speak English and the parent's native language is a language other than Spanish, the school district must make a good faith effort to provide a written copy or audio recording of the student's IEP translated into the parent's native language.

(1) For purposes of this subsection, a written copy of the student's IEP translated into Spanish or the parent's native language means that all of the text in the student's IEP in English is accurately translated into the target language in written form. The IEP translated into the target language must be a comparable rendition of the IEP in English and not a partial translation or summary of the IEP in English.

(2) For purposes of this subsection, an audio recording of the student's IEP translated into Spanish or the parent's native language means that all of the content in the student's IEP in English is orally translated into the target language and recorded with an audio device. A school district is not prohibited from providing the parent with an audio recording of an ARD committee meeting at which the parent was assisted by an interpreter as long as the audio recording provided to the parent contains an oral translation into the target language of all of the content in the student's IEP in English.

(3) If a parent's native language is not a written language, the school district must take steps to ensure that the student's IEP is translated orally or by other means to the parent in his or her native language or other mode of communication.

(4) Under 34 CFR, §300.322(f), a school district must give a parent a written copy of the student's IEP at no cost to the parent. A school district meets this requirement by providing a parent with a written copy of the student's IEP in English or by providing a parent with a written translation of the student's IEP in the parent's native language in accordance with paragraph (1) of this subsection.

(j) A school district must comply with the following for a student who is newly enrolled in the school district.

(1) When a student transfers to a new school district within the state in the same school year and the parents verify that the student was receiving special education services in the previous school district

or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(e), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 CFR, §300.323(e)(1) or (2), is 30 school days from the date the student is verified as being a student eligible for special education services.

(2) When a student transfers from a school district in another state in the same school year and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(f), regarding the provision of special education services. If the new school district determines that an evaluation is necessary, the evaluation is considered a full individual and initial evaluation and must be completed within the timelines established by §89.1011(c) and (e) of this title. The timeline for completing the requirements in 34 CFR, §300.323(f)(2), if appropriate, is 30 calendar days from the date of the completion of the evaluation report. If the school district determines that an evaluation is not necessary, the timeline for completing the requirements outlined in 34 CFR, §300.323(f)(2), is 30 school days from the date the student is verified as being a student eligible for special education services.

(3) In accordance with TEC, §25.002, and 34 CFR, §300.323(g), the school district in which the student was previously enrolled must furnish the new school district with a copy of the student's records, including the student's special education records, not later than the 10th working day after the date a request for the information is received by the previous school district.

(k) All disciplinary actions regarding students with disabilities must be determined in accordance with 34 CFR, §§300.101(a) and 300.530-300.536; TEC, Chapter 37, Subchapter A; and §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out).

§89.1055. *Content of the Individualized Education Program.*

(a) The individualized education program (IEP) developed by the admission, review, and dismissal (ARD) committee for each student with a disability must comply with the requirements of 34 Code of Federal Regulations (CFR), §300.320 and §300.324.

(b) The IEP must include a statement of any individual appropriate and allowable accommodations in the administration of assessment instruments developed in accordance with Texas Education Code (TEC), §39.023(a)-(c), or districtwide assessments of student achievement (if the district administers such optional assessments) that are necessary to measure the academic achievement and functional performance of the student on the assessments. If the ARD committee determines that the student will not participate in a general statewide or districtwide assessment of student achievement (or part of an assessment), the IEP must include a statement explaining:

(1) why the student cannot participate in the general assessment; and

(2) why the particular alternate assessment selected is appropriate for the student.

(c) If the ARD committee determines that the student is in need of extended school year (ESY) services, as described in §89.1065 of this title (relating to Extended School Year Services), then the IEP must identify which of the goals and objectives in the IEP will be addressed during ESY services.

(d) For students with visual impairments, from birth through 21 years of age, the IEP or individualized family services plan (IFSP) must also meet the requirements of TEC, §30.002(e).

(e) For students eligible under §89.1040(c)(1) of this title (relating to Eligibility Criteria), the strategies described in this subsection must be considered, based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed, addressed in the IEP:

(1) extended educational programming (for example: extended day and/or extended school year services that consider the duration of programs/settings based on assessment of behavior, social skills, communication, academics, and self-help skills);

(2) daily schedules reflecting minimal unstructured time and active engagement in learning activities (for example: lunch, snack, and recess periods that provide flexibility within routines; adapt to individual skill levels; and assist with schedule changes, such as changes involving substitute teachers and pep rallies);

(3) in-home and community-based training or viable alternatives that assist the student with acquisition of social/behavioral skills (for example: strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community);

(4) positive behavior support strategies based on relevant information, for example:

(A) antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and

(B) a behavioral intervention plan developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;

(5) beginning at any age, consistent with subsection (h) of this section, futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;

(6) parent/family training and support, provided by qualified personnel with experience in Autism Spectrum Disorders (ASD), that, for example:

(A) provides a family with skills necessary for a student to succeed in the home/community setting;

(B) includes information regarding resources (for example: parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching/management techniques related to the student's curriculum); and

(C) facilitates parental carryover of in-home training (for example: strategies for behavior management and developing structured home environments and/or communication training so that parents are active participants in promoting the continuity of interventions across all settings);

(7) suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social/behavioral progress based on the student's developmental and learning level (acquisition, fluency, maintenance, generalization) that encourages work towards individual independence as determined by, for example:

(A) adaptive behavior evaluation results;

(B) behavioral accommodation needs across settings; and

(C) transitions within the school day;

(8) communication interventions, including language forms and functions that enhance effective communication across

settings (for example: augmentative, incidental, and naturalistic teaching);

(9) social skills supports and strategies based on social skills assessment/curriculum and provided across settings (for example: trained peer facilitators (e.g., circle of friends), video modeling, social stories, and role playing);

(10) professional educator/staff support (for example: training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP); and

(11) teaching strategies based on peer reviewed, research-based practices for students with ASD (for example: those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, or social skills training).

(f) If the ARD committee determines that services are not needed in one or more of the areas specified in subsection (e) of this section, the IEP must include a statement to that effect and the basis upon which the determination was made.

(g) If the ARD committee determines that a behavior improvement plan or a behavioral intervention plan is appropriate for a student, that plan must be included as part of the student's IEP and provided to each teacher with responsibility for educating the student.

(h) In accordance with TEC, §29.011 and §29.0111, not later than when a student reaches 14 years of age, the ARD committee must consider, and if appropriate, address the following issues in the IEP:

(1) appropriate student involvement in the student's transition to life outside the public school system;

(2) if the student is younger than 18 years of age, appropriate parental involvement in the student's transition;

(3) if the student is at least 18 years of age, appropriate parental involvement in the student's transition, if the parent is invited to participate by the student or the school district in which the student is enrolled;

(4) any postsecondary education options;

(5) a functional vocational evaluation;

(6) employment goals and objectives;

(7) if the student is at least 18 years of age, the availability of age-appropriate instructional environments;

(8) independent living goals and objectives; and

(9) appropriate circumstances for referring a student or the student's parents to a governmental agency for services.

(i) In accordance with 34 CFR, §300.320(b), beginning not later than the first IEP to be in effect when the student turns 16 years of age, or younger if determined appropriate by the ARD committee, and updated annually thereafter, the IEP must include the following:

(1) appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) the transition services, including courses of study, needed to assist the student in reaching the postsecondary goals developed under paragraph (1) of this subsection.

(j) The written statement of the IEP must document the decisions of the ARD committee with respect to issues discussed at each ARD committee meeting. The written statement must also include:

(1) the date of the meeting;

(2) the name, position, and signature of each member participating in the meeting; and

(3) an indication of whether the child's parents, the adult student, if applicable, and the administrator agreed or disagreed with the decisions of the ARD committee.

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

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

TRD-201605800

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: December 25, 2016

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



DIVISION 7. DISPUTE RESOLUTION

19 TAC §89.1195

STATUTORY AUTHORITY. The amendment is proposed under 34 Code of Federal Regulations, §300.152, which outlines time limits and minimum procedures that must be included in a state education agency's complaint procedures.

CROSS REFERENCE TO STATUTE. The amendment implements 34 Code of Federal Regulations, §300.152.

§89.1195. Special Education Complaint Resolution.

(a) In accordance with 34 Code of Federal Regulations (CFR), §300.151, the Texas Education Agency (TEA) has established a complaint resolution process that provides for the investigation and issuance of findings regarding alleged violations of Part B of the Individuals with Disabilities Education Act (IDEA).

(b) A complaint may be filed with the TEA by any individual or organization and must:

(1) be in writing;

(2) include the signature and contact information for the complainant;

(3) contain a statement that a public education agency has violated Part B of the IDEA; 34 CFR, §300.1 et seq.; or a state special education statute or administrative rule;

(4) include the facts upon which the complaint is based;

(5) if alleging violations with respect to a specific student, include:

(A) the name and address of the residence of the student;

(B) the name of the school the student is attending;

(C) in the case of a homeless child or youth (within the meaning of §725(2) of the McKinney-Vento Homeless Act (42 United

States Code, §11434a(2)), available contact information for the student and the name of the school the student is attending;

(D) a description of the nature of the problem of the student, including facts relating to the problem; and

(E) a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed;

(6) allege a violation that occurred not more than one calendar year prior to the date the complaint is received; and

(7) be forwarded to the public education agency that is the subject of the complaint at the same time that the complaint is filed with the TEA.

(c) A complaint must be filed with the TEA by mail, hand-delivery, or facsimile. The TEA has developed a form that may be used by persons or organizations filing a complaint. The form is available on request from the TEA and is also available on the TEA website. The complaint timeline will commence the next business day after the day on which the TEA receives the complaint.

(d) If a complaint does not meet the requirements outlined in subsection (b) of this section, the TEA must notify the complainant of the deficiencies in the complaint.

(e) Upon receipt of a complaint that meets the requirements of this section, the TEA must initiate an investigation to determine whether the public education agency is in compliance with applicable law and regulations in accordance with the following procedures.

(1) The TEA must send written notification to the parties acknowledging receipt of a complaint.

(A) The notification must include:

(i) the alleged violations that will be investigated;

(ii) alternative procedures available to address allegations in the complaint that are outside of the scope of Part B of the IDEA; 34 CFR, §300.1, et seq.; or a state special education statute or administrative rule;

(iii) a statement that the public education agency may, at its discretion, investigate the alleged violations and propose a resolution of the complaint;

(iv) a statement that the parties have the opportunity to resolve the complaint through mediation in accordance with the procedures in §89.1193 of this title (relating to Special Education Mediation);

(v) a timeline for the public education agency to submit:

(I) documentation demonstrating that the complaint has been resolved; or

(II) a written response to the complaint and all documentation and information requested by the TEA;

(vi) a statement that the complainant may submit additional information about the allegations in the complaint, either orally or in writing within a timeline specified by the TEA, and may provide a copy of any additional information to the public education agency to assist the parties in resolving the dispute at the local level; and

(vii) a statement that the TEA may grant extensions of the timeline for a party to submit information under clause (v) or (vi) of this subparagraph at the request of either party.

(B) The public education agency must provide the TEA with a written response to the complaint and all documentation and

information requested by the TEA. The public education agency must forward its response to the parent who filed the complaint at the same time that the response is provided to the TEA. The public education agency may also provide the parent with a copy of the documentation and information requested by the TEA. If the complaint was filed by an individual other than the student's parent, the public education agency must forward a copy of the response to that individual only if written parental consent has been provided to the public education agency.

(2) If the complaint is also the subject of a due process hearing or if it contains multiple issues of which one or more are part of that due process hearing, the TEA must:

(A) set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing; and

(B) resolve any issue in the complaint that is not a part of the due process hearing.

(3) If an issue raised in the complaint has previously been decided in a due process hearing involving the same parties, the TEA must inform the complainant that the due process hearing decision is binding.

(4) The TEA has 60 calendar days after a valid written complaint is received to carry out the investigation and to resolve the complaint. The TEA may extend the time limit beyond 60 calendar days if exceptional circumstances, as determined by the TEA, exist with respect to a particular complaint. The parties will be notified in writing by the TEA of the exceptional circumstances, if applicable, and the extended time limit. The time limit may also be extended if the parties agree to extend it in order to engage in mediation pursuant to §89.1193 of this title or other alternative means of dispute resolution. In accordance with the Texas Education Code, §29.010(e), the TEA must expedite a complaint alleging that a public education agency has refused to enroll a student eligible for special education and related services or that otherwise indicates a need for expedited resolution, as determined by the TEA.

(5) During the course of the investigation, the TEA must:

(A) conduct an investigation of the complaint that must include a complete review of all relevant documentation and that may include interviews with appropriate individuals and an independent on-site investigation, if necessary;

(B) consider all facts and issues presented and the applicable requirements specified in law, regulations, or standards;

(C) make a determination of compliance or noncompliance on each issue in the complaint based upon the facts and applicable law, regulations, or standards and issue a written report of findings of fact and conclusions, including reasons for the decision, and any corrective actions that are required, including the time period within which each action must be taken;

(D) review any evidence that the public education agency has corrected noncompliance on its own initiative;

(E) ensure that the TEA's final decision is effectively implemented, if needed, through technical assistance activities, negotiations, and corrective actions to achieve compliance; and

(F) in the case of a complaint filed by an individual other than the student's parent, provide a copy of the written report only if written parental consent has been provided to the TEA.

(6) In resolving a complaint in which a failure to provide appropriate services is found, the TEA must address:

(A) the failure to provide appropriate services, including corrective action appropriate to address the needs of the student, including compensatory services, monetary reimbursement, or other corrective action appropriate to the needs of the student; and

(B) appropriate future provision of services for all students with disabilities.

(7) In accordance with 34 CFR, §300.600(e), the public education agency must complete all required corrective actions as soon as possible, and in no case later than one year after the TEA's identification of the noncompliance. A public education agency's failure to correct the identified noncompliance within the one-year timeline will result in an additional finding of noncompliance under 34 CFR, §300.600(e), and may result in sanctions against the public education agency in accordance with §89.1076 of this title (relating to Interventions and Sanctions).

(f) If a party to a complaint believes that the TEA's written report includes an error that is material to the determination in the report, the party may submit a signed, written request for reconsideration to the TEA by mail, hand-delivery, or facsimile within 15 calendar days of the date of the report. The party's reconsideration request must identify the asserted error and include any documentation to support the claim. The party filing a reconsideration request must forward a copy of the request to the other party at the same time that the request is filed with the TEA. The other party may respond to the reconsideration request within five calendar days of the date on which the TEA received the request. The TEA will consider the reconsideration request and provide a written response to the parties within 45 calendar days of receipt of the request. The filing of a reconsideration request must not delay a public education agency's implementation of any corrective actions required by the TEA.

(g) In accordance with 34 CFR, §300.151, the TEA's complaint resolution procedures must be widely disseminated to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities.

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

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

TRD-201605801

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: December 25, 2016

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



19 TAC §§89.1151, 89.1165, 89.1175, 89.1180, 89.1183, 89.1185, 89.1186, 89.1191 - 89.1193

The Texas Education Agency (TEA) proposes amendments to §§89.1151, 89.1165, 89.1175, 89.1180, 89.1183, 89.1185, 89.1186, 89.1191, and 89.1193, and new §89.1192, concerning special education services. The proposed amendments and new section would add a rule regarding a court's award of attorneys' fees under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*; clarify the circumstances under which a party may request and the procedural rules that

apply to an expedited due process hearing requested under IDEA; amend a rule regarding the assignment of mediators to mediations requested under IDEA; and make minor technical corrections and clarifications.

IDEA and its implementing regulations provide that parents and public agencies may request mediation and due process hearings when disputes arise regarding the identification, evaluation, or educational placement of a child with a disability or the provision of a free appropriate public education to the child. IDEA requires TEA, as the state educational agency, to offer mediation as a dispute resolution mechanism and to conduct due process hearings and have procedural safeguards in effect to ensure that each public agency in the state meets the IDEA requirements.

Chapter 89, Division 7, would be revised to clarify dispute resolution rules as follows.

Section 89.1151, Special Education Due Process Hearings, would be amended to make minor technical changes to use plain language and for consistency.

Section 89.1165, Request for Special Education Due Process Hearing, would be amended to make a minor technical change to use plain language.

Section 89.1175, Representation in Special Education Due Process Hearings, would be amended to make minor technical changes to use plain language.

Section 89.1180, Prehearing Procedures, would be amended to make minor technical changes to use plain language and for consistency.

Section 89.1183, Resolution Process, would be amended to make minor technical changes to use plain language.

Section 89.1185, Hearing Procedures, would be amended to make minor technical changes to use plain language.

Section 89.1186, Extensions of Time, would be amended to make minor technical changes to use plain language.

Section 89.1191, Special Rule for Expedited Due Process Hearings, would be amended to clarify that an expedited due process hearing may be requested by a parent to appeal a disciplinary placement decision or a manifestation determination or by a school district to appeal a current placement decision that is substantially likely to result in injury to the child or others. The rule would also be amended to clarify that the timelines that apply to expedited due process hearings are mandatory and that requests for expedited due process hearings may not be amended or challenged as insufficient. Finally, the rule would be amended to make minor technical edits.

New §89.1192, Attorneys' Fees, would be added to clarify that, consistent with IDEA, a court may award attorneys' fees to the prevailing party in a due process hearing under certain circumstances.

Section 89.1193, Special Education Mediation, would be amended to align with IDEA and inform the public by rule of the considerations TEA may use in assigning a mediator. The amendment would clarify that when special education mediation is requested, TEA will assign a mediator on a random, rotational, or other impartial basis. Additional new language would explain that if the parties have a preference for a particular mediator, the parties must advise TEA of their preference and must not contact a mediator to discuss the mediator's availability to conduct the mediation. The amendment would also explain that TEA will

make the final assignment decision based on relevant program concerns, including availability, the need for equitable rotation, and travel considerations. New language would be added to state that TEA will provide the parties with written notice of the specific mediator selected to conduct the mediation. The rule would also be amended to make minor technical changes.

The proposed revisions would have no new procedural and reporting implications. The proposed revisions would have no new locally maintained paperwork requirements.

FISCAL NOTE. Von Byer, general counsel, has determined that for the first five-year period the amendments and new section are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments and new section. There is no effect on local economy for the first five years that the proposed amendments and new section are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Mr. Byer has determined that for each year of the first five years the amendments and new section are in effect the public benefit anticipated as a result of enforcing the amendments and new section will be to further clarify the special education dispute resolution system for students, parents, and school districts. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov.

Public hearings to solicit testimony and input on the proposed rules will be held at 8:30 a.m. on December 8 and December 9, 2016, in Room 1-100, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at one of the hearings must sign in between 8:15 a.m. and 9:00 a.m. on the day of the respective hearing. Each hearing will conclude once all who have signed in have been given the opportunity to comment. Questions about the hearings should be directed to the Division of IDEA Support at (512) 463-9414.

STATUTORY AUTHORITY. The amendments and new section are proposed under the Texas Education Code (TEC), §29.001, which requires the Texas Education Agency to develop and modify as necessary a statewide plan that includes rules for the administration and funding of the delivery of services to children with disabilities in the state of Texas so that a free appropriate public education (FAPE) is available to all of those children between the ages of 3 and 21; TEC, §29.0162, which gives the commissioner authority to adopt rules related to the qualification of non-attorney representatives at due process hearings; 34 Code of Federal Regulations (CFR), §300.100, which requires a state to submit a plan to the Secretary of Education that provides assurances that the state has policies and procedures in effect to ensure that it meets the conditions in 34 CFR,

§§300.101-300.176; 34 CFR, §300.121, which requires that a state have procedural safeguards in effect to ensure that each public agency in the state meets the dispute resolution requirements in 34 CFR, §§300.500-300.536, and also requires that children with disabilities and their parents be afforded those procedural safeguards; 34 CFR, §300.506, which requires a state to establish and implement procedures to allow parents and public education agencies who are in dispute regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of a FAPE to the child the opportunity to resolve the dispute through a mediation process; 34 CFR, §300.507, which provides that a state has the authority to establish an explicit time limitation for filing a request for a hearing; 34 CFR, §300.508, which mandates that a state must implement procedures to require either party in a due process hearing to provide a copy of the request for a hearing to the other party; 34 CFR, §300.511, which requires a state to ensure that parents and public education agencies have the opportunity for an impartial due process hearing conducted by the state when they are involved in a dispute regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of a FAPE to the child; 34 CFR, §300.512, which allows for state law determination of whether parties may be represented at due process hearings by non-attorney representatives; 34 CFR, §300.517, which allows a court the discretion to award reasonable attorneys' fees to the prevailing party in any action or proceeding brought under IDEA and describes the circumstances for making the award; and 34 CFR, §300.532, which provides that a state may establish procedural rules governing expedited due process hearings.

CROSS REFERENCE TO STATUTE. The amendments and new section implement the Texas Education Code, §29.001 and §29.0162, and 34 Code of Federal Regulations, §§300.100, 300.121, 300.506-300.508, 300.511, 300.512, 300.517, and 300.532.

§89.1151. Special Education Due Process Hearings.

(a) A parent or public education agency may initiate a due process hearing as provided in 34 Code of Federal Regulations (CFR), §300.507 and §300.508.

(b) The Texas Education Agency will ~~shall~~ implement a one-tier system of hearings. The proceedings in hearings will ~~shall~~ be governed by the provisions of 34 CFR, §§300.507-300.515 and 300.532, if applicable, and this division.

(c) A parent or public education agency must request a hearing within one year of the date the parent or public education agency ~~complainant~~ knew or should have known about the alleged action that serves as the basis for the request.

(d) The timeline described in subsection (c) of this section does not apply to a parent if the parent was prevented from filing a request for a due process hearing ~~complaint~~ due to:

(1) specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the request for a hearing ~~due process complaint~~; or

(2) the public education agency's withholding of information from the parent that was required by 34 CFR, §300.1, et seq. to be provided to the parent.

§89.1165. Request for Special Education Due Process Hearing.

(a) A request for a due process hearing (due process complaint) must be in writing and must be filed with the Texas Education

Agency (TEA). The request may be filed by mail, hand-delivery, or facsimile.

(b) The party filing a request for a hearing must forward a copy of the request to the non-filing party at the same time that the request is filed with the TEA. The timelines applicable to hearings will ~~shall~~ commence the calendar day after the non-filing party receives the request. Unless rebutted, it will be presumed that the non-filing party received the request on the date it is sent to the parties by the TEA.

(c) The request for a hearing must include:

- (1) the name of the child;
- (2) the address of the residence of the child;
- (3) the name of the school the child is attending;

(4) in the case of a homeless child or youth (within the meaning of §725(2) of the McKinney-Vento Homeless Assistance Act (42 United States Code §11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) a proposed resolution of the problem to the extent known and available to the party at the time.

(d) A party may not have a hearing until the party files a request for a hearing that meets the requirements of subsection (c) of this section.

(e) The TEA has developed a model form that may be used by parents and public education agencies to request a hearing. The form is available on request from the TEA and on the TEA website.

§89.1175. *Representation in Special Education Due Process Hearings.*

(a) A party to a due process hearing may represent himself or herself or be represented by:

- (1) an attorney who is licensed in the State of Texas; or
- (2) an individual who is not an attorney licensed in the State of Texas but who has special knowledge or training with respect to problems of children with disabilities and who satisfies the qualifications of this section.

(b) A party who wishes to be represented by an individual who is not an attorney licensed in the State of Texas must file a written authorization with the hearing officer promptly after filing the request for a due process hearing or promptly after retaining the services of the non-attorney representative. The party must forward a copy of the written authorization to the opposing party at the same time that the written authorization is filed with the hearing officer.

(c) The written authorization must ~~shall~~ be on the form provided in this subsection.

Figure: 19 TAC §89.1175(c) (No change.)

(d) The written authorization must include the non-attorney representative's name and contact information and a description of the non-attorney representative's:

- (1) special knowledge or training with respect to problems of children with disabilities;
- (2) knowledge of the rules and procedures that apply to due process hearings, including those in 34 Code of Federal Regulations, §§300.507-300.515 and 300.532, if applicable, and this division;

(3) knowledge of federal and state special education laws, regulations, and rules; and

(4) educational background.

(e) The written authorization must state the party's acknowledgment of the following:

(1) the non-attorney representative has been given full authority to act on the party's behalf with respect to the hearing;

(2) the actions or omissions by the non-attorney representative are binding on the party, as if the party had taken or omitted those actions directly;

(3) documents are deemed to be served on the party if served on the non-attorney representative;

(4) communications between the party and a non-attorney representative are not generally protected by the attorney-client privilege and may be subject to disclosure during the hearing proceeding;

(5) neither federal nor state special education laws provide for the recovery of fees for the services of a non-attorney representative; and

(6) it is the party's responsibility to notify the hearing officer and the opposing party of any change in the status of the authorization and that the provisions of the authorization will ~~shall~~ remain in effect until the party notifies the hearing officer and the opposing party of the party's revocation of the authorization.

(f) The written authorization must be signed and dated by the party.

(g) An individual is prohibited from being a party's representative under subsection (a)(2) of this section if the individual has prior employment experience with the school district and the school district raises an objection to the individual serving as a representative based on the individual's prior employment experience. No other objections to a party's representation by a non-attorney are permitted under this section.

(h) Upon receipt of a written authorization filed under this section, the hearing officer must ~~shall~~ promptly determine whether the non-attorney representative is qualified to represent the party in the hearing and must ~~shall~~ notify the parties in writing of the determination. A hearing officer's determination is final and not subject to review or appeal.

(i) A non-attorney representative may not file pleadings or other documents on behalf of a party, present statements and arguments on behalf of a party, examine and cross-examine witnesses, offer and introduce evidence, object to the introduction of evidence and testimony, or engage in other activities in a representative capacity unless the hearing officer has reviewed a written authorization filed under this section and determined that the non-attorney representative is qualified to represent the party in the hearing.

(j) In accordance with the Texas Education Code, §38.022, a school district may require an attorney or a non-attorney representative who enters a school campus to display his or her driver's license or another form of government-issued identification. A school district may also verify whether the representative is a registered sex offender and may apply a policy adopted by its board of trustees regarding the action to be taken when a visitor to a school campus is identified as a sex offender.

§89.1180. *Prehearing Procedures.*

(a) Promptly upon being assigned to a due process hearing, the hearing officer will forward to the parties a scheduling order which sets

the time, date, and location of the hearing and contains the timelines for the following actions, as applicable:

- (1) Response to Request for a Due Process Hearing (34 Code of Federal Regulations (CFR), §300.508(f));
- (2) Resolution Meeting (34 CFR, §300.510(a));
- (3) Contesting Sufficiency of the Request for a Hearing [Complaint] (34 CFR, §300.508(d));
- (4) Resolution Period (34 CFR, §300.510(b));
- (5) Five-Business Day Disclosure (34 CFR, §300.512(a)(3)); and
- (6) the date by which the final decision of the hearing officer must [shall] be issued (34 CFR, §300.515 and §300.532(c)(2)).

(b) The hearing officer must [shall] schedule a prehearing conference to be held at a time reasonably convenient to the parties to the hearing. The prehearing conference must [shall] be held by telephone unless the hearing officer determines that circumstances require an in-person conference.

(c) The prehearing conference must [shall] be recorded and transcribed by a court reporter, who will [shall] promptly prepare a transcript of the prehearing conference for the hearing officer with copies to each of the parties.

(d) The purpose of the prehearing conference will [shall] be to consider any of the following:

- (1) specifying issues as set forth in the request for a hearing [due process complaint];
- (2) admitting certain assertions of fact or stipulations;
- (3) establishing any limitations on the number of witnesses and the time allotted for presenting each party's case; and/or
- (4) discussing other matters which may aid in simplifying the proceeding or disposing of matters in controversy, including settling matters in dispute.

(e) Promptly upon the conclusion of the prehearing conference, the hearing officer will issue and deliver to the parties a written prehearing order which confirms and/or identifies:

- (1) the time, place, and date of the hearing;
- (2) the issues to be adjudicated at the hearing;
- (3) the relief being sought at the hearing;
- (4) the deadline for disclosure of evidence and identification of witnesses, which must be at least five business days prior to the scheduled date of the hearing (hereinafter referred to as the "Disclosure Deadline");
- (5) the date by which the final decision of the hearing officer must [shall] be issued; and
- (6) other information determined to be relevant by the hearing officer.

(f) No pleadings, other than the request for a hearing, and the response to the request for a hearing [Response to Complaint], if applicable, are mandatory, unless ordered by the hearing officer. Any pleadings after the request for a hearing must [shall] be filed with the hearing officer. Copies of all pleadings must [shall] be sent to all parties of record in the hearing and to the hearing officer. If a party is represented by an attorney or a non-attorney determined by the hearing officer to be qualified to represent the party, all copies must [shall]

be sent to the attorney of record or non-attorney representative, as applicable. Facsimile copies may be substituted for copies sent by other means. An affirmative statement that a copy of the pleading has been sent to all parties and the hearing officer is sufficient to indicate compliance with this subsection.

(g) Discovery methods are [shall be] limited to those specified in the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001, and may be further limited by order of the hearing officer. Upon a party's request to the hearing officer, the hearing officer may issue subpoenas and commissions to take depositions under the APA. Subpoenas and commissions to take depositions must [shall] be issued in the name of the Texas Education Agency.

(h) On or before the Disclosure Deadline (which must be at least five business days prior to a scheduled hearing), each party must disclose and provide to all other parties and the hearing officer copies of all evidence (including, without limitation, all evaluations completed by that date and recommendations based on those evaluations) that the party intends to use at the hearing. An index of the documents disclosed must be included with and accompany the documents. Each party must also include with the documents disclosed a list of all witnesses (including their names, addresses, phone numbers, and professions) that the party anticipates calling to testify at the hearing.

(i) A party may request a dismissal or nonsuit of a hearing to the same extent that a plaintiff may dismiss or nonsuit a case under the Texas Rules of Civil Procedure, Rule 162. However, if a party requests a dismissal or nonsuit of a hearing after the Disclosure Deadline has passed and, at any time within one year thereafter requests a subsequent hearing involving the same or substantially similar issues as those alleged in the original hearing, then, absent good cause or unless the parties agree otherwise, only evidence disclosed and witnesses identified by the Disclosure Deadline in the original hearing may be introduced at the subsequent hearing.

§89.1183. Resolution Process.

(a) Within 15 calendar days of receiving notice of the parent's request for a due process hearing, the public education agency must [shall] convene a resolution meeting with the parent and the relevant members of the admission, review, and dismissal committee who have specific knowledge of the facts identified in the request. The resolution meeting:

- (1) must include a representative of the public education agency who has decision-making authority on behalf of the public education agency; and
- (2) may not include an attorney of the public education agency unless the parent is accompanied by an attorney.

(b) The purpose of the resolution meeting is for the parent of the child to discuss the hearing issues and the facts that form the basis of the request for a hearing so that the public education agency has the opportunity to resolve the dispute.

(c) The resolution meeting described in subsections (a) and (b) of this section need not be held if:

- (1) the parent and the public education agency agree in writing to waive the meeting; or
- (2) the parent and the public education agency agree to use the mediation process described in §89.1193 of this title (relating to Special Education Mediation).

(d) The parent and the public education agency determine the relevant members of the admission, review, and dismissal committee to attend the resolution meeting.

(e) The parties may enter into a confidentiality agreement as part of their resolution agreement. There is nothing in this division, however, that requires the participants in a resolution meeting to keep the discussion confidential or make a confidentiality agreement a condition of a parent's participation in the resolution meeting.

(f) If the public education agency has not resolved the hearing issues to the satisfaction of the parent within 30 calendar days of the receipt of the request for a hearing, the hearing may occur.

(g) Except as provided in subsection (k) of this section, the timeline for issuing a final decision begins at the expiration of this 30-day resolution period.

(h) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding subsections (f) and (g) of this section, the failure of the parent filing a request for a hearing to participate in the resolution meeting delays the timelines for the resolution process and the hearing until the meeting is held.

(i) If the public education agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented in accordance with the procedures in 34 Code of Federal Regulations, §300.322(d)), the public education agency may at the conclusion of the 30-day resolution period, request that a hearing officer dismiss the parent's request for a hearing.

(j) If the public education agency fails to hold the resolution meeting within 15 calendar days of receiving the parent's request for a hearing or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the hearing timeline.

(k) Notwithstanding subsections (f) and (g) of this section, the timeline for issuing a final decision starts the calendar day after one of the following events:

(1) both parties agree in writing to waive the resolution meeting;

(2) after either the mediation or resolution meeting starts but before the end of the 30-day resolution period, the parties agree in writing that no agreement is possible; or

(3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later the parent or public education agency withdraws from the mediation process.

(l) If a resolution to the dispute is reached at the resolution meeting, the parties must [shalt] execute a legally binding agreement that is:

(1) signed by both the parent and a representative of the public education agency who has the authority to bind the public education agency; and

(2) enforceable in any state or federal court of competent jurisdiction.

(m) If the parties execute an agreement pursuant to subsection (l) of this section, a party may void the agreement within three business days of the agreement's execution.

§89.1185. *Hearing Procedures.*

(a) The hearing officer must [shalt] afford the parties an opportunity for hearing within the timelines set forth in 34 Code of Federal Regulations (CFR), §300.515 and §300.532, as applicable, unless the hearing officer, at the request of either party, grants an extension of time, except that the timelines for expedited hearings cannot be extended.

(b) Each hearing must [shalt] be conducted at a time and place that are reasonably convenient to the parents and child involved.

(c) All persons in attendance must [shalt] comport themselves with the same dignity, courtesy, and respect required by the district courts of the State of Texas. All argument must [shalt] be made to the hearing officer alone.

(d) Except as modified or limited by the provisions of 34 CFR, §§300.507-300.514 or 300.532, or this division, the Texas Rules of Civil Procedure will [shalt] govern the proceedings at the hearing and the Texas Rules of Evidence will [shalt] govern evidentiary issues.

(e) Before a document may be offered or admitted into evidence, the document must be identified as an exhibit of the party offering the document. All pages within the exhibit must be numbered, and all personally identifiable information concerning any student who is not the subject of the hearing must be redacted from the exhibit.

(f) The hearing officer may set reasonable time limits for presenting evidence at the hearing.

(g) Upon request, the hearing officer, at his or her discretion, may permit testimony to be received by telephone.

(h) Granting of a motion to exclude witnesses from the hearing room will [shalt] be at the hearing officer's discretion.

(i) Hearings conducted under this division must [shalt] be closed to the public, unless the parent requests that the hearing be open.

(j) The hearing must [shalt] be recorded and transcribed by a court reporter, who will [shalt] promptly prepare and transmit a transcript of the evidence to the hearing officer with copies to each of the parties.

(k) Filing of post-hearing briefs will [shalt] be permitted only upon order of the hearing officer.

(l) The hearing officer must [shalt] issue a final decision, signed and dated, no later than 45 calendar days after the expiration of the 30-day resolution period under 34 CFR, §300.510(b), and §89.1183 of this title (relating to Resolution Process) or the adjusted time periods described in 34 CFR, §300.510(c), and §89.1183 of this title after a request for a due process hearing is received by the Texas Education Agency (TEA), unless the deadline for a final decision has been extended by the hearing officer as provided in §89.1186 of this title (relating to Extensions of Time). A final decision must be in writing and must include findings of fact and conclusions of law separately stated. Findings of fact must be based exclusively on the evidence presented at the hearing. The final decision must [shalt] be mailed to each party by the hearing officer on the day that the decision is issued. The hearing officer, at his or her discretion, may render his or her decision following the conclusion of the hearing, to be followed by written findings of fact and written decision.

(m) At the request of either party, the hearing officer must [shalt] include, in the final decision, specific findings of fact regarding the following issues:

(1) whether the parent or the public education agency unreasonably protracted the final resolution of the issues in controversy in the hearing; and

(2) if the parent was represented by an attorney, whether the parent's attorney provided the public education agency the appropriate information in the request for a hearing in accordance with 34 CFR, §300.508(b).

(n) The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 34 CFR, §300.516.

(o) A public education agency must [shah] implement any decision of the hearing officer that is, at least in part, adverse to the public education agency within the timeframe prescribed by the hearing officer or, if there is no timeframe prescribed by the hearing officer, within ten school days after the date the decision was rendered. In accordance with 34 CFR, §300.518(d), a public education agency must implement a hearing officer's decision during the pendency of an appeal, except that the public education agency may withhold reimbursement for past expenses ordered by the hearing officer.

(p) In accordance with 34 CFR, §300.152(c)(3), a parent may file a complaint with the TEA alleging that a public education agency has failed to implement a hearing officer's decision.

§89.1186. Extensions of Time.

(a) A hearing officer may grant extensions of time for good cause beyond the time period specified in §89.1185(l) of this title (relating to Hearing Procedures) at the request of either party. A hearing officer must [shah] not solicit extension requests, grant extensions on his or her own behalf, or unilaterally issue extensions for any reason. Any extension must [shah] be granted to a specific date, and the reason for the extension must be documented in a written order of the hearing officer and provided to each of the parties.

(b) A hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

- (1) whether the delay will positively contribute to, or adversely affect, the child's educational interest or well-being;
- (2) the need of a party for additional time to prepare or present the party's position at the hearing;
- (3) any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and
- (4) whether there has already been a delay in the proceeding through the actions of one of the parties.

§89.1191. Special Rule for Expedited Due Process Hearings.

A parent who disagrees with any decision regarding a child's placement under 34 Code of Federal Regulations (CFR), §300.530 and §300.531, or a manifestation determination under 34 CFR, §300.530(e), or a school district that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others, may appeal the decision by requesting an [An] expedited due process hearing [requested by a party] under 34 CFR [Code of Federal Regulations (CFR)], §300.532. An expedited due process hearing will[; shah] be governed by the same procedural rules as are applicable to due process hearings generally, except that:

- (1) the hearing must occur within 20 school days of the date the request for a due process hearing is filed;
- (2) the hearing officer must make a decision within 10 [ten] school days after the hearing;
- (3) unless the parents and the school district agree in writing to waive the resolution meeting required by 34 CFR, §300.532(c)(3)(i), or to use the mediation process described in 34 CFR, §300.506, the resolution meeting must occur within seven calendar days of the receipt of the request for a hearing;

(4) the hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the request for a hearing; ~~and~~

(5) the hearing officer must [shah] not grant any extensions of time or grant permission for the hearing to proceed under the timelines that apply to hearings involving non-disciplinary matters; and[-]

(6) the provisions in 34 CFR, §300.508(d), do not apply.

§89.1192. Attorneys' Fees.

In an action or proceeding brought under this division, a court, in its discretion, may award reasonable attorneys' fees to the prevailing party under the circumstances described in 34 Code of Federal Regulations, §300.517.

§89.1193. Special Education Mediation.

(a) In accordance with 34 Code of Federal Regulations (CFR), §300.506, the Texas Education Agency (TEA) has established a mediation process to provide parents and public education agencies with an opportunity to resolve disputes involving any matter arising under Part B of the Individuals with Disabilities Education Act (IDEA) or 34 CFR, §300.1 et seq. Mediation is available to resolve these disputes at any time.

(b) The mediation procedures must [shah] ensure that the process is:

- (1) voluntary on the part of the parties;
- (2) not used to deny or delay a parent's right to a due process hearing or to deny any other rights afforded under Part B of the IDEA; and
- (3) conducted by a qualified and impartial mediator who is trained in effective mediation techniques and who is knowledgeable in laws and regulations relating to the provision of special education and related services.

(c) A request for mediation must be in writing and must be filed with the TEA by mail, hand-delivery, or facsimile. The TEA has developed a form that may be used by parties requesting mediation. The form is available on request from the TEA and is also available on the TEA website.

(d) The TEA will [shah] maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(e) An individual who serves as a mediator:

- (1) must [may] not be an employee of the TEA or the public education agency that is involved in the education or care of the child who is the subject of the mediation process;
- (2) must [shah] not have a personal or professional conflict of interest, including relationships or contracts with schools or parents outside of mediations assigned by the TEA; and
- (3) is not an employee of the TEA solely because the individual is paid by the TEA to serve as a mediator.

(f) The TEA will select mediators on a random, rotational, or other impartial basis. If both parties join in requesting a specific mediator, the TEA will consider the request but reserves the right to make the final mediator selection based on availability, the need for equitable rotation, travel considerations, and other relevant mediation program considerations. The parties must advise the TEA of any preference they have in a mediator and must not contact a mediator to discuss the mediator's availability to conduct the mediation. The TEA will provide the parties with written notice of the specific mediator selected to conduct the mediation.

{(f) The parties by agreement may select a mediator from the list maintained by the TEA. If the parties do not select a mediator by agreement, a mediator will be selected on a random basis by the TEA.}

(g) If a mediator is also a hearing officer under §89.1170 of this title (relating to Impartial Hearing Officer), that individual may not serve as a mediator if he or she is the hearing officer in a pending due process hearing involving the same student who is the subject of the mediation process or was the hearing officer in a previous due process hearing involving the student who is the subject of the mediation process.

(h) The TEA will [shalt] bear the cost of the mediation process.

(i) A mediation session must [shall] be scheduled in a timely manner and held in a location that is convenient to the parties.

(j) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that:

(1) states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(2) is signed by both the parent and a representative of the public education agency who has the authority to bind the public education agency.

(k) A written, signed mediation agreement under subsection (j) of this section is enforceable in any state or federal court of competent jurisdiction.

(l) Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings of any state or federal court.

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

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Director, Rulemaking

Texas Education Agency

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SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING HIGH SCHOOL EQUIVALENCY PROGRAMS

19 TAC §§89.1403, 89.1409, 89.1417

The Texas Education Agency (TEA) proposes amendments to §§89.1403, 89.1409, and 89.1417, concerning the High School Equivalency Program (HSEP). The proposed amendments would modify rules for HSEPs to update references; simplify language for meeting required state assessment instruments for admission into the program; and amend conditions of program operation to reflect the change to multiple testing vendors, align with statute, and remove obsolete language.

The Texas Education Code (TEC), §29.087, authorizes the operation of HSEPs and outlines program requirements, including

application to operate a program, and student eligibility. TEC, §29.087(n), authorizes the commissioner to adopt rules for the implementation and administration of HSEPs. The rules in 19 TAC Chapter 89, Subchapter DD, implement the provisions of the TEC, §29.087.

The proposed amendments would modify HSEP student eligibility language to update references to statute and a state agency name. The amendments would also update the language for state assessment requirements. Lastly, the amendments would make necessary changes to conditions of program operation to reflect the change to multiple high school equivalency test vendors, align with a statutory change from instructional days to minutes, and remove obsolete language.

Section 89.1403, Student Eligibility, would be updated to reference the applicable section of the Family Code rather than the Code of Criminal Procedure for court-ordered students. In addition, Texas Youth Commission would be updated to Texas Juvenile Justice Department.

The following changes would be made in §89.1409, Assessment. Subsection (a) would be amended to use the general term *state assessment instruments* rather than stating each required assessment for a particular school year or naming specific assessment instruments. Subsection (a)(3) would be deleted because it is redundant. Subsection (b) would be updated to reference the applicable section of the Family Code rather than the Code of Criminal Procedure for court-ordered students, and Texas Youth Commission would be updated to Texas Juvenile Justice Department. In subsection (c), vendor-specific language would be deleted since Texas now allows multiple testing vendors.

Section 89.1417, Conditions of Program Operation, would be amended in subsection (a) to delete the requirement that HSEPs submit an annual progress report to the TEA. The requirement was specific to a certain testing vendor and is no longer required since Texas now allows multiple testing vendors. Subsections (b), (c), and (e) are obsolete and would be deleted. Subsection (d), relettered as subsection (b), would be amended to align with House Bill 2610, 84th Texas Legislature, 2015, which changed instructional days to minutes.

The proposed amendments would eliminate a requirement that approved HSEPs submit an annual progress report to the TEA.

The proposed amendments would have no new locally maintained paperwork requirements.

FISCAL NOTE. Penny Schwinn, deputy commissioner for academics, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Dr. Schwinn has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to align the rules for HSEP with those for high school equivalency testing. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND

MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on November 25, 2016.

STATUTORY AUTHORITY. The amendments are proposed under the Texas Education Code, §29.087, which authorizes the commissioner to allow schools to operate high school equivalency programs that meet certain conditions and parameters established by the statute and commissioner rule.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §29.087.

§89.1403. *Student Eligibility.*

A student is eligible to participate in a High School Equivalency Program if:

(1) the student has been ordered by a court under Texas Family Code, §65.103 [the Code of Criminal Procedure, Article 45.054], or by the Texas Juvenile Justice Department [Youth Commission] to:

(A) participate in a preparatory class for the high school equivalency examination; or

(B) take the high school equivalency examination administered under the Texas Education Code (TEC), §7.111; or

(2) the following conditions are satisfied:

(A) the student is at least 16 years of age at the beginning of the school year or semester;

(B) the student is at risk of dropping out of school, as defined by the TEC, §29.081;

(C) the student and the student's parent, or person standing in parental relation to the student, agree in writing to the student's participation; and

(D) at least two school years have elapsed since the student first enrolled in Grade 9 and the student has accumulated less than one third of the credits required to graduate under the minimum graduation requirements of the district or school.

§89.1409. *Assessment.*

(a) A student entering a High School Equivalency Program (HSEP) must take:

(1) each state assessment instrument required for the student's applicable grade or cohort prior to entering the program; and [the following assessments, as applicable:]

[(A) if the student first enters Grade 9 prior to the 2011-2012 school year, the student must take the Grade 9 Texas Assessment of Knowledge and Skills (TAKS) assessment in reading and mathematics; or]

[(B) if the student first enters Grade 9 during or after the 2011-2012 school year, the student must take the end-of-course (EOC) assessments for Algebra I and English I. Released Grade 9 TAKS assessments may be used until the applicable EOC has been released. The local school district shall be responsible for scoring the released assessment.];

(2) each state [TAKS or EOC] assessment instrument required for the student's applicable grade or cohort [to be administered] during the period in which the student is enrolled in the program. [; and]

[(3) the assessment instruments required by this subsection before taking the high school equivalency examination.];

(b) A student entering an HSEP by order of the court under Texas Family Code, §65.103 [pursuant to the Code of Criminal Proceedings, Article 45.054], or by order of the Texas Juvenile Justice Department [Youth Commission (TYC)], is exempt from the assessment requirements specified in subsection (a) of this section.

(c) The school district or open-enrollment charter school operating an approved HSEP must present to the [General Educational Development (GED) testing center, on a form provided by the] Texas Education Agency (TEA)[;] proof that a student has been administered the assessment instruments required by subsection (a) of this section. The TEA [GED testing centers] will not allow an HSEP student to take the high school equivalency examination without proof from the approved HSEP that the student has been administered the required assessment instruments. A student who is enrolled in an HSEP as described in this section and withdraws from the HSEP before taking the assessment instruments required by this subsection cannot take the high school equivalency examination [GED] until after the individual's 18th birthday.

(d) The school district or open-enrollment charter school operating an approved HSEP must inform each student who has completed the program of the time and place at which the student may take the high school equivalency examination as authorized by the TEC, §7.111. A student must be over 17 years of age or meet other requirements specified in the TEC, §7.111, to take the high school equivalency examination.

§89.1417. *Conditions of Program Operation.*

(a) A school district or open-enrollment charter school operating a High School Equivalency Program (HSEP) must comply with all assurances in the program application. [Approved HSEPs will be required to submit annually one progress report as instructed by the General Educational Development Testing Service (GEDTS) to the Texas Education Agency.] Approved HSEPs will be required to submit data as stated in the assurances section of the program application.

[(b) A school district or open-enrollment charter school authorized by the commissioner of education on or before August 31, 2003, to operate a program in accordance with this subchapter may continue to operate that program in accordance with this section.];

[(c) Enrollment in an HSEP may not exceed by more than 5% the total number of students enrolled in a similar program operated by the school district or charter school during the 2000-2001 school year.];

(b) [(d)] A student enrolled in an HSEP must be offered at a minimum 420 minutes of instruction per [a seven-hour] school day and 75,600 [a 180-day] instructional minutes per [year] calendar year.

[(e) Beginning with the 2003-2004 school year, a student may be enrolled in an HSEP that was authorized by the commissioner on or before August 31, 2003; however, the student cannot take any portion

of the GED test after September 1, 2003, without meeting the assessment requirements specified in §89.1409 of this title (relating to Assessment).]

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

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S
RULES CONCERNING OPEN-ENROLLMENT
CHARTER SCHOOLS
DIVISION 1. GENERAL PROVISIONS

19 TAC §100.1010

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §100.1010 is not included in the print version of the Texas Register. The figure is available in the on-line version of the November 25, 2016, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §100.1010, concerning open-enrollment charter schools. The proposed amendment would adopt in rule the *2016 Charter School Performance Framework Manual* established under Texas Education Code (TEC), §12.1181.

The TEC, §12.1181, requires the commissioner to develop and adopt rules for performance frameworks that establish standards by which to measure the performance of open-enrollment charter schools. The frameworks are used to annually evaluate each open-enrollment charter school. However, the performance of a school on a performance framework may not be considered for purposes of renewal of a charter under TEC, §12.1141(d), or revocation of a charter under TEC, §12.115(c).

In accordance with statute, the TEA developed the Charter School Performance Framework (CSPF) Manual. The manual includes measures for charters registered under the standard system and measures for charters registered under the alternative education accountability system as adopted under 19 TAC §97.1001, Accountability Rating System. The commissioner exercised rulemaking authority to adopt 19 TAC §100.1010 effective September 18, 2014.

The performance frameworks evolve from year to year, so the criteria and standards for measuring open-enrollment charter schools in the most current year differ to some degree over those applied in the prior year. The intention is to update 19 TAC §100.1010 annually to refer to the most recently published CSPF Manual.

The proposed amendment would adopt in rule the *2016 Charter School Performance Framework Manual*, which would be used to assign performance levels on the 2016 CSPF report.

The proposed amendment would have no procedural or reporting implications. The proposed amendment would have no new locally maintained paperwork requirements.

FISCAL NOTE. A.J. Crabill, deputy commissioner for governance, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Mr. Crabill has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be informing the public of specific criteria used to measure the performance of open-enrollment charter schools in the CSPF report. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on November 25, 2016.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code, §12.1181, which requires the commissioner to develop and by rule adopt performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §12.1181.

§100.1010. Performance Frameworks.

(a) The performance of an open-enrollment charter school will be measured annually against a set of criteria set forth in the Charter School Performance Framework (CSPF) Manual established under Texas Education Code, §12.1181. The CSPF Manual will include measures for charters registered under the standard system and measures for charters registered under the alternative education accountability system as adopted under §97.1001 of this title (relating to Accountability Rating System).

(b) The assignment of performance levels for open-enrollment charter schools on the 2016 CSPF report is based on specific criteria, which are described in the 2016 Charter School Performance Framework Manual provided in this subsection.

Figure: 19 TAC §100.1010(b)

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

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DIVISION 2. COMMISSIONER ACTION AND INTERVENTION

19 TAC §100.1033

The Texas Education Agency proposes an amendment to §100.1033, concerning open-enrollment charter schools. The proposed amendment would modify the section to comply with statutory provisions implemented as a result of House Bill 1842, 84th Texas Legislature, 2015, and to more closely match other existing statutory provisions, including the reauthorization of the No Child Left Behind Act as the Every Student Succeeds Act (ESSA).

Section 100.1033 was established to allow for changes to a charter holder's contract, including the growth or expansion of an existing charter school. The section was last amended effective September 18, 2014, to make changes to the charter amendment process and the types of amendments available.

The proposed amendment to 19 TAC §100.1033 would provide clarity and align the section with provisions in the Texas Education Code as well as ESSA. The changes would provide clarity around the consideration of three distinct categories of charter school expansions and their corresponding criteria: regular expansions, expedited expansions, and high-quality campus designations.

The proposed amendment would have no new procedural or reporting implications. The proposed amendment would have no new locally maintained paperwork requirements.

FISCAL NOTE. A.J. Crabill, deputy commissioner for governance, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Mr. Crabill has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be ensuring that rules governing open-enrollment charter schools are aligned with current law. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND

MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on November 25, 2016.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §12.101(b-4), as amended by House Bill 1842, 84th Texas Legislature, 2015, which provides autonomy for a charter holder to establish an expedited campus if the charter school meets the criteria outlined in the statute and the commissioner of education does not determine the charter school does not satisfy the requirements; and TEC, §12.114, which provides for the growth or revision of a charter through the amendment process and stipulates that a revision or amendment to the charter school contract may only be made with the approval of the commissioner of education not later than 60 days following the request.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §12.101(b-4) and §12.114.

§100.1033. Charter Amendment.

(a) Amendments in writing. Subject to the requirements of this section, the terms of an open-enrollment charter may be revised with the consent of the charter holder by written amendment approved by the commissioner of education in writing.

(b) Types of amendments. An amendment includes any change to the terms of an open-enrollment charter, including the following: maximum enrollment, grade levels, [~~maximum enrollment~~] geographic boundaries, approved campus(es), approved sites, relocation of campus, charter holder name, charter school (district) name, charter campus name, charter holder governance, articles of incorporation, corporate bylaws, management company, admission policy, or the educational program of the school. [~~For purposes of this section, educational program means the educational philosophy or mission of the school or curriculum models or whole-school designs that are inconsistent with those specified in the school's charter.~~] An amendment must be approved by the commissioner under this subsection. Expanding prior to receiving the commissioner's approval will have financial consequences as outlined in §100.1041(d)(1) of this title (relating to State Funding).

(1) Charter amendment request. Prior to implementation, the charter holder shall file a request, in the form prescribed, with the Texas Education Agency (TEA) division responsible for charter schools. [~~a request, clearly labeled "charter amendment request."~~] As applicable, the request shall set forth the text and page references, or a photocopy, of the current open-enrollment charter language to be changed, and the text proposed as the new open-enrollment charter language. The request must be [~~made in or~~] attached to a written resolution adopted by the governing body of the charter holder and signed by a majority of the members indicating approval of the requested amendment.

(2) Timeline. All charter amendment requests, with the exception of [except for] expansion amendments, may be filed with the commissioner at any time.

(3) Relevant information considered. As directed by the commissioner, a charter holder requesting a substantive amendment shall submit current information required by the prescribed [current] amendment form, as well as any other information requested by the commissioner. In considering the amendment request, the commissioner may consider any relevant information concerning the charter holder, including its student and other performance; compliance, staff, financial, and organizational data; and other information.

(4) Best interest of students. The commissioner may approve an amendment only if the charter holder meets all applicable requirements, and only if the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school. The commissioner may consider the performance of all charters operated by the same charter holder in the decision to finally grant or deny an amendment.

(5) Conditional approval. The commissioner may grant the amendment without condition, or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school. An amendment receiving conditional approval shall not be effective until a written resolution accepting all conditions and/or requirements, adopted by the governing body of the charter holder and signed by the members voting in favor, is filed with the TEA division responsible for charter schools.

(6) Relocation amendment. An amendment to relocate an existing campus or site with the same administration and staff while still serving the same students and grade levels is not an expansion amendment subject to paragraphs (9)(A) and (10)(D) of this subsection. An amendment to relocate solely permits a charter holder [an existing campus] to relocate an existing campus or site to an alternate address while serving the same students and grade levels without a significant disruption to the delivery of the educational services. The alternate address in the relocation request shall not be in excess of 25 miles from the existing campus address.

(7) Ineligibility. The commissioner will not consider any amendment that is submitted by a charter holder that has been notified by the commissioner of the intent to revoke or nonrenew the charter [under Texas Education Code (TEC), §12.115(e)]. Nothing in this subsection limits the commissioner's authority to accept the surrender of a charter.

(8) Amendment determination. The commissioner's decision on an amendment request shall be final and may not be appealed. The same amendment request may not be submitted prior to the first anniversary of the original submitted amendment.

(9) Expansion amendment standards. An expansion amendment is an amendment that permits a charter school to increase its maximum allowable enrollment, extend the grade levels it serves, [add a campus, add a site,] change its geographic boundaries, or add a campus or site [increase its maximum allowable enrollment].

(A) In addition to the requirements of this subsection, the commissioner may approve an expansion amendment only if:

(i) the expansion will be effective no earlier than the start of the fourth full school year at the affected charter school. This restriction does not apply if the affected charter school has a [as its most recent] rating of "academically acceptable" [or higher,] as defined by §100.1001(26) of this title (relating to Definitions) as its most recent rating[;] and is operated by a charter holder that operates multiple [other] charter campuses and all of that charter holder's most recent

campus ratings are "academically acceptable" [or higher,] as defined by §100.1001(26) of this title[; under the relevant accountability manual];

(ii) the amendment request under paragraph (1) of this subsection is received no earlier than the first day of February[; or after the submission to the TEA of the annual financial report for the immediately preceding fiscal year,] and no later than the first day of April preceding the school year in which the expansion will be effective;

(iii) the most recent district rating for the charter school is [90% of the campuses operated under the charter are] "academically acceptable" and the most recent campus rating for at least 90% of the campuses operated under the charter school is "academically acceptable" [or higher,] as defined by §100.1001(26) of this title[; under the relevant accountability manual];

(iv) the most recent district financial accountability rating for the charter school in the Financial Integrity Rating System of Texas (FIRST) for Charter Schools is "satisfactory" as defined by §100.1001(27) of this title;

(v) the charter school has an accreditation status of Accredited;

(vi) [(iv)] the charter holder has provided evidence of the notification of the expansion amendment request, via certified mail, as documented by a return receipt to the board of trustees and superintendent of each school district affected by the expansion as described in the amendment request form, noting that each entity [that each school district affected by the expansion was sent a notice of the expansion amendment and] was given an opportunity to submit a statement regarding the impact of the amendment on the district;

[(v)] the commissioner determines that the amendment is in the best interest of the students of Texas;

(vii) [(vi)] before voting to request an expansion amendment [the enrollment increase], the charter holder governing board [body] has considered a business plan, has determined by majority vote of the board that the growth proposed is prudent, and includes such a statement in the board resolution. Upon [which upon] request by the TEA, the business plan must be filed within ten business days. The business plan must be comprised of the following components:

(I) a statement discussing the need for the expansion [an increase in the maximum enrollment];

(II) a statement discussing the current and projected financial condition of the charter holder and charter school;

(III) an unaudited statement of financial position for the current fiscal year;

(IV) an unaudited statement of financial activities for the current fiscal year;

(V) an unaudited statement of cash flows for the current fiscal year;

(VI) a pro forma budget that includes the costs of operating the charter school, including the implementation of the expansion amendment;

(VII) a statement or schedule that identifies the assumptions used to calculate the charter school's estimated Foundation School Program revenues;

(VIII) a statement discussing the use of debt instruments to finance part or all of the charter school's incremental costs;

(IX) a statement discussing the incremental cost of acquiring additional facilities, furniture, and equipment to accommodate the anticipated increase in student enrollment; ~~and~~

(X) a statement discussing the incremental cost of additional on-site personnel and identifying the additional number of full-time equivalents that will be employed; and

(XI) a statement that the growth proposed is prudent;

~~(viii)~~ [(vii)] the charter holder submits, for the most recent year ~~[three years]~~ of operation, copies of the compliance information relating to ~~[on file as required in]~~ §100.1035 of this title (relating to Compliance Records on Nepotism, Conflicts of Interest, and Restrictions on Serving) to include documents such as affidavits identifying a board member's substantial interest in a business entity or in real property, documentation of a board member's abstention from voting in the case of potential conflicts of interest, and affidavits or other documents identifying other family members within the third degree of affinity or consanguinity who serve as board members and/or employees; ~~and~~

~~(ix)~~ the commissioner determines that the amendment is in the best interest of the students of Texas; and

~~(x)~~ [(viii)] the charter holder meets all other requirements applicable to expansion amendment requests and other amendments.

(B) Notice of the approval or disapproval of expansion amendments will be made by the commissioner within 60 days of the date the charter holder submits a completed expansion amendment request. The commissioner may provide notice electronically. The commissioner shall specify the earliest effective date for implementation of the expansion. In addition, the commissioner may require compliance with such conditions and/or requirements that [as] may be in the best interest of the students of Texas.

(10) Expansion amendments.

(A) Maximum enrollment. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to increase maximum allowable enrollment only if:]

~~[(i)]~~ within the calendar year preceding the request, the charter holder has not requested another expansion amendment seeking to increase maximum allowable enrollment.] ~~and~~

~~[(ii)]~~ the board resolution required by paragraph (1) of this subsection includes a statement that the charter holder board has considered the business plan required by paragraph (9)(A)(vi) of this subsection and has determined by majority vote of the board that the enrollment growth proposed in the business plan is prudent.]

(B) Grade span. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to extend the grade levels it serves only if it is accompanied by appropriate educational plans for the additional grade levels in accordance with Chapter 74, Subchapter A of this title (relating to Required Curriculum), and such plan has been reviewed and approved by the charter governing board.

(C) Geographic boundary. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to expand the geographic boundaries of the charter school only if it is accompanied by the relevant letters of notification of impact of the surrounding districts and evidence of mailing, and such requests are in relation to any current or newly proposed facility location.

(D) Additional campus. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to add a new campus~~]; within 60 days of the date the charter holder submits a completed request;]~~ only if it meets the following criteria:

(i) the charter holder has operated at least one charter school campus in Texas for a minimum of three consecutive years; and

~~(ii)~~ the charter school has at least 50% of the student population in tested grades.

~~[(ii)]~~ the charter has been evaluated under the accountability rating system established in §97.1001 of this title (relating to Accountability Rating System) and meets the following:]

~~(I)~~ has at least 50% of the student population in tested grades, unless waived by the commissioner;]

~~[(II)]~~ has an accreditation status of Accredited; and]

~~[(III)]~~ is currently evaluated under the standard accountability procedures and received a district rating of highest or second highest rating for three of the last five years with at least 75% of the campuses rated under the charter also having the highest or second highest rating and no campus with the lowest performance rating in the most recent state accountability ratings.]

(E) Additional site. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to add a new site only if it meets the following criteria:

(i) the charter school campus under which the proposed new site will be assigned currently has at least 50% of the student population in tested grades; and

~~(ii)~~ the site will be located within 25 miles of the campus with which it is associated.

(11) Expedited ~~[Quality]~~ expansion. An expedited [A quality] expansion amendment allows for the establishment of a new charter campus under TEC, §12.101(b-4). [The commissioner may approve a quality expansion for a charter only if:]

(A) In order to submit an expedited expansion amendment, the charter school must meet the following requirements.

~~[(A)]~~ [the commissioner does not disapprove in writing within 60 days after receipt of a completed application; and]

~~(i)~~ ~~[(B)]~~ The [the] charter school must have [holder has] an accreditation status of Accredited and meet [meets] the following criteria:

~~(I)~~ ~~[(i)]~~ currently has at least 50% of its student population in grades assessed under TEC, Chapter 39, Subchapter B, or has had at least 50% of the students in the grades assessed enrolled in the school for at least three years; and

~~(II)~~ ~~[(ii)]~~ is currently evaluated under the standard accountability procedures for evaluation under TEC, Chapter 39, and received a district rating in the highest or second highest performance rating category under TEC, Chapter 39, Subchapter C, for three of the last five years with:

~~(-a-)~~ ~~[(i)]~~ at least 75% of the campuses rated under the charter school also receiving a rating in the highest or second highest performance rating category in the most recent ratings; and

~~(b-)~~ ~~(H)~~ ~~[with]~~ no campus receiving ~~[with]~~ a rating in the lowest performance rating category in the most recent ratings.

~~(ii)~~ The charter holder must submit an expedited expansion amendment request in the time, manner, and form prescribed to the TEA division responsible for charter schools. The expansion amendment request will be:

~~(I)~~ effective no earlier than the start of the fourth full school year at the affected charter school;

~~(II)~~ received no earlier than the first day of February and no later than the first day of April preceding the school year in which the expansion will be effective;

~~(III)~~ communicated via certified mail with a return receipt to the following entities:

~~(a-)~~ the board of trustees and superintendent of each school district affected by the expedited expansion as described in the amendment request form; and

~~(b-)~~ the members of the legislature who represent the geographic area affected by the expedited expansion as described in the amendment request form, noting that each entity has an opportunity to submit a statement regarding the impact of the amendment to the TEA division responsible for charter schools;

~~(IV)~~ voted on by the charter holder governing body after consideration of a business plan determined by majority vote of the board affirming the growth proposed in the business plan is prudent. Such a statement must be included in the board resolution. Upon request by the TEA, the business plan must be filed within ten business days; and

~~(V)~~ submitted with copies of the most recent compliance information relating to §100.1035 of this title to include documents such as affidavits identifying a board member's substantial interest in a business entity or in real property, documentation of a board member's abstention from voting in the case of potential conflicts of interest, and affidavits or other documents identifying other family members within the third degree of affinity or consanguinity who serve as board members and/or employees.

~~(B)~~ Notice of eligibility to establish an expedited campus under this section will be made by the commissioner within 60 days of the date the charter holder submits a completed expedited expansion amendment.

~~(12)~~ High-Quality Campus Designation ~~[New school designation]~~. A High-Quality Campus Designation is a separate designation and must be paired with ~~[new school designation is]~~ an expansion amendment. If approved by the commissioner, this designation [that] permits a charter holder to establish an additional charter school campus under an existing open-enrollment charter school pursuant to federal non-regulatory guidance [in the Elementary and Secondary Education Act (ESEA), Section 5202(d)(1), as amended]. Charter holders of charter schools that receive High-Quality Campus Designation [new school designations] from the commissioner will be eligible to participate in the charter school program competitive grant process when federal funding for the Texas charter school program is available.

~~(A)~~ The commissioner may approve a High-Quality Campus Designation ~~[new school designation]~~ for a charter only if:

~~(i)~~ the charter holder meets all requirements applicable to an expansion amendment set forth in this section and has operated at least one charter school campus in Texas for a minimum of five consecutive years;

~~(ii)~~ the charter school has been evaluated under the accountability rating system established in §97.1001 of this title (relating to Accountability Rating System) currently with at least 50% of the student population in grades assessed by the state accountability system, has an accreditation status of Accredited, and ~~[meets the following:]~~

~~{(I)}~~—is currently evaluated under the standard accountability procedures and received the highest or second highest district rating for three of the last five years with all ~~[at least 75%]~~ of the campuses operated ~~[rated]~~ under the charter also receiving the highest or second highest rating ~~[and no campus with an "academically unacceptable" rating;]~~ as defined by §100.1001(26) of this title~~;~~ in the most recent state accountability ratings. ~~[A rating that does not meet the criteria for "academically acceptable" as defined in §100.1001(26) of this title shall not be considered the highest or second highest academic performance rating for purposes of this section; or]~~

~~{(II)}~~ is currently evaluated under the alternative education accountability (AEA) procedures and received the highest or second highest AEA district rating for five of the last five years with:]

~~{(a-)}~~ in the most recent applicable state accountability ratings; all rated campuses under the charter receiving an "academically acceptable" or higher rating, as defined by §100.1001(26) of this title; and]

~~{(b-)}~~ if evaluated using AEA procedures, the district-level assessment data corresponding to the most recent accountability ratings demonstrate that at least 30% of the students in each of the following student groups (if evaluated) met the standard as reported by the sum of all grades tested on the standard accountability indicator in each subject area assessed: African American, Hispanic, white, special education, economically disadvantaged, limited English proficient, and at risk;]

~~(iii)~~ no charter campus has been identified for federal interventions in the most current report;

~~(iv)~~ the charter school is not under any sanction imposed by TEA authorized under TEC, Chapter 39; Chapter 97, Subchapter EE, of this title (relating to Accreditation Status, Standards, and Sanctions); or federal requirements;

~~(v)~~ the charter holder completes an application approved by the commissioner;

~~(vi)~~ the new charter school campus will serve at least 100 students in its first year of operation;

~~(vii)~~ the amendment complies with all requirements of this paragraph; and

~~(viii)~~ the commissioner determines that the designation is in the best interest of the students of Texas.

~~(B)~~ In addition to the requirements of subparagraph (A) of this paragraph, the commissioner may approve a High-Quality Campus Designation ~~[new school designation]~~ only on making the following written findings:

~~(i)~~ the proposed school satisfies each element of the definition of a public charter school as set forth in federal law ~~[the ESEA, Section 5210(1)];~~

~~{(ii)}~~ the proposed school is not merely an extension of an existing charter school;]

~~(ii)~~ ~~{(iii)}~~ the proposed school campus is separate and distinct from the existing charter school campus(es) ~~[school(s)]~~ established under the open-enrollment charter school with a new facility and county-district-campus number; and

(iii) [(iv)] the open-enrollment charter school, as amended, includes a separate written performance agreement for the proposed school campus that meets the requirements of federal law [the ESEA, Section 5210(1)(L),] and TEC, §12.111(a)(3) and (4).

(C) In making the findings required by subparagraph (B)(i) and (iii) of this paragraph, the commissioner shall consider:

(i) the terms of the open-enrollment charter school as a whole, as modified by the High-Quality Campus Designation [new school designation]; and

(ii) whether the proposed school campus shall be established and recognized as a separate school under Texas law.

(D) In making the findings required by subparagraph (B)(ii) [and (iii)] of this paragraph, the commissioner shall consider whether the proposed school campus and the existing charter school campus(es) [school(s)] have separate sites, employees, student populations, and governing bodies and whether their day-to-day operations are carried out by different officers. The presence or absence of any one of these elements, by itself, does not determine whether the proposed school campus will be found to be separate or part of an existing school. However, the presence or absence of several elements will inform the commissioner's decision.

(E) In making the finding required by subparagraph (B)(iii) [(B)(iv)] of this paragraph, the commissioner shall consider:

(i) whether the proposed school campus and the existing charter school campus(es) [school(s)] have distinctly different requirements in their respective written performance agreements; [and]

(ii) whether an annual independent financial audit of the proposed school campus is to be conducted. The high-quality campus must have a plan for a separate audit schedule apart from the open-enrollment charter school audit; and

(iii) [(iv)] the extent to which the performance agreement for the proposed school campus imposes higher standards than those imposed by TEC, §12.104(b)(2)(L).

(F) Failure to meet any standard or requirement outlined in this paragraph or agreed to in a performance agreement under subparagraph (B)(iii) [(B)(iv)] of this paragraph shall mean the immediate termination of any federal charter school program grant and/or any waiver exempting a charter from some of the expansion amendment requirements that may have been granted to a charter holder as a result of the High-Quality Campus Designation [new school designation].

(13) Delegation amendment. A delegation amendment is an amendment that permits a charter holder to delegate, pursuant to §100.1101(c) of this title (relating to Delegation of Powers and Duties), the powers or duties of the governing body of the charter holder to any other person or entity.

(A) The commissioner may approve a delegation amendment only if:

(i) the charter holder meets all requirements applicable to delegation amendments and amendments generally;

(ii) the amendment complies with all requirements of Chapter 100, Subchapter AA, Division 5, of this title (relating to Charter School Governance); and

(iii) the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school.

(B) The commissioner may grant the amendment without condition or may require compliance with such conditions and/or

requirements as may be in the best interest of the students enrolled in the charter school.

(C) The following powers and duties must generally be exercised by the governing body of the charter holder itself, acting as a body corporate in meetings posted in compliance with Texas Government Code, Chapter 551. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(vi) of this subparagraph cannot reasonably be carried out by the charter holder governing body, the commissioner may not grant an amendment delegating such functions to any person or entity through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the governing body of the charter holder shall not delegate:

(i) final authority to hear or decide employee grievances, citizen complaints, or parental concerns;

(ii) final authority to adopt or amend the budget of the charter holder or the charter school, or to authorize the expenditure or obligation of state funds or the use of public property;

(iii) final authority to direct the disposition or safekeeping of public records, except that the governing body may delegate this function to any person, subject to the governing body's superior right of immediate access to, control over, and possession of such records;

(iv) final authority to adopt policies governing charter school operations;

(v) final authority to approve audit reports under TEC, §44.008(d); or

(vi) initial or final authority to select, employ, direct, evaluate, renew, non-renew, terminate, or set compensation for the superintendent or, as applicable, the administrator serving as the educational leader and [a] chief executive officer.

(D) The following powers and duties must be exercised by the superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer of the charter school [holder]. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(iii) of this subparagraph cannot reasonably be carried out by the superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer of the charter school [holder], the commissioner may not grant an amendment permitting the superintendent/chief [chief] executive officer to delegate such function through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the superintendent/chief [chief] executive officer of the charter school [holder] shall not delegate final authority:

(i) to organize the charter school's central administration;

(ii) to approve reports or data submissions required by law; or

(iii) to select and terminate charter school employees or officers.

(c) Required forms and formats. The TEA division responsible for charter schools may develop and promulgate, from time to time, forms or formats for requesting charter amendments under this section. If a form or format is promulgated for a particular type of amendment, it must be used to request an amendment of that type.

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

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Director, Rulemaking

Texas Education Agency

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



CHAPTER 103. HEALTH AND SAFETY
SUBCHAPTER DD. COMMISSIONER'S
RULES CONCERNING VIDEO SURVEILLANCE
OF CERTAIN SPECIAL EDUCATION SETTINGS
19 TAC §103.1301

The Texas Education Agency (TEA) proposes an amendment to §103.1301, concerning video surveillance of certain special education settings. The proposed amendment would update the rule to be consistent with the plain language in the authorizing statute.

In order to promote the safety of students receiving special education and related services in certain self-contained classrooms and other special education settings, Texas Education Code (TEC), §29.022, requires video surveillance on request by a parent, trustee, or staff member. Beginning with the 2016-2017 school year, a school district or open-enrollment charter school must provide video equipment, including video cameras with audio recording capabilities, to campuses on request by a parent, trustee, or staff member. Campuses that receive such equipment must place, operate, and maintain video cameras in certain self-contained classrooms or other special education settings. Video recordings are confidential under the section and may only be released for viewing to certain individuals.

In March 2016, the TEA sought guidance from the Texas Attorney General regarding the proper construction of certain provisions in TEC, §29.022. While the opinion request was pending, TEA adopted new 19 TAC §103.1301 effective August 15, 2016, and advised the public that it would modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion. On September 13, 2016, the Texas Attorney General issued his opinion, which advised TEA that the definition of *staff member* in 19 TAC §103.1301 is more restrictive than the plain language in TEC, §29.022. The opinion also advised that the plain language of the statute requires a school district or open-enrollment charter school to provide, upon request, video equipment to *each* self-contained classroom or other special education setting.

The proposed amendment would update the rule to be consistent with the plain language in statute by clarifying the definition of *staff member*. A conforming edit would be made to language relating to who may view a video recording made under TEC, §29.022. In addition, to align with statute, technical changes would be made to change the article *the* to *a* when referring to self-contained classrooms or other special education settings.

The proposed amendment would have no new procedural or reporting implications. The proposed amendment would have no new locally maintained paperwork requirements.

FISCAL NOTE. Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the amendment is in effect, enforcing or administering the amendment will have no foreseeable economic implications. However, the authorizing statute, TEC, §29.022, has fiscal implications for school districts and open-enrollment charter schools. The agency is not able to report the total number of self-contained classrooms or other special education settings that may be subject to the requirements in TEC, §29.022. Whether a classroom or setting is subject to the statute is dependent upon whether a majority of the students in regular attendance receive special education services in the classroom or setting for a majority of the instructional day. According to school district representatives, the costs associated with implementing TEC, §29.022, will vary widely from district to district based on the number of self-contained classrooms and other special education settings in the district, the number of cameras needed to cover each classroom or setting, the district's existing technological infrastructure, the economies of scale (i.e., smaller districts will purchase fewer video cameras at a higher price while larger ones will purchase more cameras at a lower price), and other factors. On a per classroom basis, school districts have estimated costs ranging between \$3,500 and \$5,500. School districts have estimated that conducting video surveillance districtwide could cost anywhere from \$350,000 to \$6.8 million.

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

PUBLIC BENEFIT/COST NOTE. Ms. Martinez has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be providing needed clarification of certain requirements in TEC, §29.022. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins November 25, 2016, and ends December 27, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on November 25, 2016.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §29.022, which requires video surveillance in certain special education settings in order to promote student safety. TEC, §29.022(k), authorizes the commissioner to adopt rules to implement and administer TEC, §29.022,

including rules regarding the special education settings to which the section applies.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §29.022.

§103.1301. *Video Surveillance of Certain Special Education Settings.*

(a) Requirement to implement. Beginning with the 2016-2017 school year, in order to promote student safety, on request by a parent, trustee, or staff member, a school district or open-enrollment charter school must provide video equipment to campuses in accordance with Texas Education Code (TEC), §29.022, and this section. Campuses that receive video equipment must place, operate, and maintain video cameras in self-contained classrooms or other special education settings in accordance with TEC, §29.022, and this section.

(b) Definitions. For purposes of TEC, §29.022, and this section, the following terms have the following meanings.

(1) Parent means a person described in TEC, §26.002, whose child receives special education and related services for at least 50 percent of the instructional day in a ~~the~~ self-contained classroom or other special education setting. Parent also means a student who receives special education and related services for at least 50 percent of the instructional day in a ~~the~~ self-contained classroom or other special education setting and who is 18 years of age or older or whose disabilities of minority have been removed for general purposes under Texas Family Code, Chapter 31, unless the student has been determined to be incompetent or the student's rights have been otherwise restricted by a court order.

(2) Staff member means an employee of the school district or open-enrollment charter school ~~[a teacher, related service provider, paraprofessional, or educational aide assigned to work in the self-contained classroom or other special education setting. Staff member also includes the principal or an assistant principal of the campus at which the self-contained classroom or other special education setting is located].~~

(3) Trustee means a member of a school district's board of trustees or a member of an open-enrollment charter school's governing body.

(4) Open-enrollment charter school means a charter granted to a charter holder under TEC, §12.101 or §12.152, identified with its own county district number.

(5) Self-contained classroom means a classroom on a regular school campus (i.e., a campus that serves students in general education and students in special education) of a school district or an open-enrollment charter school in which a majority of the students in regular attendance are provided special education and related services and have one of the following instructional arrangements/settings described in the student attendance accounting handbook adopted under §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook):

(A) self-contained (mild/moderate/severe) regular campus;

(B) full-time early childhood (preschool program for children with disabilities) special education setting;

(C) residential care and treatment facility--self-contained (mild/moderate/severe) regular campus;

(D) residential care and treatment facility--full-time early childhood special education setting;

(E) off home campus--self-contained (mild/moderate/severe) regular campus; or

(F) off home campus--full-time early childhood special education setting.

(6) Other special education setting means a classroom on a separate campus (i.e., a campus that serves only students who receive special education and related services) of a school district or open-enrollment charter school in which a majority of the students in regular attendance are provided special education and related services and have one of the following instructional arrangements/settings described in the student attendance accounting handbook adopted under §129.1025 of this title:

(A) residential care and treatment facility--separate campus; or

(B) off home campus--separate campus.

(7) Video camera means a video surveillance camera with audio recording capabilities.

(8) Video equipment means one or more video cameras and any technology and equipment needed to place, operate, and maintain video cameras as required by TEC, §29.022, and this section. Video equipment also means any technology and equipment needed to store and access video recordings as required by TEC, §29.022, and this section.

(9) Incident means an event or circumstance that:

(A) involves alleged "abuse" or "neglect," as those terms are described in Texas Family Code, §261.001, of a student by an employee of the school district or charter school or alleged "physical abuse" or "sexual abuse," as those terms are described in Texas Family Code, §261.410, of a student by another student; and

(B) allegedly occurred in a self-contained classroom or other special education setting in which video surveillance under TEC, §29.022, and this section is conducted.

(c) Exclusions. A school district or open-enrollment charter school is not required to provide video equipment to a campus of another district or charter school or to a nonpublic school. In addition, the Texas School for the Deaf, the Texas School for the Blind and Visually Impaired, the Texas Juvenile Justice Department, and any other state agency that provides special education and related services to students are not subject to the requirements in TEC, §29.022, and this section.

(d) Use of funds. A school district or open-enrollment charter school may solicit and accept gifts, grants, and donations from any person to implement the requirements in TEC, §29.022, and this section. A district or charter school is not permitted to use Individuals with Disabilities Education Act, Part B, funds or state special education funds to implement the requirements of TEC, §29.022, and this section.

(e) Dispute resolution. The special education dispute resolution procedures in 34 Code of Federal Regulations, §§300.151-300.153 and 300.504-300.515, do not apply to complaints alleging that a school district or open-enrollment charter school has failed to comply with TEC, §29.022, and/or this section. Complaints alleging violations of TEC, §29.022, and/or this section must be addressed through the district's or charter school's local grievance procedures or other dispute resolution channels.

(f) Regular school year and extended school year services. TEC, §29.022, and this section apply to video surveillance during the regular school year and during extended school year services.

(g) Policies and procedures. Each school district board of trustees and open-enrollment charter school governing body must adopt written policies relating to video surveillance under TEC, §29.022, and this section. At a minimum, the policies must include:

(1) a statement that video surveillance is for the purpose of promoting student safety in certain self-contained classrooms and other special education settings;

(2) the procedures for requesting video surveillance and the procedures for responding to a request for video surveillance;

(3) the procedures for providing advanced written notice to the campus staff and the parents of the students assigned to a self-contained classroom or other special education setting that video and audio surveillance will be conducted in the classroom or setting;

(4) a requirement that video cameras be operated at all times during the instructional day when students are in a [the] self-contained classroom or other special education setting;

(5) a statement regarding the personnel who will have access to video equipment or video recordings for purposes of operating and maintaining the equipment or recordings;

(6) a requirement that a campus continue to operate and maintain any video camera placed in a self-contained classroom or other special education setting for as long as the classroom or setting continues to satisfy the requirements in TEC, §29.022(a);

(7) a requirement that video cameras placed in a self-contained classroom or other special education setting be capable of recording video and audio of all areas of the classroom or setting, except that no video surveillance may be conducted of the inside of a bathroom or other area used for toileting or diapering a student or removing or changing a student's clothes;

(8) a statement that video recordings must be retained for at least six months after the date the video was recorded;

(9) a statement that the regular or continual monitoring of video is prohibited and that video recordings must not be used for teacher evaluation or monitoring or for any purpose other than the promotion of student safety;

(10) at the school district's or open-enrollment charter school's discretion, a requirement that campuses post a notice at the entrance of any self-contained classroom or other special education setting in which video cameras are placed stating that video and audio surveillance are conducted in the classroom or setting;

(11) the procedures for reporting a complaint alleging that an incident occurred in a self-contained classroom or other special education setting in which video surveillance under TEC, §29.022, and this section is conducted;

(12) the local grievance procedures for filing a complaint alleging violations of TEC, §29.022, and/or this section; and

(13) a statement that video recordings made under TEC, §29.022, and this section are confidential and a description of the limited circumstances under which the recordings may be viewed.

(h) Confidentiality of video recordings. A video recording made under TEC, §29.022, and this section is confidential and may only be viewed by the following individuals, to the extent not limited by the Family Educational Rights and Privacy Act of 1974 (FERPA) or other law:

(1) a staff member [or other school district or charter school employee] or a parent of a student involved in an incident described in

subsection (b)(9) of this section that is documented by a video recording for which a complaint has been reported to the district or charter school;

(2) appropriate Texas Department of Family and Protective Services personnel as part of an investigation under Texas Family Code, §261.406;

(3) a peace officer, school nurse, administrator trained in de-escalation and restraint techniques as provided by commissioner rule, or a human resources staff member designated by the school district's board of trustees or open-enrollment charter school's governing body in response to a complaint or an investigation of an incident described in subsection (b)(9) of this section; or

(4) appropriate Texas Education Agency or State Board for Educator Certification personnel or agents as part of an investigation.

(i) Child abuse and neglect reporting. If a person described in subsection (h)(3) or (4) of this section views a video recording and has cause to believe that the recording documents possible abuse or neglect of a child under Texas Family Code, Chapter 261, the person must submit a report to the Texas Department of Family and Protective Services or other authority in accordance with the local policy adopted under §61.1051 of this title (relating to Reporting Child Abuse and Neglect) and Texas Family Code, Chapter 261.

(j) Disciplinary actions and legal proceedings. If a person described in subsection (h)(2), (3), or (4) of this section views a video recording and believes that it documents a possible violation of school district, open-enrollment charter school, or campus policy, the person may allow access to the recording to appropriate legal and human resources personnel of the district or charter school to the extent not limited by FERPA or other law. A recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy may be used in a disciplinary action against district or charter school personnel and must be released in a legal proceeding at the request of a parent of the student involved in the incident documented by the recording. A recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy must be released for viewing by the district or charter school employee who is the subject of the disciplinary action at the request of the employee.

(k) Access rights. Subsections (i) and (j) of this section do not limit the access of a student's parent to an educational record of the student under FERPA or other law. To the extent any provisions in TEC, §29.022, and this section conflict with FERPA or other federal law, federal law prevails.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.350

The Comptroller of Public Accounts proposes new §3.350, concerning master recordings and broadcasts. This section is being proposed to implement Tax Code, §151.3185 (Property Used in the Production of Motion Pictures or Video or Audio Recordings and Broadcasts), as amended by House Bill 2507, 84th Legislature, 2015 (effective September 1, 2015), which provides an exemption from sales and use tax for certain taxable items used in the production of motion pictures, video and audio recordings, and broadcasts, including certain equipment used for digital television and digital audio broadcasting. In addition, §3.350 is being proposed to implement Tax Code, §151.3415 (Items Sold to or Used to Construct, Maintain, Expand, Improve, Equip, or Renovate Media Production Facilities at Media Production Locations; Report), which provides an exemption from sales and use tax for certain taxable items purchased by a qualified person for use in a qualified media production location.

The new section replaces repealed §3.309 of this title (relating to Electrical Transcriptions, Recording Studios, Producers) and repealed §3.350 of this title (relating to Motion Pictures). The comptroller repealed both of these sections in order to simplify the consolidation of related sections into a single section. See (27 TexReg 9386).

Subsection (a) provides definitions of words and phrases used in the new section. Paragraph (1) defines the term "audio recording." This definition is derived from the definition of "sound recording" in the United States Copyright Act, 17 U.S.C. §101.

Paragraph (2) defines the term "broadcast" in accordance with its ordinary meaning and expands the definition to include cable television. In other contexts, the term "broadcasting" may be limited to transmissions over frequencies that are available to the general public. But the legislature has clarified that for purposes of Tax Code, §151.3185, the term "broadcasting" also includes the "production of a broadcast by or for a cable program producer." The term "cable program producer" has more than one reasonable interpretation. The comptroller believes that the use of the term "cable television" in this section should be consistent with the definition of "cable television service" in Tax Code, §151.0033 ("Cable Television Service"), which covers the "distribution of video programming with or without the use of wires to subscribing or paying customers." As with the definition of "cable television service" in Tax Code, §151.0033, this definition includes the transmission of programming by means of subscription television services delivered via satellite.

Paragraph (3) provides that "C.F.R." stands for the Code of Federal Regulations.

Paragraph (4) defines the term "C.F.R.-compliant digital audio broadcast equipment" by reference to digital audio broadcast stations which provide broadcast services described by 47 C.F.R. §73.403 (Digital Audio Broadcasting Service Requirements) and §73.404 (Interim Hybrid IBOC DAB Operation).

Paragraph (5) defines the term "C.F.R.-compliant digital television transmission equipment" by reference to those stations required to comply with the television transmission standards in 47 C.F.R. §73.682(d) (Digital Broadcast Television Transmission Standard).

Paragraph (6) defines the term "distribute." This definition is derived from the corresponding dictionary definition in the American Heritage College Dictionary, Fourth Edition.

Paragraph (7) defines the term "exhibit." This definition is based on the use of the term "exhibition" in the United States Copyright Act, 17 U.S.C. §101, which refers to the public performance of a copyrighted work.

Paragraph (8) defines the term "license." This definition is derived from the corresponding dictionary definition in the American Heritage College Dictionary, Fourth Edition.

Paragraph (9) defines the term "live program" to identify the productions covered by Tax Code, §151.3185(a)(1)(B) and (a)(2)(B) that are not covered by Tax Code, §151.3185(a)(1)(A) and (a)(2)(A). Because Tax Code, §151.3185(a)(1)(A) and (a)(2)(A) cover pre-recorded programs, the only additional type of program covered by Tax Code, §151.3185(a)(1)(B) and (a)(2)(B) is a "live" program.

Paragraph (10) defines the term "master recording." This term is intended to encompass the statutory concept of "a motion picture or video or audio recording, a copy of which is sold or offered for ultimate sale, licensed, distributed, broadcast, or otherwise exhibited." See Tax Code, §151.3185(a)(1)(A), (2)(A). The definition also incorporates portions of the definition of the term "broadcasting" provided in 47 U.S.C. §153(7) (Definitions). In addition, the definition includes the guidance provided in STAR Accession No. 200307027L (July 23, 2003).

Paragraph (11) defines the term "media production facility" and is assigned the same meaning as in Government Code, §485A.002(1) (Definitions).

Paragraph (12) defines the term "motion picture recording." This definition is derived from the definition of "motion picture" in the United States Copyright Act, 17 U.S.C. §101.

Paragraph (13) defines the term "moving image project" and is assigned the same meaning as in Government Code, §485A.002(3).

Paragraph (14) defines the term "producer," which is used only once in Tax Code, §151.3185(e) to identify the person eligible to claim an exemption on the sale of a motion picture, video, or audio master. Logically, the "producer" must be the original owner of the rights that can be sold.

Paragraph (15) defines the term "qualified media production location" and has the same meaning as in Government Code, §485A.002(6). Because the Office of the Governor does not currently have a Music, Film, Television, and Multimedia Office, a reference to the Texas Film Commission is used in place of that office.

Paragraph (16) defines the term "qualified person" and has the same meaning as in Government Code, §485A.002(7).

Paragraph (17) defines the term "Texas Film Commission" and is provided to reference the division of the Office of the Governor of Texas that is assigned to administer and monitor the implementation of Government Code, Chapter 485A (Media Production Development Zones).

Paragraph (18) defines the term "video game." This definition is derived from guidance provided in STAR Accession No. 201405957L (May 28, 2014).

Paragraph (19) defines the term "video recording." This definition is derived from the definition of "audiovisual works" in the United States Copyright Act, 17 U.S.C. §101.

Subsection (b) addresses the sale and license of master recordings. Paragraph (1) implements Tax Code, §151.3185(e), which exempts the sale of a master recording by its producer. Paragraph (2) addresses sales of copies of a master recording. Paragraph (3) explains that sales and use tax is not due on the sale of a license to broadcast, distribute, or exhibit a master recording.

Subsection (c) lists the exemptions from Texas sales and use tax on the purchase or use of taxable items used in the production of master recordings and live programs, which are listed in Tax Code, §151.3185(a) and (b).

Subsection (d) identifies certain items of tangible personal property and certain taxable services that do not qualify for exemption under Tax Code, §151.3185. Paragraph (1) implements Tax Code, §151.3185(c). This paragraph lists taxable items that are subject to sales and use tax even when used in the production of master recordings or live programs. Paragraph (2) provides additional examples. Paragraph (3) implements Tax Code, §151.3185(d).

Subsection (e) explains that motor vehicle and trailers are exempt from sales and use tax under Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) because they are subject to motor vehicle tax. See Tax Code, §151.308 (Items Taxed by Other Law). Although transportation equipment is excluded from the exemption in this section, purchases and rentals of motor vehicles are not subject to the sales and use tax.

Subsection (f) establishes exemptions available for the purchase of C.F.R.-compliant digital television transmission equipment pursuant to Tax Code, §151.3185(f). The Tax Code refers to entities "to which 47 C.F.R. Section 73.624(b) applies." Because 47 C.F.R. §73.624(b) applies to digital television broadcast station licensees and permittees, that is the terminology used in subsection (f). This subsection memorializes guidance previously provided in STAR Accession No. 200212663L (December 30, 2002) (partially superseded on other grounds). Paragraph (1) specifies when C.F.R.-compliant digital television transmission equipment is exempt. Paragraph (2) explains that qualifying equipment may be used for both analog and digital television transmission. Paragraph (3) memorializes prior comptroller guidance providing that an Advanced Television Systems Committee (ATSC) encoder is exempt. Paragraph (4) explains why equipment purchased by a cable or satellite company is not exempt.

Subsection (g) establishes exemptions available to In-band On-Channel (IBOC) digital audio broadcast stations that provide broadcast services described in 47 C.F.R. §73.403 or §73.404. This subsection implements House Bill 2507, which added subsection (g) to Tax Code, §151.3185. Paragraph (1) specifies when C.F.R.-compliant digital audio broadcast equipment is exempt. Paragraph (2) specifies that equipment used to transmit both over-the-air digital audio programming at no direct charge to listeners and over-the-air digital audio programming for a fee to listeners is exempt. Broadcast stations using IBOC are required by 47 C.F.R. §73.403 to transmit at least one over-the-air digital audio programming stream at no direct charge

to listeners. Paragraph (3) specifies when equipment does not qualify for the exemption.

Subsection (h) describes the exemptions available for the repair and maintenance of items purchased tax-free pursuant to the exemptions in subsections (c), (f), and (g). This subsection implements Tax Code, §151.3111 (Services on Certain Exempted Personal Property). The exemption in this section extends to the repair and maintenance of tangible personal property. Since the statute does not provide an exemption for real property, the repair and maintenance of tangible personal property incorporated into real property that has become real property is subject to sales and use tax pursuant to Tax Code, §151.0101(a)(13).

Subsection (i) addresses exemptions available for natural gas and electricity used in the production of a master recording. Paragraph (1) implements Tax Code, §151.317(a)(2). The statutory language limits the exemption to use of gas and electricity by a person processing tangible personal property for sale as tangible personal property. Consequently, it does not cover the production of live programs. Paragraph (2) addresses the use of natural gas and electricity for a purpose that is not exempt. Examples of non-exempt use are provided. Paragraph (3) explains the requirement for a predominant use study to establish eligibility for the exemption when natural gas and electricity is used in exempt and non-exempt ways and measured by a single meter.

Subsection (j) establishes exemptions available for qualified media production locations pursuant to Tax Code, §151.3415. Paragraph (1) identifies persons eligible for the exemption.

Paragraph (2) provides that a taxable item is exempt based on its purpose and use. Subparagraphs (A), (B), and (C) explain how the equipment must be used for the exemption to apply. This paragraph implements Tax Code, §151.3415(b).

Paragraph (3) addresses the taxability of repair and maintenance services performed at a media production facility located in a qualified media production location.

Paragraph (4) explains that the exemption is temporary. This paragraph implements the statement in Tax Code, §151.3415(b) that the exemption "is for a maximum of two years." As explained in subparagraph (A), the exemption begins on the date that both the qualified person and qualified media production location are certified by the Texas Film Commission, pursuant to Government Code, §485A.201. Subparagraph (B) explains that the exemption ends on the earlier of the date on which the qualified person's certification expires pursuant to Government Code, §485A.203; the qualified media production location's certification expires pursuant to Government Code, §485A.111; the qualified person's certification is revoked pursuant to Government Code, §485A.204; or the qualified media production location's certification is revoked pursuant to Government Code, §485A.112. Subparagraph (C) provides that the exemption is available for a maximum of two years from the date of certification of the qualified person or the qualified media production location.

Paragraph (5) provides that each qualified person must complete an annual report as required by Tax Code, §151.3415. Subparagraph (A) identifies the content which must be included in the report. Subparagraph (B) establishes the annual report periods. Subparagraph (C) provides a date when the reports are due to the comptroller's office. For ease of administration, it was determined that all reports due by qualified persons shall be due on the same date. September 30 was selected as a due date as according to Government Code, §485A.111(c), a media produc-

tion development zone approval and qualified media production location designation, as long as it has not been previously removed by the Texas Film Commission, remains in effect until September 1 of the final year of the approval or designation.

Subsection (k) explains that a purchaser may issue an exemption certificate in lieu of paying sales tax to claim the exemption. A cross-reference to §3.287 of this title (relating to Exemption Certificates) is provided for additional information.

Subsection (l) addresses taxability of items purchased tax-free pursuant to the exemptions available in this section and used in a taxable manner. Paragraph (1) explains that sales or use tax is due when taxable items purchased tax-free under the exemptions in this section are used in a way that does not qualify for the exemption. Cross-references to §3.287 of this title and to Tax Code, §151.155 (Exemption Certificate) are provided for guidance in calculating the tax due on the non-exempt use of an item purchased tax-free. Paragraph (2) states that records must be maintained to document when an item purchased tax-free is used in a taxable manner and to document the payment of sales or use tax due on such use.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule to current statutes and current agency policy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new section is proposed under Tax Code §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of provisions of Tax Code, Title 2 (State Taxes).

The new section implements Tax Code, §151.3185 (Property Used in the Production of Motion Pictures or Video or Audio Recordings and Broadcasts) and Tax Code, §151.3415 (Items Sold to or Used to Construct, Maintain, Expand, Improve, Equip, or Renovate Media Production Facilities at Media Production Locations; Report).

§3.350. Master Recordings and Broadcasts.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Audio recording--The fixation of signals representing a series of musical, spoken, or other sounds, but not including motion pictures, by any method now known or later developed.

(2) Broadcast--For the purposes of this section only, the dissemination of audio signals, video signals, or a combination of both audio and video signals in the form of radio or television programming to the public over the segment of the radio spectrum used for broad-

casting, and the exhibition of video programming with or without the use of wires to subscribing or paying customers.

(3) C.F.R.--Code of Federal Regulations.

(4) C.F.R.--compliant digital audio broadcast equipment--Tangible personal property that is sold to the permittee or licensee of an AM or FM station that commences interim hybrid In-band On-Channel (IBOC) digital audio broadcast (DAB) pursuant to 47 C.F.R. §73.404(a) (Interim Hybrid IBOC DAB Operation), if the tangible personal property is necessary for the licensee or permittee to provide the broadcast services described by 47 C.F.R. §73.403 (Digital Audio Broadcasting Service Requirements) or 47 C.F.R. §73.404.

(5) C.F.R.--compliant digital television transmission equipment--Tangible personal property that is sold to a digital television broadcast station permittee or licensee to which 47 C.F.R. §73.624(b) applies, if the tangible personal property is necessary for the permittee or licensee to comply with 47 C.F.R. §73.682(d) (Digital Broadcast Television Transmission Standard).

(6) Distribute--For purposes of this section only, to supply copies of a master recording to persons who will sell, license, further distribute, broadcast, or exhibit copies of the master recording. For example, copies of a motion picture are distributed to movie theaters which exhibit the motion pictures to the public for consideration.

(7) Exhibit--

(A) To play or perform a master recording or live program at a place open to the public or at any place where a substantial number of persons, outside of a normal circle of a family and its social acquaintances, is gathered; or

(B) to transmit or otherwise communicate a performance of the master recording or live program to the public by any means, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same or different times.

(8) License--To authorize or otherwise grant legal permission to use a copy of a master recording in a limited manner, for a limited purpose, or both. For example, the owner of a master audio recording may license a copy of the master audio recording for use as part of an advertising campaign in a specific geographic area for a specified period of time.

(9) Live program--Radio or television content that is not pre-recorded and that is broadcast by a producer of cable programs or a radio or television station licensed by the Federal Communications Commission.

(10) Master recording--The principal media on which images, sound, or a combination of images and sound are first fixed, and from which copies are intended to be reproduced for the purpose of obtaining consideration from the ultimate sale, license, distribution, broadcast, or exhibition of the copies. A master recording may be an audio recording, motion picture recording, video recording, or a combination of these.

(A) Master recordings include feature films, television programs, television commercials, corporate films, infomercials, recordings of live performances, musical albums, and other projects that are intended for commercial distribution, even if commercial distribution is very limited, such as the distribution of training or industrial films.

(B) Master recordings do not include training videos for in-house use, student films, wedding videos, recordings exhibited on

social media, and other recordings not intended to be copied for commercial distribution or commercial exhibition.

(C) A master recording may contain interactive software that allows a viewer to locate, see, or hear a segment of the master recording without having to see or hear the master recording in full.

(D) A master recording does not include video games even if the games contain recorded audio or visual sequences.

(11) Media production facility--A structure, building, or room used for the specific purpose of creating a moving image project. The term includes but is not limited to:

(A) a soundstage and scoring stage;

(B) a production office;

(C) an editing facility, an animation production facility, and a video game production facility;

(D) a storage and construction space; and

(E) a sound recording studio and motion capture studio.

(12) Motion picture recording--A series of related images stored in any method now known or later developed which, when shown in succession, together with any accompanying sounds, impart an impression of motion.

(13) Moving image project--A visual and sound production, including a film, television program, national or multistate commercial, or digital interactive media production. The term does not include a production that is obscene, as defined by Penal Code, §43.21 (Definitions).

(14) Producer--A person who owns the original rights to a master recording.

(15) Qualified media production location--A location in a media production zone that has been designated by the Texas Film Commission as a qualified media production location in accordance with Government Code, Chapter 485A (Media Production Development Zones).

(16) Qualified person--A person certified by the Texas Film Commission as a qualified person under Government Code, §485A.201 (Qualified person).

(17) Texas Film Commission--The division of the Office of the Governor of Texas, by whatever name called, that is assigned to administer and monitor the implementation of the Media Production Development Zone Act as provided in Government Code, Chapter 485A.

(18) Video game--An electronic game in which a player controls images on a video screen, television, or computer monitor.

(19) Video recording--A series of related images intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with any accompanying sounds, stored in any method now known or later developed.

(b) Master recordings.

(1) The sale of a master recording by the producer of the master recording is exempt from sales and use tax under this section.

(2) The sale of a copy of a master recording is taxable under Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) as the sale of tangible personal property.

(3) A license of all or part of the rights to a master recording is not subject to tax under Tax Code, Chapter 151.

(c) Exempt items used in production.

(1) Except as provided in subsections (d) and (e) of this section, sales and use tax is not due on the purchase or use of the following items:

(A) tangible personal property that will become an ingredient or component part of a master recording or a live program; and

(B) tangible personal property or taxable services that are necessary or essential to, and used or consumed in or during, the production of a master recording or live program.

(i) Tangible personal property that is leased or rented is eligible for exemption described in this subparagraph regardless of the length of the lease or rental.

(ii) Taxable items used in pre-production activities do not qualify for the exemption under this section because they are not used or consumed in or during the production of the master recording or live program. Examples of equipment used in pre-production include equipment used in gathering news prior to the beginning of a television production and computers and software used in authoring or editing a script.

(2) The exemption in this subsection includes, but is not limited to:

(A) cameras, film, and film developing chemicals that are necessary and essential to and used or consumed in the production of a master recording or a live program;

(B) lights, props, sets, teleprompters, microphones, digital equipment, special effects equipment and supplies, and other equipment that is necessary and essential to and used or consumed directly in the production of a master recording or a live program; and

(C) audio or video routing switchers located in a production or recording studio that are necessary and essential to and used or consumed directly in the production of a master recording or a live program.

(d) Nonexempt items used in production.

(1) The following items do not qualify for exemption under this section even when used in the production of a master recording or a live program:

(A) office equipment or supplies;

(B) maintenance or janitorial equipment or supplies;

(C) machinery, equipment, or supplies used in sales or transportation activities;

(D) machinery, equipment, or supplies used in distribution activities, unless otherwise exempted by this section;

(E) taxable items that are used incidentally in the production of a master recording or a live program;

(F) telecommunications equipment and services;

(G) transmission equipment, other than qualifying C.F.R.-compliant digital television transmission equipment and qualifying C.F.R.-compliant digital audio broadcast equipment;

(H) security services;

(I) motor vehicle parking services; and

(J) food ready for immediate consumption.

(2) Examples of nonexempt items used in production include, but are not limited to: tents for catering or staging areas; office furniture; crew jackets; flowers for dressing rooms; catering or other food ready for immediate consumption; bodyguard services; script typing; landscape maintenance; director's chairs; gas cans; ladders; shipping cases; battery chargers; mobile offices; pagers, cellular phones, and other communication equipment (except those used exclusively on the set); telecommunications services such as mobile phone service; waste removal (including waste that will be recycled); wardrobe racks; and alcoholic and non-alcoholic beverages.

(3) Taxable items are not exempt under this section when used in the production of a master recording for broadcast, or in the production of a live program for broadcast, if the master recording or live program is not intended to be broadcast to either the general public or to cable television service subscribers or paying customers.

(e) Transportation equipment. Motor vehicles, including trailers and semitrailers, are subject to motor vehicle sales tax and are exempt from sales and use tax imposed by Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax). For more information on the taxes due on motor vehicles, see Subchapter F, of this chapter (Motor Vehicle Sales Tax). Other types of machinery, equipment, or supplies used in transportation activities, such as helicopters, do not qualify for exemption from sales and use tax under this section.

(f) C.F.R.-compliant digital television transmission.

(1) The purchase of C.F.R.-compliant digital television transmission equipment by a digital television broadcast station permittee or licensee is exempt from sales and use tax. The exemption applies whether the equipment is used for television transmission in high or standard definition.

(2) Equipment that may be used for both analog and digital television transmission is exempt if it is necessary to comply with 47 C.F.R. §73.682(d) (TV transmission standards). Transmission equipment that is not necessary for digital television transmission, or that can be used only for analog transmission, is not exempt under this section.

(3) An Advanced Television Systems Committee (ATSC) encoder is exempt.

(4) Entities that are not subject to the relevant provisions of 47 C.F.R. Part 73 (Radio Broadcast Services), such as cable and satellite television providers, may not make exempt purchases under this subsection.

(g) C.F.R.-compliant digital audio broadcast equipment.

(1) The purchase of C.F.R.-compliant digital audio broadcast equipment by a radio broadcast station permittee or licensee is exempt from sales and use tax.

(2) Equipment used to transmit both over-the-air digital audio programming at no direct charge to listeners and over-the-air digital audio programming for a fee to listeners is exempt.

(3) Equipment used solely to transmit over-the-air digital audio programming for a fee to listeners is not exempt.

(h) Exemptions for repair and maintenance. Repair or maintenance of tangible personal property that is exempted under this section is also exempt, unless the tangible personal property is installed into realty and has lost its identity as tangible personal property. For information on the repair or maintenance of items that become real property after installation, see §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance). For information on new construction that incorporates

materials exempted under this section see §3.291 of this title (relating to Contractors).

(i) Exemptions for natural gas and electricity.

(1) Natural gas and electricity used in the production of a master recording are exempt.

(2) Natural gas and electricity are taxable when used for a non-exempt purpose. For example, an entertainment venue provides beverages to customers during live performances. The venue also makes master recordings of the live performances. The electricity used for the beverage refrigeration equipment is not exempt; however the electricity used to power the recording equipment is exempt under this subsection. Non-exempt purposes include, but are not limited to, the following:

(A) administrative or office operations;

(B) marketing;

(C) transportation; or

(D) warehousing.

(3) A predominant use study is required to determine the exempt and non-exempt use of natural gas or electricity measured by a single meter. See §3.295 of this title (relating to Natural Gas and Electricity).

(j) Exemptions for qualified media production locations.

(1) The exemption in this subsection is available only to a qualified person acquiring a taxable item for use at a qualified media production location. Information on becoming certified as a qualified person or a qualified media production location is available through the Texas Film Commission.

(2) The sale, lease, or rental of a taxable item, including nonresidential repair or remodeling services, is exempt if the item is used:

(A) for the construction, maintenance, expansion, improvement, or renovation of a media production facility at a qualified media production location;

(B) to equip a media production facility at a qualified media production location; or

(C) for the renovation of a building or facility at a qualified media production location that is to be used exclusively as a media production facility.

(3) Repair or maintenance of tangible personal property used to equip a media production facility at a qualified media production location is exempt during the exemption period described in paragraph (4) of this subsection.

(4) The exemption in this subsection is temporary.

(A) The exemption begins when both the qualified person and related qualified media production location are certified by the Texas Film Commission.

(B) The exemption ends on the earlier of:

(i) the expiration date identified in the approval documents issued for the certification of the qualified media production location;

(ii) the expiration date identified in the approval documents issued for the certification of the qualified person; or

(iii) the date the certification of either the qualified person or the qualified media production location is revoked.

(C) In no event shall the exemption period extend for more than two years from the earlier of the date of certification of the qualified person or the date of certification of the related qualified media production location.

(5) Reports required. Each qualified person is required to submit a report for each qualified media production location.

(A) The report must be in the form and manner prescribed by the comptroller and must contain the following information:

(i) the name, address, and comptroller-issued taxpayer identification number of the qualified person;

(ii) the name, address, and, if applicable, comptroller-issued taxpayer identification number of the qualified media production location;

(iii) a description of the project or activity conducted by the qualified person at the qualified media production location;

(iv) the date of certification and the expiration date of the certification of the qualified person and related qualified media production zone as identified in the approval documents issued by the Texas Film Commission;

(v) a statement that no items were purchased tax-free under the exemption in this subsection during the period covered by the report, if applicable; or for each item purchased tax-free under this exemption the following information:

(I) the name, address, and comptroller-issued taxpayer identification number of the seller;

(II) the date of purchase;

(III) the name or description of the item, or like items;

(IV) the purpose or brief explanation of how the item, or like items, were, or are to be, used;

(V) the sales price of the item;

(VI) the lease or rental terms, if applicable; and

(VII) the current location of the item.

(B) Report periods. The initial report covers the time period from the date of certification of the qualified person and the related qualified media production location through August 31. For example, if the qualified person and the related qualified media production location received certification on April 1, the initial report period is April 1 through August 31. Subsequent reports cover the time period from September 1 through August 31 of the following year.

(C) The report is due September 30 each year. If the due date falls on a Saturday, Sunday, or legal holiday, the report will be due the next business day.

(k) Exemption certificates. The exemptions under this section may be claimed by providing the seller with a properly completed exemption certificate at the time of purchase in lieu of paying sales and use tax. See §3.287 of this title (relating to Exemption Certificates).

(l) Divergent use.

(1) When a taxable item purchased tax-free under a properly completed exemption certificate is used in a taxable manner, sales and use tax is due. The tax is calculated based on the fair market rental value of the tangible personal property for the period of time used in the taxable manner. See §3.287 of this title and Tax Code, §151.155 (Exemption Certificate).

(2) Records must be maintained to document the taxable use of an item purchased tax-free, and the payment of sales and use tax due on such use.

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

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

TRD-201605797

Don Neal

Chief Deputy General Counsel

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 403. CRIMINAL CONVICTIONS AND ELIGIBILITY FOR CERTIFICATION

37 TAC §403.5

The Texas Commission on Fire Protection (the commission) proposes amendments to Chapter 403, Criminal Convictions and Eligibility for Certification, concerning, §403.5, Access to Criminal History Record Information.

The purpose of the proposed amendments is to better define the procedures for submittal of a request for early review of information by an individual for certification.

Tim Rutland, Executive Director, has determined that for each year of the first five year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments.

Mr. Rutland has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is that the new language will clarify the responsibilities of both the individual submitting the review request as well as that of the agency. There will be no effect on micro or small businesses or persons required to comply with the amendments as proposed.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; §419.032 which allows the commission to appoint fire protection personnel; and §419.0325 which allows the commission to obtain criminal history record information.

The proposed amendments implement Texas Government Code, Chapter 419, §419.008, §419.032 and §419.0325.

§403.5. *Access to Criminal History Record Information.*

(a) Criminal history record. The commission is entitled to obtain criminal history record information maintained by the Department of Public Safety, or another law enforcement agency to investigate the eligibility of a person applying to the commission for or holding a certificate.

(b) Confidentiality of information. All information received under this section is confidential and may not be released to any person outside the agency except in the following instances:

- (1) a court order;
- (2) with written consent of the person being investigated;
- (3) in a criminal proceeding; or
- (4) in a hearing conducted under the authority of the commission.

(c) Early review. A fire department that employs a person regulated by the commission, a person seeking to apply for a beginning position with a regulated entity, a volunteer fire department, or an individual participating in the commission certification program may seek the early review under this chapter of the person's present fitness to be certified. Prior to completing the requirements for certification, the individual may request such a review in writing by following the required procedure. [submitting the required forms and fee(s)-] A decision by the commission based on an early review does not bind the commission if there is a change in circumstances. The following pertains to early reviews:

(1) The commission will complete its review and notify the requestor in writing concerning potential eligibility or ineligibility within 90 days following receipt of all required and necessary information for the review.

(2) A notification by the commission regarding the results of an early review is not a guarantee of certification, admission to any training program, or employment with a local government.

(3) A fee assessed by the commission for conducting an early review will be in an amount sufficient to cover the cost to conduct the review process, as provided in §437.19 of this title (relating to Early Review Fees).

(4) An early review request will be considered incomplete until the requestor submits all required and necessary information. Early review requests that remain incomplete for 90 days following receipt of the initial request will expire. If the request expires and an early review is still desired, a new request and fee must be submitted.

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

Filed with the Office of the Secretary of State on November 8, 2016.

TRD-201605753
Tim Rutland
Executive Director

Texas Commission on Fire Protection
Earliest possible date of adoption: December 25, 2016
For further information, please call: (512) 936-3812



CHAPTER 437. FEES

37 TAC §437.19

The Texas Commission on Fire Protection (the commission) proposes a new section to Chapter 437, Fees, concerning, §437.19, Early Review Fees.

The purpose of the proposed new section is to establish a fee for conducting an early review of an individual's criminal history to determine eligibility for certification which can devote a notable amount of staff time depending upon an individual's record.

Tim Rutland, Executive Director, has determined that for each year of the first five year period the proposed new section is in effect, there will be no significant fiscal impact to state government or local governments.

Mr. Rutland has also determined that for each year of the first five years the proposed new section is in effect, the public benefit from the passage is that individuals will know in advance if they are eligible for certification before enrolling in a training program or applying for certification. There will be no effect on micro or small businesses or persons required to comply with the proposal.

Comments regarding the proposal may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

The new section is proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; §419.032 which allows the commission to appoint fire protection personnel; and §419.0325 which allows the commission to obtain criminal history record information.

The proposed new section implements Texas Government Code, Chapter 419, §§419.008, 419.032 and 419.0325.

§437.19. *Early Review Fees.*

A non-refundable fee of \$75 will be charged for each early review conducted by the commission for the purpose of determining the eligibility of a person to be certified by the commission based upon a review of their criminal history.

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

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Tim Rutland
Executive Director
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 806. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

The Commission proposes the repeal of the following sections of Chapter 806, relating to Purchases of Products and Services from People with Disabilities, as follows:

General, §806.1

Definitions, §806.2

Organization, §806.3

Ethical Standards, §806.4

Open Meetings; Public Testimony and Access, §806.5

Certification and Recertification of Community Rehabilitation Programs, §806.6

Contracting with Central Nonprofit Agencies, §806.7

Product Specifications and Exceptions, §806.8

Determination of Fair Market Value, §806.9

Consumer Information; Complaints and Resolution, §806.10

Records, §806.11

Performance Standards for a Central Nonprofit Agency, §806.12

Recognition and Approval of Community Rehabilitation Program Products and Services, §806.13

The Commission proposes new sections to Chapter 806, relating to Purchases of Products and Services from People with Disabilities, as follows:

Subchapter A. General Provisions Regarding Purchases of Products and Services from People with Disabilities, §806.1 and §806.2

Subchapter B. Advisory Committee Responsibilities, Meeting Guidelines, §806.21 and §806.22

Subchapter C. Central Nonprofit Agencies, §806.31 and §806.32

Subchapter D. Community Rehabilitation Programs, §806.41

Subchapter E. Products and Services, §§806.51 - 806.53

Subchapter F. Complaints, Vendor Protests, Resolutions, §806.61 and §806.62

Subchapter G. Disclosure of Records, §806.71

Subchapter H. Reports; Plans, §806.81 and §806.82

Subchapter I. Political Subdivisions, §806.91 and §806.92

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the amendments to the Chapter 806 rules is to comply with the requirements of Senate Bill (SB) 212, enacted by

the 84th Texas Legislature, Regular Session (2015), which abolished the Texas Council on Purchasing from People with Disabilities (Council). Section 29(a) of SB 212 §29(a) transferred all former Council powers and duties to the Texas Workforce Commission (Agency) to administer the Purchasing from People with Disabilities (PPD) program effective September 1, 2015. Per SB 212, the rules of the Texas Comptroller of Public Accounts (comptroller) were transferred to the Agency and placed in 40 Texas Administrative Code Chapter 806.

SB 212's primary impact was the abolishment of the Council. The Council was replaced with an advisory committee appointed by the Commission, which serves in a different capacity.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

The Commission proposes new Subchapter A, General Provisions Regarding Purchases of Products and Services from People with Disabilities, as follows:

§806.1. General

New §806.1 establishes the purpose of the Purchases of Products and Services from People with Disabilities state use program and names the Agency as the administering agency. The Commission proposes to modify §806.1 to remove references to "the Texas Council on Purchasing from People with Disabilities (TCPPD)" and replace them with "Commission," pursuant to SB 212.

§806.2. Definitions

New §806.2(1) defines "Appreciable contribution." The Agency proposes to replace the term "persons" with "individuals" pursuant to SB 212, to align with statute and the Agency's rule structure.

New §806.2(2) adds a new definition for "Advisory Committee" pursuant to SB 212, to align with statute and the Agency's rule structure.

New §806.2(3) defines "Central nonprofit agency." Based on a review of the Council's rules transferred from the Comptroller, the Agency retains this definition, replaces the term "Council" with "Agency" per SB 212, and renumbers accordingly.

New §806.2(4) defines "Chapter 122." Based on a review of the Council's rules transferred from the Comptroller, the Agency retains this definition and renumbers accordingly.

New §806.2(5) defines "Community rehabilitation program." Based on a review of the Council's rules transferred from the Comptroller, the Agency modifies this definition per SB 212 and renumbers accordingly.

The previous §806.2(6) definition of "The Texas Council on Purchasing from People with Disabilities" has been removed, as it is no longer applicable to this chapter.

New §806.2(6) defines "Comptroller." Based on a review of the Council's rules transferred from the Comptroller, the Agency retains this definition and renumbers accordingly.

New §806.2(10) defines "State use program." Based on a review of the Council's rules transferred from the Comptroller, the Agency retains this definition, replaces the term "Council" with "Agency" and the term "persons" with "individuals" per SB 212.

New §806.2(11) defines "Value added." Based on a review of the Council's rules transferred from the Comptroller, the Agency retains this definition and replaces the term "persons" with "individuals" per SB 212.

Subchapter B. ADVISORY COMMITTEE RESPONSIBILITIES AND MEETING GUIDELINES

The Commission proposes new Subchapter B, Advisory Committee Responsibilities, Meeting Guidelines, as follows:

§806.21. Advisory Committee

New §806.21 provides language establishing the newly formed advisory committee, states the purpose of the advisory committee, and sets forth the responsibilities of the Agency, committee, and Commission, pursuant to SB 212.

§806.22. Open Meetings: Public Testimony and Access

New §806.22 sets forth the requirements of the Committee to comply with the Open Meetings Law, Open Meetings Act, and Texas Government Code, Chapter 2001.

Subchapter C. CENTRAL NONPROFIT AGENCIES

The Commission proposes new Subchapter C, Central Nonprofit Agencies, as follows:

§806.31. Contracting with Central Nonprofit Agencies

New §806.31 sets forth the contract requirements and responsibilities of the Agency, Commission, and CNAs.

§806.32. Performance Standards and Goals for a Central Nonprofit Agency

New §806.32 sets forth the performance standards, goals, and requirements of CNAs.

Subchapter D. COMMUNITY REHABILITATION PROGRAMS

The Commission proposes new Subchapter D, Community Rehabilitation Programs, as follows:

§806.41. Certification and Recertification of Community Rehabilitation Programs

New §806.41 sets forth the criteria and requirements the Commission and Agency will use to certify and recertify CRPs.

Subchapter E. PRODUCTS AND SERVICES

The Commission proposes new Subchapter E, Products and Services, as follows:

§806.51. Product Specifications and Exceptions

New §806.51 provides language that products must meet certain specifications in order to be available for purchase by state agencies under Texas Human Resources Code §122.014 and §122.016.

§806.52. Determination of Fair Market Value

New §806.52 provides language that products and services are required to be at a price determined to be the fair market price under Texas Human Resources Code §122.007 and §122.015.

§806.53. Recognition and Approval of Community Rehabilitation Program Products and Services

New §806.53 sets forth the criteria and requirements the Agency will use to approve products and services to be available for purchase.

Subchapter F. COMPLAINTS, PROTESTS, RESOLUTIONS

The Commission proposes new Subchapter F, Complaints, Vendor Protests, Resolutions, as follows:

§806.61. Consumer Information; Complaints and Resolution

New §806.61 sets forth the process for filing complaints and duties of the Agency to resolve complaints.

§806.62. Vendor Protests.

New §806.62 sets forth the process for disputing a solicitation or award of a contract and duties of the Agency to resolve protests.

Subchapter G. DISCLOSURE OF RECORDS

The Commission proposes new Subchapter G, Disclosure of Records, as follows:

§806.71. Records

New §806.71 sets forth the requirements and duties of the Agency to handle records.

Subchapter H. Reports; Plans

The Commission proposes new Subchapter H, Reports; Plans, as follows:

§806.81. Annual Financial Report

New §806.81 sets forth the requirement of the Agency to prepare an annual financial report and file with the governor and the presiding officer of each house of the legislature under Texas Human Resources Code §122.022.

§806.82. Strategic Plan: Final Operating Plan

New §806.82 sets forth the requirement for the Agency to prepare a strategic plan and a final operating plan relating to the Agency's and Commission's activities under this chapter, as required by Texas Government Code, Chapter 2054, Subchapter E under Texas Human Resources Code §122.024.

Subchapter I. Political Subdivisions

The Commission proposes new Subchapter I, Political Subdivisions, as follows:

§806.91. Procurement for Political Subdivisions

New §806.91 sets forth the requirement for political subdivisions to follow procurement rules as required by Texas Human Resources Code §122.017, relating to procurement for political subdivisions.

§806.92. Political Subdivisions Excluded

New §806.92 sets forth the requirement of excluded political subdivisions to follow procurement rules as required by Texas Human Resources Code §122.018, relating to political subdivisions excluded.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses.

Doyle Fuchs, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Reagan Miller, Deputy Director, Workforce Solutions, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to ensure state agencies purchase products and services through businesses that employ people with disabilities.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on June 30, 2016. The Commission also conducted a conference call with Board executive directors and Board staff on July 8, 2016, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. Comments must be received or postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

40 TAC §§806.1 - 806.13

The rules are repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.1. *General.*

§806.2. *Definitions.*

§806.3. *Organization.*

§806.4. *Ethical Standards.*

§806.5. *Open Meetings; Public Testimony and Access.*

§806.6. *Certification and Recertification of Community Rehabilitation Programs.*

§806.7. *Contracting with Central Nonprofit Agencies.*

§806.8. *Product Specifications and Exceptions.*

§806.9. *Determination of Fair Market Value.*

§806.10. *Consumer Information; Complaints and Resolution.*

§806.11. *Records.*

§806.12. *Performance Standards for a Central Nonprofit Agency.*

§806.13. *Recognition and Approval of Community Rehabilitation Program Products and Services.*

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

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Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

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For further information, please call: (512) 475-0829



SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §806.1, §806.2

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.1. *General.*

The Texas Workforce Commission is responsible for fulfilling the purpose of Chapter 122 of the Texas Human Resources Code, which is to:

(1) further the state's policy of encouraging and assisting individuals with disabilities to achieve maximum personal independence by engaging in useful productive employment activities; and

(2) provide state agencies, departments, and institutions and political subdivisions of the state with a method for achieving conformity with requirements of nondiscrimination and affirmative action in employment matters related to individuals with disabilities.

§806.2. *Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. "Agency" and "Commission" are defined in §800.2 of this title, relating to Definitions.

(1) Appreciable contribution--The term used to refer to the substantial work effort contributed by individuals with disabilities in the reforming of raw materials, assembly of components or packaging of bulk products in more saleable quantities, by which value is added into the final product offered for sale.

(2) Advisory committee--Advisory committee established by the Commission as described in Texas Human Resources Code §122.0057.

(3) Central nonprofit agency (CNA)--An agency designated as a central nonprofit agency under contract with the Agency pursuant to Texas Human Resources Code §122.019.

(4) Chapter 122--Chapter 122 of the Texas Human Resources Code, relating to Purchasing from People with Disabilities.

(5) Community rehabilitation program (CRP)--A government or nonprofit private program operated under criteria established by the Commission and under which individuals with severe disabilities produce products or perform services for compensation.

(6) Comptroller--The Comptroller of Public Accounts.

(7) Direct labor--All work required for preparation, processing, and packaging of a product, or work directly relating to the performance of a service, except supervision, administration, inspection, or shipping products.

(8) Disability--A mental or physical impairment, including blindness that impedes a person who is seeking, entering, or maintaining gainful employment.

(9) Exception--Any product or service approved for the state use program purchased from a vendor other than a CRP because the state use product or service does not meet the applicable requirements as to quantity, quality, delivery, life cycle costs, and testing and inspection requirements pursuant to Texas Government Code §2155.138 and §2155.069 or as described in Texas Human Resources Code §122.014 and §122.016.

(10) State use program--The statutorily authorized mandate requiring state agencies to purchase, on a noncompetitive basis, the products made and services performed by individuals with disabilities, which have been approved by the Agency, pursuant to Texas Human Resources Code, Chapter 122 and which also meet the requirements of Texas Government Code, §2155.138 and §2155.069. This program also makes approved products and services available to be purchased on a noncompetitive basis by any political subdivision of the state.

(11) Value added--The labor of individuals with disabilities applied to raw materials, components, goods purchased in bulk form resulting in a change in the composition or marketability of component materials, packaging operations, and/or the servicing tasks associated with a product. Pass-throughs are not allowed; therefore, solely affixing a packaging label to a commodity does not qualify.

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

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Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

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For further information, please call: (512) 475-0829



SUBCHAPTER B. ADVISORY COMMITTEE RESPONSIBILITIES, MEETING GUIDELINES

40 TAC §806.21, §806.22

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.21. Advisory Committee.

(a) The advisory committee (committee), as described in Texas Human Resources Code §122.0057, shall assist the Commission in establishing:

(1) performance goals for the program administered under this chapter; and

(2) criteria for certifying a CRP for participation in the program administered under this chapter.

(b) The committee shall:

(1) establish specific objectives for the program administered under this chapter that are appropriate given the program's status as one of several employment-related services the state offers to individuals with disabilities;

(2) develop performance measures that may be used by the Agency to evaluate whether the program is meeting the objectives established under paragraph (1) of this subsection; and

(3) recommend criteria for certifying CRPs for participation in the program.

(c) In developing the performance measures under subsection (b) of this section, the advisory committee must consider the following factors as applicable to the program administered under this chapter:

(1) The percentage of total sales revenue attributable to the program as:

(A) paid in wages to individuals with disabilities; and

(B) spent on direct training and professional development services for individuals with disabilities;

(2) The average hourly wage earned by an individual participating in the program;

(3) The average annual salary earned by an individual participating in the program;

(4) The number of individuals with disabilities participating in the program paid less than minimum wage and occupations into which such individuals are placed;

(5) The average number of hours worked each week by an individual with a disability who participates in the program;

(6) The percentage of individuals with disabilities who participate in the program and who are placed into competitive positions, including competitive management or administrative positions within CRPs; and

(7) The percentage of work performed by individuals with disabilities who participate in the program that is purely repackaging labor.

(d) The Committee shall provide input to the Commission in adopting rules applicable to the program administered under this chapter relating to the employment-first policies described in Texas Government Code §531.02447 and §531.02448.

(e) The Agency shall provide administrative support to the Committee.

(f) The Committee is not subject to Texas Government Code, Chapter 2110.

§806.22. Open Meetings: Public Testimony and Access.

The Committee, established under Texas Human Resources Code §122.0057, is subject to the requirements of the Open Meetings Law, Texas Government Code, Chapter 551, the Open Meetings Act, Texas Government Code, Chapter 552, and Texas Government Code, Chapter 2001.

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

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Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

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SUBCHAPTER C. CENTRAL NONPROFIT AGENCIES

40 TAC §806.31, §806.32

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.31. Contracting with Central Nonprofit Agencies.

(a) The Agency may select and contract with one or more CNAs and shall contract through a request for proposals for a period not to exceed five years to perform, at a minimum, the duties set forth in Texas Human Resources Code §122.019(a) and (b).

(b) The management fee rate charged by a CNA for its services to a Community Rehabilitation Program (CRP) and its method of calculation must be approved by the Commission. The maximum management fee rate must be reviewed on an annual basis.

(c) A percentage of the management fee described in subsection (b) of this section shall be paid to the Agency and is subject to Texas Human Resources Code §122.023. The percentage shall be set by the Commission in the amount necessary to reimburse the general revenue fund for direct and reasonable costs incurred by the Comptroller and the Agency in administering the Comptroller's and the Agency's duties under this chapter, including any costs associated with providing support to the Committee.

(d) In accordance with Texas Human Resources Code §122.019(c), the Agency shall annually review services by and the performance of a CNA and the revenue required to accomplish the program. The purpose of the review shall be to determine whether a CNA has complied with statutory requirements, contract requirements, and performance standards set forth in §806.32 of this title (relating to performance standards for a CNA).

(e) Following the review of a CNA as required by Texas Human Resources Code §122.019(d), the Agency may approve the performance of the CNA and the continuation of the contract through its termination date.

(f) For the effective administration of this chapter, the CNA will provide to the Agency, no later than 15 days after the end of each federal fiscal quarter, the following information regarding CRPs that have contracted with the CNA:

(1) For CRPs:

(A) a collective executive summary of the CRPs annual state use program evaluations;

(B) the number of individuals with disabilities, according to their type of disability, who are employed in CRPs participating in the programs established by this chapter or who are employed by businesses or workshops that receive supportive employment from CRPs;

(C) the amount of annual wages paid to an individual participating in the program in a format determined by the Agency;

(D) a summary of the sale of products offered by the CRPs;

(E) a list of products and/or services offered by a CRP;

(F) the geographic distribution of CRPs;

(G) the number of individuals without disabilities who are employed in CRPs under this chapter; and

(H) the average and range of weekly earnings for individuals with disabilities and individuals without disabilities who are employed in CRPs under this chapter; and

(2) from each CRP data on individual outplacement or supported employment to include:

(A) the number of individuals in outplacement employment;

(B) the hourly wage range;

(C) the range of hours worked; and

(D) the number of individuals with disabilities employed, listed by primary type of disability.

(g) In accordance with Texas Human Resource Code §122.019(c) and §122.019(d), a CNA will provide or make available to the Agency:

(1) quarterly reports for each calendar quarter of its contract of sales of products or services, wages paid and hours worked by individuals with disabilities for CRPs participating in the state use program;

(2) quarterly reports for each calendar quarter listing CRPs that do not meet criteria for participation in the state use program and the reasons that each CRP listed does not meet the criteria;

(3) at least once a year by October 31, and prior to any review and/or renegotiation of the contract:

(A) an updated marketing plan;

(B) a proposed annual budget with estimated sales, commissions, and expenses;

(C) a program budget with details on how the expected revenue and expenses will be allocated to directly support and expand the state use program and other programs that expand direct services and/or the enhancement of employment opportunities for individuals with disabilities; and

(D) an audited annual financial statement that shall include information on FDIC coverage of all cash balances, earnings attributed to the management fee for the state use program, accounts receivable, cash reserves, line of credit borrowings, interest payments, bad debt, administrative overhead and any detailed supporting documentation requested by the Agency;

(4) quarterly reports of categories of expenditures in reporting format approved by the Agency;

(5) records in accordance with Texas Human Resources Code §122.009(a) and §122.0019(d) for audit purposes, consistent with Texas Government Code, Chapter 552, the "Public Information Act"; and

(6) any other information the Agency requests as set forth in this chapter.

(h) Duties of a CNA include, but are not limited to, those listed in Texas Human Resources Code §122.019(a).

(i) The services of a CNA may include marketing and marketing support services, such as those identified in §122.019(b). Other duties as designated by the Agency may include:

(1) establishing a payment system with a goal to pay CRPs within fourteen (14) to twenty-one (21) calendar days, but not less than thirty (30) days of completion of work and proper invoicing;

(2) resolving contract issues and/or problems as they arise between the CRPs and customers of the program, referring those that cannot be resolved to the Agency;

(3) maintaining a system that tracks and monitors product and service sales; and

(4) tracking and reporting quality and delivery times of products and services.

(j) Each year by October 31, a CNA will establish performance goals for the next fiscal year in support of objectives set by the Commission in §806.21(h).

(k) The Agency may terminate a contract with a CNA if the Agency:

(1) finds substantial evidence of the CNA's noncompliance with contractual obligations or of conflict of interest as defined by federal and state laws; and

(2) has provided at least 30 days written notice to that CNA of the termination of the contract.

(l) The Agency may request an audit by the state auditor of:

(1) the management fee set for any CNA; or

(2) the financial condition of any CNA.

(m) The Commission must annually review the management fees the CRPs are charged by the CNAs. The annual review process includes:

(1) sending notice to affected parties, including CNAs;

(2) soliciting and considering public comment; and

(3) reviewing documentation provided by a CNA, CRP, or the public in support or opposition of a proposed management fee rate change.

(n) An individual may not operate a CRP and at the same time contract with the Agency as a CNA.

§806.32. Performance Standards and Goals for a Central Nonprofit Agency.

(a) A CNA shall meet performance standards in carrying out the terms and conditions of the contract.

(b) Operating pursuant to statute and rules, a CNA must manage and coordinate the day-to-day operation of the state use program including, but not limited to, the following activities:

(1) Increase employment opportunities for individuals with disabilities by promoting employment counseling and placement services provided by CRPs;

(2) Increase employment opportunities for individuals with disabilities by researching new products, services, and markets; improving existing products and services; and reporting to the Agency on a quarterly basis the status of these activities;

(3) Provide superior customer relations by monitoring customer satisfaction with products and services, responding to customer complaints within one business day or less, and reporting to the Agency on a quarterly basis the level of consumer satisfaction for each CRP, based on complaints as to products or services provided, with a goal of incurring no more than five complaints per year that have not been resolved to customer satisfaction;

(4) Provide quarterly regional information workshops to promote the state use program throughout the year and across the state;

(5) Provide training programs to CRPs on the requirements to participate in the state use program, governmental contracting, and procurement procedures and laws;

(6) Resolve contract issues and/or problems as they arise between the CRPs, the CNA, and/or customers, referring those that cannot be resolved to the Agency and submitting quarterly status reports on issues and referrals;

(7) Provide an annual report that includes the CNA's audited financial statements, an updated strategic plan, and an updated projected schedule of expenses that details how the management fee is being allocated to directly support the state use program and what amount of funds are being devoted to expanding direct services to programs that enhance the lives of individuals with disabilities and what percentage of funds will be used for administrative overhead, such as salaries;

(8) Demonstrate compliance with state and federal tax laws and payroll laws by submitting quarterly reports of sales and taxes paid to the Texas Comptroller of Public Accounts and the Internal Revenue Service (IRS);

(9) Maintain a system in accordance with generally accepted accounting principles that will record information related to purchase orders, invoices, and payments to each CRP to facilitate the preparation and submission of the annual report;

(10) Create a database of state agency and political subdivision purchases to promote sales of state use program products and services;

(11) Conduct business ethically and submit detailed reports on a quarterly basis of any conflicts between the CRPs and the CNA;

(12) Create and maintain automated tracking and monitoring of product/service sales and submit quarterly reports to the Agency regarding delivery turnaround times and contract performance for each CRP;

(13) Respond to inquiries about individual sales and/or total sales within five business days or sooner and submit quarterly reports regarding the number of inquiries and average response time in conjunction with the report described in paragraph (11) of this subsection;

(14) Maintain knowledge of governmental contracting and procurement processes and laws;

(15) Provide general administration of the state use program with performance criteria and timely submission of reports required by these rules;

(16) Monitor CRP compliance and promptly report violations to the Agency, offering assistance as needed to achieve compliance; and

(17) Maintain and dispose of records in accordance with the laws and directives set forth by the Agency and submit any or all records requested within three weeks of the request. Disclosure to the public of any and all CNA records shall be subject to the Public Information Act.

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

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SUBCHAPTER D. COMMUNITY REHABILITATION PROGRAMS

40 TAC §806.41

The new rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.41. Certification and Recertification of Community Rehabilitation Programs.

(a) No applicant for certification may participate in the state use program prior to the approval of certification.

(b) The Commission may recognize programs that are accredited by nationally accepted vocational rehabilitation accrediting organizations and approve CRPs that have been approved by a state's habilitation or rehabilitation agency.

(c) The Commission may delegate the administration of the certification process for CRPs to a CNA.

(d) An applicant for CRP certification must be a government or nonprofit private program operated under criteria established by the Commission and under which individuals with severe disabilities produce products or perform services for compensation.

(e) A certified CRP must:

(1) maintain payroll, human resource functions, accounting, and all relevant documentation showing that the employees who produce products or perform services under the state use program are individuals with disabilities;

(2) ensure that documentation includes approved disability determination forms that shall be subject to review at the request of the Agency or the CNA under authority from the Commission, with adherence to privacy and confidentiality standards applicable to such CRP and employee records; and

(3) maintain and dispose of records or documents required by the Agency, including contracts with other entities, in accordance with generally accepted accounting principles, and all laws relevant to the records.

(f) An applicant for certification must submit a completed application and the required documents to the Agency through the CNA for the state use program. Upon receipt, the CNA will verify the completeness and accuracy of the application. No application will be considered without the following documents:

(1) Copy of the IRS nonprofit determination under §501(c), when required by law;

(2) Copy of the Articles of Incorporation issued by the Secretary of State, when required by law;

(3) List of the board of directors and officers with names, addresses, and telephone numbers;

(4) Copy of the organizational chart with job titles and names;

(5) Proof of current insurance coverage in the form of a certificate of insurance specifying each and all coverages for the CRP's liability insurance, auto insurance for vehicles owned or leased by the CRP for state use contract purposes, and workers' compensation insurance coverage or legally recognized equivalent coverage, if applicable. Such insurance shall be carried with an insurance company authorized to do business in the State of Texas, and written notice of cancellation or any material change in insurance coverage will be provided to the CNA 10 business days in advance of cancellation or change;

(6) Fire inspection certificate issued within one year of the formal consideration of the CRP application, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(7) Copy of the building inspection certificate or certificate of occupancy, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(8) Copy of the wage exemption certificate (WH-228) if below minimum wages will be paid to customers or to individuals with disabilities who will be employed, and a statement of explanation of circumstances requiring subminimum wages; and

(9) Notarized statement that the CRP agrees to maintain compliance with the requirement that at least 75 percent of the CRP's total hours of direct labor, for each contract, necessary to perform ser-

VICES or reform raw materials, assemble components, manufacture, prepare, process and/or package products will be performed by individuals with documented disabilities consistent with the definition set forth in this chapter. If a CRP intends to seek a waiver from the 75 percent requirement of the CRP's total hours of direct labor for a contract, the waiver request must be submitted with the application for approval.

(g) The Agency shall review each complete application and all required documentation and, if acceptable, forward its recommendations to the Commission for approval. Once approved, the Agency will notify the CRP in writing and assign the CRP a certification number.

(h) A CRP may protest a recommendation of non-approval pursuant to the Agency's appeal process in §806.61.

(i) To continue in the program, each CRP must be recertified by the Commission every three years. The recertification process requires submission of all previously requested documentation, a review of reports submitted to the CNA, and a determination that the CRP has maintained compliance with the stated requirements of the state use program. The Commission shall establish a schedule for the recertification process and the CNA shall assist each CRP as necessary to attain recertification. The CRP, after notification, shall submit within 30 days the application for recertification and required documents to the CNA. If the CRP fails to do so, the Agency may request a written explanation and/or the appearance of a representative of the CRP before the Agency. If the CRP fails to respond in a timely manner, the Agency may consider the suspension of all state use program contracts until the recertification process has been completed and approval has been attained.

(j) The CRP shall submit quarterly wage and hour reports to the CNA. These reports are due no later than the last day of the month following the end of the quarter. If the CRP fails to submit reports on time, the Agency may request a representative of the CRP to appear before the Agency. The Agency may consider the suspension of the CRP's state use program contracts if compliance is not achieved in a consistent and timely manner.

(k) CRPs shall maintain compliance with the state use program regarding percentage requirements related to administrative costs, supply costs, wages, and hours of direct labor necessary to perform services and/or produce products. Compliance will be monitored by the CNA and/or the Agency, and violations will be reported promptly to the Agency. A violation will result in a warning letter from the CNA or Agency, which will then offer assistance as needed to achieve compliance. A CRP that fails to meet compliance requirements, without a waiver from the Agency, for two quarters in any four-quarter period, shall submit a written explanation and a representative of the CRP will be requested to appear before the Agency. State use program contracts may be suspended and/or certification revoked if compliance is not immediately and consistently maintained. To attain reinstatement, the CRP must apply for recertification following the procedures outlined in this chapter.

(l) The Agency may review or designate a CNA or third party to review any CRP participating in the state-use program to verify compliance with the requirements outlined in this chapter.

(m) A CRP must not serve, in whole or part, as an outlet or front for any entity whose purpose is not the employment of individuals with disabilities.

(n) A CRP shall promptly report any conflict of interest or receipt of benefit or promise of benefit to the Agency. The Agency will consider such reports on an individual basis. Verified instances of conflict of interest by a CRP may result in suspension of the CRP's eligi-

bility to participate in the state use program and/or revocation of certification.

(o) The Commission, the Agency, individual members, the State of Texas, or any other Texas state agency will not be responsible for any loss or losses, financial or otherwise, incurred by a CRP should its product or services not be approved for the state use program as provided by law.

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SUBCHAPTER E. PRODUCTS AND SERVICES

40 TAC §§806.51 - 806.53

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.51. *Product Specifications and Exceptions.*

(a) A product manufactured for sale through the Comptroller to any office, department, institution or agency of the state shall be manufactured or produced according to specifications developed by the Comptroller. If the Comptroller has not developed specifications for a particular product, the production shall be based on commercial or federal specifications in current use by the industry.

(b) Requisitions for products and/or services required by state agencies are processed by the Comptroller according to Comptroller rules.

(c) An exception from subsection (a) of this section may be made in any case as follows:

(1) Under the rules of the Comptroller, the product and/or service so produced or provided does not meet the reasonable requirements of the office, department, institution, or agency; or

(2) The requisitions made cannot be reasonably complied with through provision of products and/or services produced by individuals with disabilities.

(d) An office, department, institution, or agency may not evade purchasing products and/or services produced or provided by individuals with disabilities by requesting variations from standards adopted by the Comptroller when the products and/or services produced or provided by individuals with disabilities, per established standards, are reasonably adapted to the actual needs of the office, department, institution, or agency and comply with Texas Government Code §2155.138 and §2155.069.

(e) The Comptroller shall provide the Agency with a list of items known to have been purchased under the exceptions provided in subsection (c) of this section monthly, in the format adopted by the Agency.

(f) The Agency shall review submitted state agency exception reports made available by the Comptroller that list purchase products or services available from a CNA or CRP under this chapter, but purchased from another business that is not a CNA or CRP under this chapter.

(g) The Agency shall coordinate with the employee designated by each state agency to assist in attaining future compliance with this chapter, when an agency makes and reports an unjustified purchase or purchases of a product available under the programs authorized under this chapter.

§806.52. Determination of Fair Market Value.

(a) Pursuant to Texas Human Resources Code, Chapter 122 and Texas Government Code §2155.138, a suitable product and/or service that meets applicable specifications established by the state or its political subdivisions and that is available within the time specified must be procured from a CRP at the price determined by the Commission to be the fair market price under Texas Human Resources Code §122.007.

(b) The Agency shall review products, services, and price revisions submitted by the CNA on behalf of participating or prospective CRPs. Due consideration shall be given to the factors set forth in Texas Human Resources Code §122.015, as well as to the extent applicable, the amounts being paid for similar articles in similar quantities by state agencies purchasing the products or services not in the state use program.

(c) The Agency may also consider other criteria as necessary to determine the fair market price of the products and/or services, including, but not limited to:

- (1) changing market conditions;
- (2) frequency and volume of past state purchases of the particular products and/or services offered;
- (3) request from a state agency that a CRP develop and provide a particular product and/or service;
- (4) value added necessary to maximize the employment of people with disabilities; and/or
- (5) quality comparison between similar products and/or services.

(d) The Comptroller shall provide the Agency with the information and resources necessary for the Agency to comply with this section.

§806.53. Recognition and Approval of Community Rehabilitation Program Products and Services.

(a) A CRP desiring to provide services under the state use program must comply with the following requirements to obtain approval from the Commission:

- (1) A minimum of 35 percent of the contract price of the service must be paid to the individuals with disabilities who perform the service in the form of wages and benefits;
- (2) Supply costs for the service must not exceed 20 percent of the contract price of the service;
- (3) Administrative costs allocated to the service must not exceed 10 percent of the contract price for the service. At least 75 per-

cent of the hours of direct labor for each contract, necessary to perform a service, must be performed by individuals with disabilities;

(4) The Agency may establish a different percentage if the Agency determines that a percentage greater than the 75 percent for the offered service is reasonable based on consideration of factors, including, but not limited to:

- (A) past practices in a particular area;
- (B) whether other CRPs providing the same or similar services have achieved the 75 percent requirement; and
- (C) whether the Commission has established a policy goal to encourage employment of individuals with disabilities in a particular field.

(5) Any necessary subcontracted services shall be performed to the maximum extent possible by other CRPs and in a manner that maximizes the employment of individuals with disabilities.

(b) A CRP must comply with the following requirements to obtain approval from the Commission for state use products:

- (1) At least 75 percent of the hours of direct labor, for each contract, necessary to reform raw materials, assemble components, manufacture, prepare, process and/or package a product, must be performed by individuals with disabilities;
- (2) Appreciable contribution and value added to the product by individuals with disabilities must be determined to be substantial on a product-by-product basis, based on requested documentation provided to the Agency upon application for a product to be approved for the state use program; and
- (3) The Agency may establish a different percentage if the Agency determines that a percentage greater than the 75 percent for the offered product is reasonable based on consideration of factors, including, but not limited to:

- (A) past practices in a particular area;
- (B) whether other CRPs providing the same or similar products have achieved the 75 percent requirement;
- (C) whether the Commission has established a policy goal to promote workplace integration for individuals with disabilities; and
- (D) whether the Commission has established a policy goal to encourage employment of individuals with disabilities in a particular field.

(c) The rules governing the approval of products to be offered by a CRP apply to all items that a CRP proposes to offer to state agencies or political subdivisions, regardless of the method of acquisition by the agency, whether by sale or lease. A CRP must own any product it leases. A proposal by a CRP to rent or lease a product to a state agency is a proposal to offer a product, not a service, and the item offered must meet the requirements of these rules. If the product is offered for lease by the CRP, the unit cost of the product, for purposes of applying the standards set forth in these rules, is the total cost to the state agency of leasing the product over its expected useful life.

(d) Raw materials or components may be obtained from companies operated for profit, but a CRP must own any product that it offers for sale to state agencies or political subdivisions through the state use program and make an appreciable contribution to the product that accounts for a substantial amount of the value added to the product.

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SUBCHAPTER F. COMPLAINTS, VENDOR PROTESTS, RESOLUTIONS

40 TAC §806.61, §806.62

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.61. Consumer Information; Complaints and Resolution.

(a) Complaints regarding matters under the Agency's jurisdiction, in accordance with Texas Human Resources Code, Chapter 122, shall be made in writing and addressed to the Agency for review and determination.

(b) The Agency shall maintain an information file regarding each complaint.

(c) If a written complaint is filed with the Agency, the Agency, at least as frequently as quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

(d) The Agency shall provide to the individual filing the complaint, and to each individual who is a subject of the complaint, a copy of the Agency's policies and procedures relating to complaint investigation and resolution.

(e) Any product or service may be removed or temporarily suspended from the state use program after review and/or investigation of a filed complaint, if the Agency determines that a CRP is:

- (1) providing products that fail to meet specifications;
- (2) failing to make a delivery as promised;
- (3) making unauthorized substitutions;
- (4) misrepresenting merchandise;
- (5) failing to make satisfactory adjustments when required;

or

- (6) taking unethical actions; or
- (7) non-complying with other Agency rules or contract.

(f) A product or service that has been temporarily suspended may be reinstated by promptly correcting the reason(s) for suspension. A failure to make the necessary correction promptly may result in the termination of the CRP's contract with the CNA.

(g) Complaints shall be resolved by the Agency.

§806.62. Vendor Protests.

(a) A protest shall be made in writing and received by the Agency within 10 working days after the protesting party knows, or should have known, of the occurrence of the action that is protested.

(b) A protest must include:

- (1) a precise statement of the relevant facts;
- (2) a statement of any issues (of law or fact) that the protesting party contends must be resolved; and
- (3) a statement of the argument and authorities that the protesting party offers in support of the protest.

(c) A statement that copies of the protest have been mailed or delivered to the using entity and all other identifiable interested parties must be included. The program manager may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal to the deputy executive director.

(d) If the protest is not resolved by mutual agreement, the program manager shall issue a written determination that resolves the protest.

(e) The protesting party may appeal a written determination by the program manager to the deputy executive director.

(f) The Agency shall maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the retention schedule of the Texas Department of Procurement and Support Services.

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SUBCHAPTER G. DISCLOSURE OF RECORDS

40 TAC §806.71

The new rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.71. Records.

(a) The Agency shall access financial or other information and records from a CNA or a CRP if the Agency determines the information and records are necessary for the effective administration of this chapter and rules adopted under this chapter.

(b) Information and records must be obtained under subsection (a) of this section in recognition of the privacy interest of individuals employed by CNAs or CRPs. The information and records may not be released or made public on subpoena or otherwise, except that release may be made:

(1) for statistical purposes, but only if a person is not identified;

(2) with the consent of each person identified in the information released; or

(3) regarding a compensation package of any CNA employee or subcontractor if determined by the Commission to be relevant to the administration of this chapter.

(c) No records belonging to a CNA or a CRP may be accessed or released to anyone, including advisory committee members, outside entities, and individuals, unless disclosure is required under the Texas Public Information Act.

(d) The Agency or a CNA shall inspect a CRP for compliance with certification criteria established under Texas Human Resources Code §122.013(c).

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

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SUBCHAPTER H. REPORTS; PLANS

40 TAC §806.81, §806.82

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.81. Annual Financial Report.

(a) On or before November 1 of each year, the Agency shall prepare an annual financial report in the form prescribed by Texas Government Code §2101.011, relating to the Commission's activities, and Texas Human Resources Code §122.022 relating to reports, and file the report with the governor and the presiding officer of each house of the legislature.

(b) As part of the report filed under subsection (a) of this section, the Agency shall provide:

(1) the number of individuals with disabilities, by type of disability, who are employed in CRPs participating in the programs established by this chapter or who are employed by businesses or workshops that receive supportive employment from CRPs;

(2) the amount of annual wages paid to a person participating in the program;

(3) a summary of the sale of products offered by a CRP;

(4) a list of products and services offered by a CRP;

(5) the geographic distribution of the CRPs;

(6) the number of individuals without disabilities who are employed in CRPs under this chapter; and

(7) the average and the range of weekly earnings for individuals with disabilities and individuals without disabilities who are employed in CRPs under this chapter.

§806.82. Strategic Plan; Final Operating Plan.

The Agency shall prepare a strategic plan and a final operating plan relating to the Commission's activities under this chapter, as required by Texas Government Code, Chapter 2054, Subchapter E.

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

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SUBCHAPTER I. POLITICALSUBDIVISIONS

40 TAC §806.91, §806.92

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§806.91. Procurement for Political Subdivisions.

Political subdivisions shall follow procurement rules as required by Texas Human Resources Code §122.017, relating to procurement for political subdivisions.

§806.92. Political Subdivisions Excluded.

Excluded political subdivisions shall follow procurement rules as required by Texas Human Resources Code §122.018, relating to political subdivisions excluded.

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

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TITLE 43. TRANSPORTATION

**PART 10. TEXAS DEPARTMENT OF
MOTOR VEHICLES**

CHAPTER 218. MOTOR CARRIERS

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 218, Motor Carriers, Subchapter A: §218.2, Definitions; Subchapter B: §218.13, Application for Motor Carrier Registration; Subchapter C: §218.31, Investigations and Inspections of Motor Carrier Records; and §218.32, Motor Carrier Records; Subchapter E: §218.52, Advertising; §218.53, Household Goods Carrier Cargo Liability; §218.56, Proposals and Estimates for Moving Services; §218.59, Inventories; 218.60, Determination of Weights; and §218.61, Claims.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §643.155, requires the department to appoint a rules advisory committee (advisory committee) consisting of representatives of the public, the department, and motor carriers transporting household goods. The rules advisory committee is required to examine rules adopted by the department under §643.153(a) and (b) and make recommendations to the department on modernizing and streamlining the rules. The advisory committee made recommendations to the department after meeting four times to discuss and examine the rules. The majority of the proposed amendments resulted from the advisory committee's recommendations to the department.

Amendments are proposed to §218.2 to add definitions for the terms "advertisement" and "print advertisement," which are regulated to protect the shippers (consumers). Amendments renumber the remaining terms. Also, an amendment to the existing term "household goods carrier" clarifies that the term applies to all motor carriers that transport household goods for compensation, regardless of the size of the vehicle. Further, the definition for the term "manager" was deleted because the proposed amendments delete this term from Chapter 218.

An amendment is proposed to §218.13 to require an application for registration by a household goods carrier to include a tariff. This proposed amendment helps to protect the consumers by ensuring a tariff is on file before the household goods carrier begins to transport household goods for compensation. The tariff lists the maximum rates the household goods carrier can charge the consumer. According to the Better Business Bureau (BBB) representative on the advisory committee, the second most frequent complaint they receive from consumers regarding household goods carriers is that the price at the end of the move is different than the verbal quote. The BBB representative also stated they will not accredit a household goods carrier until the carrier is registered with the department. If the BBB has not accredited a household goods carrier, a consumer may be less likely to do business with that carrier.

An amendment to §218.13 clarifies that the director's conditional acceptance of an application does not authorize the applicant to

operate as a motor carrier. This proposed amendment helps protect consumers from motor carriers that may incorrectly think they can operate as a motor carrier if the director has conditionally accepted an application.

Amendments to §218.31 clarify that employees of the department are certified as department investigators and may conduct investigations and inspect records under Transportation Code, Chapters 643 and 645. Amendments further specify the time, location, and notification requirements for the investigations and inspections. Conforming amendments are proposed throughout Chapter 218 to use the term "department investigator."

Amendments to §218.32 delete unnecessary language regarding household goods carrier's records and clarify that all records must be prepared and maintained in a complete and accurate manner. Also, an amendment clarifies that out-of-state motor carriers may maintain the required records at a business location in Texas, rather than at its principal place of business in Texas.

Amendments to §218.52 modify the requirements for household goods carrier advertisements, including the specific requirements for print advertisements and websites. Amendments also delete outdated language and modify the requirements regarding the identifying markings on household goods carrier's vehicles. The amendments require a household goods carrier that is operating vehicles under a short-term lease to display the name of the carrier and the carrier's certificate of registration number on both sides of the vehicle. The markings help to protect consumers by enabling law enforcement officers and the department's investigators to quickly identify vehicles involved in the transportation of household goods. In addition, the markings help the consumer in identifying the household goods carrier.

Amendments to §218.53 clarify the amount of and the method of calculating a carrier's liability for loss or damage of cargo. According to the BBB representative on the advisory committee, the third most frequent complaint they receive from consumers regarding household goods carriers is that the consumer does not understand how the liability works.

An amendment to §218.56 removes the language that prohibits a motor carrier from including the following in a proposal because this language is inconsistent with current practice: the name, logo, or motor carrier registration number of any other motor carrier. An amendment also clarifies that proposals based on hourly rates are required to state the maximum amount the consumer could be required to pay for the listed transportation and related services. According to one of the household goods carrier representatives on the advisory committee, some household goods carriers believe the current rules do not require a proposal based on hourly rates to state the maximum amount the consumer could be required to pay. According to the BBB representative on the advisory committee, the second most frequent complaint they receive from consumers regarding household goods carriers is the price at the end of the move is different than the verbal quote. This clarification helps to protect consumers by making it clear that any proposal must state the maximum amount the consumer could be required to pay.

Amendments to §218.59 modify the requirements regarding inventories prepared by agreement between the motor carrier and the consumer to give the parties the flexibility they need for each move. Amendments clarify that a consumer's agent may sign an inventory for the consumer at origin and designation.

Amendments to §§218.59, 218.60, and 218.61, respectively, allow the inventory to be prepared in an electronic format, allow

weight tickets to be in an electronic format, and allow a claim and an acknowledgment of a claim to be filed in an electronic format. These amendments expressly allow the consumer and the household goods carrier to benefit from the convenience of modern technology.

Amendments to §218.61 also add clarifying language.

Proposed amendments are made throughout Chapter 218 to revise terminology for consistency with other department rules and with current department practice. Nonsubstantive amendments are proposed to correct grammar throughout the proposed amended sections.

FISCAL NOTE

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

William P. Harbeson, Director of the Enforcement Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of enforcing or administering the amendments will be to: 1) provide more protection for the consumers; 2) modernize the rules; and 3) streamline the rules. There are no anticipated economic costs for persons required to comply with the amendments as proposed, other than the proposed amendments to §218.52.

SMALL AND MICRO-BUSINESS IMPACT ASSESSMENT

Pursuant to Government Code, Chapter 2006, the department anticipates a potential adverse economic effect on small businesses and micro-businesses if the proposed amendments to §218.52 are adopted.

There may be anticipated economic costs for persons required to comply with the proposed amendments to §218.52 regarding required language on the household goods carriers' Internet website to the extent the website does not currently list the carrier's name or does not list the required information on the page that is specific to Texas intrastate household goods operations.

There may be anticipated economic costs for persons required to comply with the proposed amendments to §218.52 regarding the identifying markings on household goods carriers' vehicles that are not already governed by Transportation Code, Chapter 642, which requires identifying markings on certain vehicles. Section 218.52 does not currently require the identifying markings on power units operated under a short-term lease. The proposed amendments require the household goods carrier or its agent to include the identifying markings on power units operated under a short-term lease; however, the proposed amendments also delete the requirement to display the identifying markings on trailers. The household goods carriers may utilize different approaches to comply with the proposed requirements, such as using stickers that are available at most hardware stores or a marker and cardboard to create their own identifying markings for the power units operated under a short-term lease. The department's Economic Impact Statement provides the data for household goods carriers that choose the more expensive solu-

tion of using a printed magnet that can be removed and reused. However, the household goods carriers can choose a less expensive alternative to comply with these amendments.

The current §218.52 requires the household goods carriers to include their certificate of registration number on both sides of their vehicles. A proposed amendment to §218.52 requires the household goods carriers to include "TxDMV No." prior to their certificate of registration number on both sides of their vehicles. To the extent a household goods carrier does not display its certificate of registration number this way on both sides of their power units, the carrier may incur a cost to comply with the proposed amendment. The household goods carriers may utilize different approaches to comply with the proposed requirement, such as using a marker to write in "TxDMV No." prior to their certificate of registration number or using stickers that are available at most hardware stores. The department's Economic Impact Statement provides the data for household goods carriers that choose the more expensive solution of using a printed magnet that can be added to the current certificate of registration number. However, the household goods carriers can choose a less expensive alternative to comply with these amendments.

Out of the 590 active household goods carriers that are registered with the Texas Workforce Commission, the department determined that 98% (579 of 590) are small businesses. Out of this 98%, 84% (486 of 579) fall within the definition of a micro-business because the carrier has 20 or fewer employees. A review of the North American Industry Classification System on the U.S. Census Bureau website revealed that there are five different types of movers that are included in this classification. The five different types of movers are Furniture Moving, Used; Motor Freight Carrier, Used Household Goods; Trucking Used Household, Office, or Institutional Furniture and Equipment; Used Household and Office Goods Moving; and Van Lines, Moving and Storage Services.

The department performed research to determine the estimated cost for small businesses to comply with the proposed amendments to §218.52 regarding websites. The department concluded that an entity would have to make minor adjustments to its website and absorb the costs of doing so.

If a household goods carrier manages its website in-house, the cost would be minimal for the time spent in updating its website. If a household goods carrier hired an external company to create and maintain the carrier's website, the carrier would not incur a cost if the update is covered by the monthly maintenance fee under its contract. However, if a household goods carrier has to hire someone to update the carrier's website, the carrier might have to pay an hourly rate of \$40 for an update that is estimated to take approximately 15 minutes.

The proposed amendments to §218.52 require the household goods carrier or its agent to display certain information on two sides (left and right) of each power unit, including vehicles operated under a short-term lease. The marking must include the carrier's name (or assumed name) and certificate of registration number (styled "TxDMV No. _____"), and meet minimum sizing and readability requirements.

Because a carrier might operate a fleet of vehicles under short-term leases, or otherwise have a high vehicle turnover, the department assumes that the carrier would likely comply with the proposed requirements by attaching magnetic signs to its power units. The department finds that signs sufficient to meet the requirements can be purchased for about \$155 for ten signs

(\$15.50 per sign), which is enough for five power units. Per-sign prices fall as the carrier purchases more signs.

For a carrier that already includes the TxDMV certificate of registration number on its vehicles, but without "TxDMV No." written prior to the number, the carrier may elect to purchase smaller magnetic signs that say "TxDMV No." to place in front of the number already displayed on its vehicles. Ten 3-by-10-inch signs would cost the carrier about \$23 (\$2.30 per sign), with per-sign prices falling as the carrier purchases more signs.

The department did not find evidence that the proposed amendments to §218.52 would have an adverse economic effect on micro-businesses that is distinct from any potential adverse economic effect on small businesses.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas, 78731, or by email to rules@txdmv.gov. The deadline for receipt of comments is 5:00 p.m. on December 26, 2016.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §218.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department under the Transportation Code; Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and more specifically, Transportation Code, §643.153(a), which requires the department to adopt rules to protect a consumer using the service of a motor carrier who is transporting household goods for compensation; and Transportation Code, §643.153(b), which requires the department to adopt rules necessary to ensure that a customer of a motor carrier transporting household goods is protected from deceptive or unfair practices and unreasonably hazardous activities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 643 and 645.

§218.2. Definitions.

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

(1) Advertisement--An oral, written, graphic, or pictorial statement or representation made in the course of soliciting intrastate household goods transportation services, including, without limitation, a statement or representation made in a newspaper, magazine, or other publication, or contained in a notice, sign, poster, display, circular, pamphlet, or letter, or on radio, the Internet, or via an on-line service, or on television. The term does not include direct communica-

tion between a household goods carrier or carrier's representative and a prospective shipper, and does not include the following:

(A) promotional items of nominal value such as ball caps, tee shirts, and pens;

(B) business cards;

(C) listings not paid for by the household goods carrier or its household goods carrier's agent; and

(D) listings of a household goods carrier's business name or assumed name as it appears on the motor carrier certificate of registration, and the household goods carrier's address, and contact information in a directory or similar publication.

(2) [(4)] Approved association--A group of household goods carriers, its agents, or both, that has an approved collective ratemaking agreement on file with the department under §218.64 of this title (relating to Rates).

(3) [(2)] Binding proposal--A formal written offer stating the exact price for the transportation of specified household goods and any related services.

(4) [(3)] Board--Board of the Texas Department of Motor Vehicles.

(5) [(4)] Certificate of insurance--A certificate prescribed by and filed with the department in which an insurance carrier or surety company warrants that a motor carrier for whom the certificate is filed has the minimum coverage as required by §218.16 of this title (relating to Insurance Requirements).

(6) [(5)] Certificate of registration--A certificate issued by the department to a motor carrier and containing a unique number.

(7) [(6)] Certified scale--Any scale designed for weighing motor vehicles, including trailers or semitrailers not attached to a tractor, and certified by an authorized scale inspection and licensing authority. A certified scale may also be a platform-type or warehouse-type scale properly inspected and certified.

(8) [(7)] Commercial motor vehicle--

(A) Includes:

(i) any motor vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess of 26,000 pounds, that is designed or used for the transportation of cargo in furtherance of any commercial enterprise;

(ii) any vehicle, including buses, designed or used to transport more than 15 passengers, including the driver; and

(iii) any vehicle used in the transportation of hazardous materials in a quantity requiring placarding under the regulations issued under the federal Hazardous Materials Transportation Act (49 U.S.C. §§5101-5128).

(B) Does not include:

(i) a farm vehicle with a gross weight, registered weight, and gross weight rating of less than 48,000 pounds;

(ii) cotton vehicles registered under Transportation Code, §504.505;

(iii) a vehicle registered with the Railroad Commission under Natural Resources Code, §113.131 and §116.072;

(iv) a vehicle operated by a governmental entity;

(v) a motor vehicle exempt from registration by the Unified Carrier Registration Act of 2005; and

(vi) a tow truck, as defined by Occupations Code, §2308.002 and permitted under Occupations Code, Chapter 2308, Subchapter C.

(9) [(8)] Commercial school bus--A motor vehicle owned by a motor carrier that is:

(A) registered under Transportation Code, Chapter 643, Subchapter B;

(B) operated exclusively within the boundaries of a municipality and used to transport preprimary, primary, or secondary school students on a route between the students' residences and a public, private, or parochial school or daycare facility;

(C) operated by a person who holds a driver's license or commercial driver's license of the appropriate class for the operation of a school bus;

(D) complies with Transportation Code, Chapter 548; and

(E) complies with Transportation Code, §521.022.

(10) [(9)] Conspicuous--Written in a size, color, and contrast so as to be readily noticed and understood.

(11) [(10)] Conversion--A change in an entity's organization that is implemented with a Certificate of Conversion issued by the Texas Secretary of State under Business and Organizations Code, §10.154.

(12) [(11)] Department--Texas Department of Motor Vehicles (TxDMV).

(13) [(12)] Director--The director of the Motor Carrier Division, Texas Department of Motor Vehicles.

(14) [(13)] Division--The Motor Carrier Division.

(15) [(14)] Estimate--An informal oral calculation of the approximate price of transporting household goods.

(16) [(15)] Farmer--A person who operates a farm or is directly involved in cultivating land or in raising crops or livestock that are owned by or are under the direct control of that person.

(17) [(16)] Farm vehicle--Any vehicle or combination of vehicles controlled or operated by a farmer or rancher being used to transport agriculture products, farm machinery, and farm supplies to or from a farm or ranch.

(18) [(17)] FMCSA--Federal Motor Carrier Safety Administration.

(19) [(18)] Foreign commercial motor vehicle--A commercial motor vehicle that is owned by a person or entity that is domiciled in or a citizen of a country other than the United States.

(20) [(19)] Gross weight rating--The maximum loaded weight of any combination of truck, tractor, and trailer equipment as specified by the manufacturer of the equipment. If the manufacturer's rating is unknown, the gross weight rating is the greater of:

(A) the actual weight of the equipment and its lading; or

(B) the maximum lawful weight of the equipment and its lading.

(21) [(20)] Household goods--Personal property intended ultimately to be used in a dwelling when the transportation of that property is arranged and paid for by the householder or the householder's representative. The term does not include personal property to be used

in a dwelling when the property is transported from a manufacturing, retail, or similar company to a dwelling if the transportation is arranged by a manufacturing, retail, or similar company.

(22) [(21)] Household goods agent--A motor carrier who transports household goods on behalf of another motor carrier.

(23) [(22)] Household goods carrier--A motor carrier who transports household goods for compensation or hire in furtherance of a commercial enterprise, regardless of the size of the vehicle.

(24) [(23)] Insurer--A person, including a surety, authorized in this state to write lines of insurance coverage required by Subchapter B of this chapter.

(25) [(24)] Inventory--A list of the items in a household goods shipment and the condition of the items.

(26) [(25)] Leasing business--A person that leases vehicles requiring registration under Subchapter B of this chapter to a motor carrier that must be registered.

~~[(26) Manager--The manager of the department's Motor Carrier Division, Credentialing Section.]~~

(27) Mediation--A non-adversarial form of alternative dispute resolution in which an impartial person, the mediator, facilitates communication between two parties to promote reconciliation, settlement, or understanding.

(28) Motor Carrier or carrier--A person who controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a public highway in this state.

(29) Motor transportation broker--A person who sells, offers for sale, or negotiates for the transportation of cargo by a motor carrier operated by another person or a person who aids and abets another person in selling, offering for sale, or negotiating for the transportation of cargo by a motor carrier operated by another person.

(30) Moving services contract--A contract between a household goods carrier and shipper, such as a bill of lading, receipt, order for service, or work order, that sets out the terms of the services to be provided.

(31) Multiple user--An individual or business who has a contract with a household goods carrier and who used the carrier's services more than 50 times within the preceding 12 months.

(32) Not-to-exceed proposal--A formal written offer stating the maximum price a shipper can be required to pay for the transportation of specified household goods and any related services. The offer may also state the non-binding approximate price. Any offer based on hourly rates must state the maximum number of hours required for the transportation and related services unless there is an acknowledgment from the shipper that the number of hours is not necessary.

(33) Principal place of business--A single location that serves as a motor carrier's headquarters and where it maintains its operational records or can make them available.

(34) Print advertisement--A written, graphic, or pictorial statement or representation made in the course of soliciting intrastate household goods transportation services, including, without limitation, a statement or representation made in or contained in a newspaper, magazine, circular, or other publication. The term does not include direct communication between a household goods carrier or carrier's representative and a prospective shipper, and does not include the following:

(A) promotional items of nominal value such as ball caps, tee shirts, and pens;

(B) business cards;

(C) Internet websites;

(D) listings not paid for by the household goods carrier or its household goods carrier's agent; and

(E) listings of a household goods carrier's business name or assumed name as it appears on the motor carrier certificate of registration, and the household goods carrier's address, and contact information in a directory or similar publication.

(35) [(34)] Public highway--Any publicly owned and maintained street, road, or highway in this state.

(36) [(35)] Reasonable dispatch--The performance of transportation, other than transportation provided under guaranteed service dates, during the period of time agreed on by the carrier and the shipper and shown on the shipment documentation. This definition does not affect the availability to the carrier of the defense of force majeure.

(37) [(36)] Replacement vehicle--A vehicle that takes the place of another vehicle that has been removed from service.

(38) [(37)] Revocation--The withdrawal of registration and privileges by the department or a registration state.

(39) [(38)] Shipper--The owner of household goods or the owner's representative.

(40) [(39)] Short-term lease--A lease of 30 days or less.

(41) [(40)] SOAH--The State Office of Administrative Hearings.

(42) [(41)] Substitute vehicle--A vehicle that is leased from a leasing business and that is used as a temporary replacement for a vehicle that has been taken out of service for maintenance, repair, or any other reason causing the temporary unavailability of the permanent vehicle.

(43) [(42)] Suspension--Temporary removal of privileges granted to a registrant by the department or a registration state.

(44) [(43)] Unified Carrier Registration System or UCR--A motor vehicle registration system established under 49 U.S.C. §14504a or a successor federal registration program.

(45) [(44)] USDOT--United States Department of Transportation.

(46) [(45)] USDOT number--An identification number issued by or under the authority of the FMCSA or its successor.

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

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

TRD-201605790

David D. Duncan

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: December 25, 2016

For further information, please call: (512) 465-5665



SUBCHAPTER B. MOTOR CARRIER REGISTRATION

43 TAC §218.13

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department under the Transportation Code; Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and more specifically, Transportation Code, §643.153(a), which requires the department to adopt rules to protect a consumer using the service of a motor carrier who is transporting household goods for compensation; and Transportation Code, §643.153(b), which requires the department to adopt rules necessary to ensure that a customer of a motor carrier transporting household goods is protected from deceptive or unfair practices and unreasonably hazardous activities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 643 and 645.

§218.13. *Application for Motor Carrier Registration.*

(a) Form of application. An application for motor carrier registration must be filed with the department's Motor Carrier Division and must be in the form prescribed by the director and must contain, at a minimum, the following information.

(1) USDOT number. A valid USDOT number.

(2) Business or trade name. The applicant must designate the business or trade name of the motor carrier.

(3) Owner name. If the motor carrier is a sole proprietorship, the owner must indicate the name and social security number of the owner. A partnership must indicate the partners' names, and a corporation must indicate principal officers and titles.

(4) Principal place of business. A motor carrier must disclose the motor carrier's principal business address. If the mailing address is different from the principal business address, the mailing address must also be disclosed.

(5) Legal agent.

(A) A Texas-domiciled motor carrier must provide the name and address of a legal agent for service of process if the agent is different from the motor carrier.

(B) A motor carrier domiciled outside Texas must provide the name and Texas address of the legal agent for service of process.

(C) A legal agent for service of process shall be a Texas resident, a domestic corporation, or a foreign corporation authorized to transact business in Texas with a Texas address for service of process.

(6) Description of vehicles. An application must include a motor carrier equipment report identifying each commercial motor vehicle that requires registration and that the carrier proposes to operate. Each commercial motor vehicle must be identified by its motor vehicle identification number, make, model year, and type of cargo and by the unit number assigned to the commercial motor vehicle by the motor carrier. Any subsequent registration of vehicles must be made under subsection (e) of this section.

(7) Type of motor carrier operations. An applicant must state if the applicant:

(A) proposes to transport passengers, household goods, or hazardous materials; or

(B) is domiciled in a foreign country.

(8) Insurance coverage. An applicant must indicate insurance coverage as required by §218.16 of this title (relating to Insurance Requirements).

(9) Safety affidavit. Each motor carrier must complete, as part of the application, an affidavit stating that the motor carrier knows and will conduct operations in accordance with all federal and state safety regulations.

(10) Drug-testing certification. Each motor carrier must certify, as part of the application, that the motor carrier is in compliance with the drug-testing requirements of 49 C.F.R. Part 382. If the motor carrier belongs to a consortium, as defined by 49 C.F.R. Part 382, the applicant must provide the names of the persons operating the consortium.

(11) Duration of registration.

(A) An applicant must indicate the duration of the desired registration. Registration may be for seven calendar days or for 90 days, one year, or two years. The duration of registration chosen by the applicant will be applied to all vehicles. Household goods carriers may not obtain seven day or 90 day certificates of registration.

(B) Interstate motor carriers that operate in intrastate commerce and meet the requirements under §218.14(c) of this title (relating to Expiration and Renewal of Commercial Motor Vehicles Registration) are not required to renew a certificate of registration issued under this section.

(12) Additional requirements. The following fees and information must be submitted with all applications.

(A) An application must be accompanied by an application fee of:

(i) \$100 for annual and biennial registrations;

(ii) \$25 for 90 day registrations; or

(iii) \$5 for seven day registrations.

(B) An application must be accompanied by a vehicle registration fee of:

(i) \$10 for each vehicle that the motor carrier proposes to operate under a seven day, 90 day, or annual registration; or

(ii) \$20 for each vehicle that the motor carrier proposes to operate under a biennial registration.

(C) An application must be accompanied by proof of insurance or financial responsibility and insurance filing fee as required by §218.16.

(D) An application for registration by a household goods carrier must include a tariff that sets out the maximum charges for transportation of household goods between two or more municipalities, or a copy of the tariff governing interstate transportation services on a highway between two or more municipalities.

(E) ~~[(F)]~~ An application must be accompanied by any other information required by law.

(b) Conditional acceptance of application. If an application has been conditionally accepted by the director pursuant to Transporta-

tion Code, §643.055, the applicant may not operate the following until the department has issued a certificate under Transportation Code, §643.054:

(1) a commercial motor vehicle or any other motor vehicle to transport household goods for compensation, or

(2) a commercial motor vehicle to transport persons or cargo. [The director may conditionally accept an application if it is accompanied by all fees and by proof of insurance or financial responsibility, but is not accompanied by all required information. Conditional acceptance in no way constitutes approval of the application. The director will notify the applicant of any information necessary to complete the application. If the applicant does not supply all necessary information within 45 days from notification by the director, the application will be considered withdrawn and all fees will be retained.]

(c) Approved application. An applicant meeting the requirements of this section and whose registration is approved will be issued the following documents:

(1) Certificate of registration. The department will issue a certificate of registration. The certificate of registration will contain the name and address of the motor carrier and a single registration number, regardless of the number of vehicles requiring registration that the carrier operates.

(2) Insurance cab card. The department will issue an insurance cab card listing all vehicles to be operated under the carrier's certificate of registration. The insurance cab card shall be continuously maintained at the registrant's principal place of business. The insurance cab card will be valid for the same period as the motor carrier's certificate of registration and will contain information regarding each vehicle registered by the motor carrier.

(A) A current copy of the page of the insurance cab card on which the vehicle is shown shall be maintained in each vehicle listed, unless the motor carrier chooses to maintain a legible and accurate image of the insurance cab card on a wireless communication device in the vehicle or chooses to display such information on a wireless communication device by accessing the department's online system from the vehicle. The appropriate information concerning that vehicle shall be highlighted if the motor carrier chooses to maintain a hard copy of the insurance cab card or chooses to display an image of the insurance cab card on a wireless communication device in the vehicle. The insurance cab card or the display of such information on a wireless communications device will serve as proof of insurance as long as the motor carrier has continuous insurance or financial responsibility on file with the department.

(B) On demand by a department investigator [~~department-certified inspector~~] or any other authorized government personnel, the driver shall present the highlighted page of the insurance cab card that is maintained in the vehicle or that is displayed on a wireless communication device in the vehicle. If the motor carrier chooses to display the information on a wireless communication device by accessing the department's online system, the driver must locate the vehicle in the department's online system upon request by the department-certified inspector or other authorized government personnel.

(C) The motor carrier shall notify the department in writing if it discontinues use of a registered commercial motor vehicle before the expiration of its insurance cab card.

(D) Any erasure or alteration of an insurance cab card that the department printed out for the motor carrier renders it void.

(E) If an insurance cab card is lost, stolen, destroyed, or mutilated; if it becomes illegible; or if it otherwise needs to be replaced, the department will print out a new insurance cab card at the request of the motor carrier. Motor carriers are authorized to print out a copy of a new insurance cab card using the department's online system.

(F) The department is not responsible for a motor carrier's inability to access the insurance information using the department's online system.

(G) The display of an image of the insurance cab card or the display of insurance information from the department's online system via a wireless communication device by the motor carrier does not constitute effective consent for a law enforcement officer, the department investigator~~[department-certified inspector]~~, or any other person to access any other content of the wireless communication device.

(d) Additional and replacement vehicles. A motor carrier required to obtain a certificate of registration under this section shall not operate additional vehicles unless the carrier identifies the vehicles on a form prescribed by the director and pays applicable fees as described in this subsection.

(1) Additional vehicles. To add a vehicle, a motor carrier must pay a fee of \$10 for each additional vehicle that the motor carrier proposes to operate under a seven day, 90 day, or annual registration. To add a vehicle during the first year of a biennial registration, a motor carrier must pay a fee of \$20 for each vehicle. To add a vehicle during the second year of a biennial registration, a motor carrier must pay a fee of \$10 for each vehicle.

(2) Replacement vehicles. No fee is required for a vehicle that is replacing a vehicle for which the fee was previously paid. Before the replacement vehicle is put into operation, the motor carrier shall notify the department, identify the vehicle being taken out of service, and identify the replacement vehicle on a form prescribed by the department. A motor carrier registered under seven day registration may not replace vehicles.

(e) Supplement to original application. A motor carrier required to register under this section shall submit a supplemental application under the following circumstances.

(1) Change of cargo. A registered motor carrier may not begin transporting household goods or hazardous materials unless the carrier submits a supplemental application to the department and shows the department evidence of insurance or financial responsibility in the amounts specified by §218.16.

(2) Change of name. A motor carrier that changes its name shall file a supplemental application for registration no later than the effective date of the change. The motor carrier shall include evidence of insurance or financial responsibility in the new name and in the amounts specified by §218.16. A motor carrier that is a corporation must have its name change approved by the Texas Secretary of State before filing a supplemental application. A motor carrier incorporated outside the state of Texas must complete the name change under the law of its state of incorporation before filing a supplemental application.

(3) Change of address or legal agent for service of process. A motor carrier shall file a supplemental application for any change of address or any change of its legal agent for service of process no later than the effective date of the change. The address most recently filed will be presumed conclusively to be the current address.

(4) Change in principal officers and titles. A motor carrier that is a corporation shall file a supplemental application for any change

in the principal officers and titles no later than the effective date of the change.

(5) Conversion of corporate structure. A motor carrier that has successfully completed a corporate conversion involving a change in the name of the corporation shall file a supplemental application for registration and evidence of insurance or financial responsibility reflecting the new company name. The conversion must be approved by the Office of the Secretary of State before the supplemental application is filed.

(6) Change in drug-testing consortium status. A motor carrier that changes consortium status shall file a supplemental application that includes the names of the persons operating the consortium.

(7) Retaining a revoked or suspended certificate of registration number. A motor carrier may retain a prior certificate of registration number by:

(A) filing a supplemental application to re-register instead of filing an original application; and

(B) providing adequate evidence that the carrier has satisfactorily resolved the facts that gave rise to the suspension or revocation.

(f) Change of ownership. A motor carrier must file an original application for registration when there is a corporate merger or a change in the ownership of a sole proprietorship or of a partnership.

(g) Alternative vehicle registration for household goods agents. To avoid multiple registrations of a commercial motor vehicle, a household goods agent's vehicles may be registered under the motor carrier's certificate of registration under this subsection.

(1) The carrier must notify the department on a form approved by the director of its intent to register its agent's vehicles under this subsection.

(2) When a carrier registers vehicles under this subsection, the carrier's certificate will include all vehicles registered under its agent's certificates of registration. The carrier must register under its certificate of registration all vehicles operated on its behalf that do not appear on its agent's certificate of registration.

(3) The department may send the carrier a copy of any notification sent to the agent concerning circumstances that could lead to denial, suspension, or revocation of the agent's certificate.

(h) Substitute vehicles leased from leasing businesses. A registered motor carrier is not required to comply with the provisions of subsection (e) of this section for a substitute vehicle leased from a business registered under §218.18 of this title (relating to Short-term Lease and Substitute Vehicles). A motor carrier is not required to carry proof of registration as described in subsection (d) of this section if a copy of the lease agreement for the originally leased vehicle is carried in the cab of the temporary replacement vehicle.

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

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

TRD-201605791

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SUBCHAPTER C. RECORDS AND
INSPECTIONS

43 TAC §218.31, §218.32

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department under the Transportation Code; Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and more specifically, Transportation Code, §643.153(a), which requires the department to adopt rules to protect a consumer using the service of a motor carrier who is transporting household goods for compensation; and Transportation Code, §643.153(b), which requires the department to adopt rules necessary to ensure that a customer of a motor carrier transporting household goods is protected from deceptive or unfair practices and unreasonably hazardous activities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 643 and 645.

§218.31. *Investigations and Inspections of Motor Carrier Records.*

(a) Certification of department investigators [~~inspectors~~]. In accordance with Transportation Code, Chapter 643, the executive director or designee will designate department employees as certified [~~inspectors~~] for the purpose of entering the premises of a motor carrier to copy or verify documents the motor carrier is required to maintain according to this chapter [by this section to be maintained by the motor carrier]. The executive director or designee shall provide credentials to department investigators [~~certified inspectors~~] identifying them as department employees and as certified to conduct investigations and inspect records on behalf of the department [~~inspectors~~].

(b) Investigations and Inspections.

(1) A motor carrier shall grant a department investigator certified under this section [~~inspector~~] access to the carrier's premises to conduct inspections or investigations of alleged violations of this chapter and of Transportation Code, Chapters 643 and 645. The motor carrier shall provide adequate work space with reasonable working conditions and allow the department investigators [~~certified inspector~~] to copy and verify records and documents the motor carrier is required to maintain according to this chapter [~~be maintained by the carrier under §218.32 of this title (relating to Motor Carrier Records)~~].

(2) The department investigator [~~certified inspector~~] may conduct inspections and investigations during normal business hours unless mutual arrangements have been made otherwise.

(3) The department investigator [~~certified inspector~~] will present his or her credentials [and a written statement from the department] to the motor carrier prior to conducting an investigation or inspection [indicating the inspector's authority to inspect and investigate the motor carrier].

(c) Access. A motor carrier shall provide access to requested records and documents at:

- (1) the motor carrier's principal place of business; or
- (2) a location agreed to by the department and the motor carrier.

(d) Designation of meeting time. If the motor carrier's normal business hours do not provide the access necessary for the investigator to conduct the investigation and the parties cannot reach an agreement as to a time to meet to access the records, the department shall designate the time of the meeting and provide written notice via the business address, facsimile number, or email address on file with the department [by certified mail or facsimile].

§218.32. *Motor Carrier Records.*

(a) General records to be maintained. Every motor carrier shall prepare and maintain in a complete and accurate manner:

- (1) operational logs, insurance certificates, documents to verify the carrier's operations, and proof of registration fee payments;
- (2) [~~complete and accurate~~] records of services performed;
- (3) all certificate of title documents, weight tickets, permits for oversize or overweight vehicles and loads, dispatch records, or any other document that would verify the operations of the vehicle to determine the actual weight, insurance coverage, size, and/or capacity of the vehicle; and
- (4) the original certificate of registration and registration listing, if applicable.

~~[(b) Additional records for household goods carriers. In order to verify compliance with Subchapters B and E of this chapter (relating to Motor Carrier Registration and Consumer Protection), every household goods carrier shall retain complete and accurate records maintained in accordance with reasonable accounting procedures of all services performed in intrastate commerce. Household goods carriers shall retain all of the following information and documents:]~~

- ~~[(1) moving services contracts, such as bills of lading or receipts;]~~
- ~~[(2) proposals for moving services;]~~
- ~~[(3) inventories, if applicable;]~~
- ~~[(4) freight bills;]~~
- ~~[(5) time cards, trip sheets, or driver's logs;]~~
- ~~[(6) claim records;]~~
- ~~[(7) ledgers and journals;]~~
- ~~[(8) canceled checks;]~~
- ~~[(9) bank statements and deposit slips;]~~
- ~~[(10) invoices, vouchers, or statements supporting disbursements; and]~~
- ~~[(11) dispatch records.]~~

~~(b) [(e)] Proof of motor carrier registration.~~

(1) Except as provided in paragraph (2) of this subsection and in §218.13(c)(2) of this title (relating to Application for Motor Carrier Registration), every motor carrier shall maintain a copy of its current registration listing in the cab of each registered vehicle at all times. A motor carrier shall make available to a department investigator [~~certified inspector~~] or any law enforcement officer a copy of the current registration listing upon request.

(2) A registered motor carrier is not required to carry proof of registration in a vehicle leased from a leasing business that is registered under §218.18 of this title (relating to Short-term Lease and Substitute Vehicles), when leased as a temporary replacement due to maintenance, repair, or other unavailability of the originally leased vehicle. A copy of the lease agreement, or the lease for the originally leased vehicle, in the case of a substitute vehicle, must be carried in the cab of the vehicle.

(3) A motor carrier is not required to carry proof of compliance with UCR or the UCR plan or agreement in its vehicle.

(c) ~~[(d)]~~ Location of files. Except as provided in this subsection, every motor carrier shall maintain at a principal place of business in Texas all records and information required by the department.

(1) Texas motor carriers ~~[firms]~~. If a motor carrier wishes to maintain records at a specific location other than its principal place of business in Texas, the motor carrier shall make a written request to the director ~~[manager]~~. A motor carrier may not begin maintaining records at an alternate location until the request is approved by the director ~~[manager]~~.

(2) Out-of-state motor carriers ~~[firms]~~. A motor carrier whose principal business address is located outside the state of Texas shall maintain records required under this section at its ~~[principal place of]~~ business location in Texas. Alternatively, a motor carrier may maintain such records at a specific out-of-state facility if the carrier reimburses the department for necessary travel expenses and per diem for any inspections or investigations conducted in accordance with §218.31 of this title (relating to Investigations and Inspections of Motor Carrier Records).

(3) Regional office or driver work-reporting location. All records and documents required by this subchapter which are maintained at a regional office or driver work-reporting location, whether or not maintained in compliance with paragraphs (1) and (2) of this subsection, shall be made available for inspection upon request at the motor carrier's principal place of business or other location specified by the Department within 48 hours after a request is made. Saturdays, Sundays, and federal and state holidays are excluded from the computation of the 48-hour period of time in accordance with 49 C.F.R. §390.29.

(d) ~~[(e)]~~ Preservation and destruction of records. All books and records generated by a motor carrier, except driver's time cards and logs, must be maintained for not less than two years at the motor carrier's principal business address. A motor carrier must maintain driver's time cards and logs for not less than six months at the carrier's principal business address.

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

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SUBCHAPTER E. CONSUMER PROTECTION

43 TAC §§218.52, 218.53, 218.56, 218.59 - 218.61

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department under the Transportation Code; Transportation Code, §643.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 643; and more specifically, Transportation Code, §643.153(a), which requires the department to adopt rules to protect a consumer using the service of a motor carrier who is transporting household goods for compensation; and Transportation Code, §643.153(b), which requires the department to adopt rules necessary to ensure that a customer of a motor carrier transporting household goods is protected from deceptive or unfair practices and unreasonably hazardous activities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 643 and 645.

§218.52. *Advertising.*

(a) False, misleading, or deceptive advertisements. A household goods carrier and its household goods agents may not use any false, misleading, or deceptive advertisements.

~~[(a) Print advertising through August 4, 2015. A household goods carrier shall include the following information on print advertisements primarily addressing a local market within this state:]~~

~~[(1) the name of the household goods carrier as shown on the certificate of registration;]~~

~~[(2) the street address of the household goods carrier's or its agent's place of business in this state; and]~~

~~[(3) the household goods carrier's certificate of registration number in the following form, "DMV No. _____".]~~

(b) Print advertisements. [Print advertising on or after August 5, 2015.] A household goods carrier shall include the following information on all print advertisements primarily addressing a local market within this state:

(1) the full business name or assumed name of the household goods carrier as shown on the certificate of registration;

(2) the street address of the household goods carrier's or its agent's place of business in this state; and

(3) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".

(c) Use of household goods agent's name. A household goods carrier may include the name of its household goods agent as filed with the department in its print advertisements.

(d) Websites. A household goods carrier shall provide the following information on the home page or, in the case of a national household goods carrier, the page specific to Texas intrastate household goods operations, on any website operated by or for the household goods carrier:

(1) the household goods carrier's name;

(2) department's toll-free consumer help line as listed on the department's website; and

(3) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".

{(d) Items not considered to be print advertisements through August 4, 2015. For the purposes of this section, print advertisement shall not include:}

{(1) promotional items of nominal value such as ball caps, tee shirts, and pens;}

{(2) business cards;}

{(3) internet websites;}

{(4) listings not paid for by the household goods carrier or its household goods carrier's agent;}

{(5) nationally placed billboards; and}

{(6) single-line listings of a carrier name, address, and telephone number in a directory or similar publication.}

{(e) Items not considered to be print advertisements on or after August 5, 2015. For the purposes of this section, print advertisement shall not include:}

{(1) promotional items of nominal value such as ball caps, tee shirts, and pens;}

{(2) business cards;}

{(3) Internet websites;}

{(4) listings not paid for by the household goods carrier or its household goods carrier's agent; and}

{(5) single-line listings of a household goods carrier's name, address, and telephone number in a directory or similar publication.}

{(f) Internet websites through August 4, 2015. A household goods carrier shall provide the department's toll-free telephone number (1-888-368-4689) and the household goods carrier's certificate of registration number on any website operated by or for the household goods carrier.}

{(g) Internet websites on or after August 5, 2015. A household goods carrier shall provide the following information on any website operated by or for the household goods carrier:}

{(1) department's toll-free consumer helpline as listed on the department's website; and}

{(2) the household goods carrier's certificate of registration number in the following form, "TxDMV No. _____".}

(c) [(h)] Identifying markings on household goods carrier's vehicles.

(1) A household goods carrier or its agent shall display the following information on both sides of [either] the power unit, including power units operated under a short-term lease [or trailer]:

(A) the business name or assumed name of the household goods carrier as it appears on the motor carrier certificate of registration; and

(B) the household goods carrier's registration number as it appears on the motor carrier certificate of registration in the following form, "TxDMV No. _____".

(2) The markings required by [paragraph (1) of] this subsection shall have clearly legible letters and numbers at least two inches in height.

(3) This subsection does not apply to vehicles[;}

[(A)] required to comply with Transportation Code, Chapter 642.[; or]

{(B) operated under a short-term lease.}

{(i) Prohibited advertisements. For the purposes of this subsection, an advertisement is any communication to the public in connection with an offer or sale of an intrastate transportation service. A household goods carrier and its household goods agents may not use any false, misleading, or deceptive advertisements.}

§218.53. Household Goods Carrier Cargo Liability.

(a) Unless the carrier and shipper agree in writing to a higher limit of carrier liability, a household goods carrier's liability for loss or damage of property shall be \$.60 per pound per article. Claims for loss or damage of property may be settled based on the weight of the article multiplied by \$.60.

(b) If the carrier and shipper have agreed in writing to a higher limit of liability, the carrier may charge the shipper for this higher limit of liability. If the agreement between the carrier and shipper to a higher limit of liability provides for a deductible, the carrier's liability to pay for loss or damage of property will be reduced by the amount of the deductible.

[A household goods carrier shall be liable for \$.60 per pound per article, unless the carrier and shipper agree, in writing, to a higher limit of carrier liability. The household goods carrier shall not be liable for damages in an amount in excess of the agreed to higher limit of liability for the loss, destruction, or damage of the household goods.]

§218.56. Proposals and Estimates for Moving Services.

(a) Written proposals. Prior to loading, a household goods carrier shall provide a written proposal, such as a bid or quote, to the shipper. A proposal shall state the maximum amount the shipper could be required to pay for the listed transportation and listed related services. This section does not apply if a pre-existing transportation contract sets out the maximum amount the shipper could be required to pay for the transportation services. Pre-existing transportation contracts include, but are not limited to, corporate contracts for the relocation of multiple employees.

(1) A proposal must contain the name and registration number of the household goods carrier as they appear on the motor carrier certificate of registration. If a proposal is prepared by the household goods carrier's agent, it shall include the name of the agent as listed on the carrier's agent filing with the department. A proposal shall also include the street address of the household goods carrier or its agent. [A proposal may not include the name, logo, or motor carrier registration number of any other motor carrier.]

(2) A proposal must clearly and conspicuously state whether it is a binding or not-to-exceed proposal.

(3) A proposal must completely describe the shipment and all services to be provided. A proposal must state, "This proposal is for listed items and services only. Additional items and services may result in additional costs."

(4) A proposal must specifically state when the shipper will be required to pay the transportation charges, such as if payment must be made before unloading at the final destination. A proposal must also state what form of payment is acceptable, such as a cashier's check.

(5) A proposal must conspicuously state that a household goods carrier's liability for loss or damage to cargo is limited to \$.60 per pound per article unless the household goods carrier and shipper agree, in writing, to a higher limit of carrier liability.

(b) Hourly rates. If a proposal is based on an hourly rate, then it is not required to provide the number of hours necessary to perform the transportation and related services. However, if the number

of hours is not included in a proposal, then the carrier must secure a written acknowledgment from the shipper indicating the proposal is complete without the number of hours. Also, the proposal shall state the maximum amount the shipper could be required to pay for the listed transportation and listed related services.

(c) Proposal as addendum. If a proposal is accepted by the shipper and the carrier transports the shipment, then the proposal is considered an addendum to the moving services contract.

(d) Additional items and services. If the household goods carrier determines additional items are to be transported and/or additional services are required to load, transport, or deliver the shipment, then before the carrier transports the additional items or performs the additional services the carrier and shipper must agree, in writing, to:

- (1) allow the original proposal to remain in effect;
- (2) amend the original proposal or moving services contract; or
- (3) substitute a new proposal for the original.

(e) Amendments and storage.

(1) An amendment to an original proposal or moving services contract, as allowed in subsection (d) of this section, must:

(A) be signed and dated by the household goods carrier and shipper; and

(B) clearly and specifically state the amended maximum price for the transportation of the household goods.

(2) If the household goods carrier fails to amend or substitute an original proposal as required by this subsection and subsection (d) of this section, only the charges stated on the original proposal for moving services may be assessed on the moving services contract. The carrier shall not attempt to amend or substitute the proposal to add items or services after the items or services have been provided or performed.

(3) If through no fault of the carrier, the shipment cannot be delivered during the agreed delivery period, then the household goods carrier may place the shipment in storage and assess fees relating to storage according to the terms in §218.58 of this title (relating to Moving Services Contract - Options for Carrier Limitation of Liability), without a written agreement with the shipper to amend or substitute the original proposal.

(f) Combination document. A proposal required by subsection (a) of this section may be combined with other shipping documents, such as the moving services contract, into a single document. If a proposal is combined with other shipping documents, the purpose of each signature line on the combination document must be clearly indicated. Each signature is independent and shall not be construed as an agreement to all portions and terms of the combination document.

(g) Telephone estimates. A household goods carrier may provide an estimate for the transportation services by telephone. If the household goods carrier provides the estimate by telephone, then the carrier must also furnish a written proposal for the transportation services to the shipper prior to loading the shipment.

§218.59. Inventories.

(a) Applicability. A household goods carrier has the option of preparing an inventory of the shipment.

(b) Inventories prepared by the carrier. A household goods carrier may prepare a complete or partial inventory for its own use without an agreement between the carrier and shipper. The household goods carrier may not charge a fee for preparing an inventory for its own use.

(c) Inventories prepared by agreement between the carrier and shipper. If the household goods carrier and shipper agree to the preparation of an inventory by the carrier, the carrier may assess a fee for this service.

(1) Information contained in the inventory.

(A) The inventory must contain the shipper's name [~~and the household goods carrier's name as it appears on its motor carrier certificate of registration. The inventory may not include the name, logo, or motor carrier registration number of any other motor carrier~~]. The inventory may include the name of the household goods carrier's agent as it is listed on the carrier's agent filing with the department.

(B) The inventory must describe each item in the shipment, unless the parties agree to a partial inventory. The shipper and the carrier may agree regarding the amount of detail that must be included in the inventory.

(C) If any charges are based on the size of the containers, the inventory must list the quantity and size of each container. [~~Additionally, if the household goods carrier assesses handling charges for specific items, such as, pianos, the inventory must show these items separately, if not already shown on the moving services contract.~~]

(D) [~~(C)~~] The inventory must describe and use the symbol "CP" for all containers packed or crated by the carrier. Additionally, the inventory must describe and use the symbol "PBO" for all containers packed or crated by the shipper.

(E) [~~(D)~~] The inventory must include a key for any abbreviation used to describe the condition of the items.

(2) Inventory at origin. The inventory shall be signed by the household goods carrier and the shipper or shipper's agent at origin. The inventory must include a conspicuous statement that the shipper's signature is affirming the contents and condition of the items in the shipment.

(3) Inventory at destination. The carrier and the shipper or shipper's agent shall sign the inventory at destination. A legible copy of the inventory shall be given to the shipper. Signing the inventory does not waive a claimant's right to file a claim. [~~The inventory must include the following statement adjacent to the shipper's signature line, "Signing the inventory means:~~]

~~[(A) all items loaded have been received, except as noted;]~~

~~[(B) obvious loss or damage has been noted; and]~~

~~[(C) signing the inventory does not waive a claimant's right to file a claim."]~~

(4) Combination document. The inventory may be combined with other shipping documents, such as the moving services contract, into a single document. If the inventory is combined with other shipping documents, the purpose of each signature line on the combination document must be clearly indicated. Each signature is independent and shall not be construed as an agreement to all portions and terms of the combination document.

(d) Electronic format. An inventory may be prepared in an electronic format.

§218.60. Determination of Weights.

(a) Shipment weights. A carrier transporting household goods on a not-to-exceed proposal using shipment weight as a factor in determining transportation charges shall determine the weight of each shipment transported prior to the assessment of any charges. Except as provided in this section, the weight shall be obtained on a certified scale.

(b) Weighing procedures.

(1) The weight of each shipment shall be obtained by determining the difference between the:

(A) tare weight of the vehicle on which the shipment is to be loaded prior to the loading and the gross weight of the same vehicle after the shipment is loaded; or

(B) gross weight of the vehicle with the shipment loaded and the tare weight of the same vehicle after the shipment is unloaded.

(2) At the time of both weighings, all pads, dollies, handtrucks, ramps, and other equipment required in the transportation of a shipment shall be on the vehicle. Neither the driver nor any other person shall be on the vehicle at the time of the weighings.

(3) The fuel tanks on the vehicle shall be full at the time of each weighing or, in the alternative, no fuel may be added between the two weighings when the tare weighing is the first weighing performed.

(4) The trailer of a tractor-trailer vehicle combination may be detached from the tractor and weighed separately at each weighing providing the length of the scale platform is adequate to only accommodate and support the entire trailer at one time.

(5) Shipments weighing 1,000 pounds or less may be weighed on a certified platform or warehouse scale prior to loading for transportation or subsequent to unloading.

(6) The net weight of shipments transported in containers shall be the difference between the tare weight of the container, including all pads, blocking and bracing used or to be used in the transportation of the shipment, and the gross weight of the container with the shipment loaded.

(7) The shipper or any other person responsible for the payment of the freight charges shall have the right to observe all weighings of the shipment. The household goods carrier must advise the shipper or any other person entitled to observe the weighings of the time and specific location where each weighing will be performed and must give that person a reasonable opportunity to be present to observe the weighings. Waiver by a shipper of the right to observe any weighing or reweighing is permitted and does not affect any rights of the shipper under this subchapter.

(c) Weight tickets.

(1) The carrier shall obtain a separate weight ticket for each weighing required under this subsection and the ticket shall be carried on the vehicle. However, if both weighings are performed on the same scale, one weight ticket may be used to record both weighings. Every weight ticket shall be signed by the person performing the weighing. Weight tickets or copies of weight tickets in an electronic format shall be maintained with [attached to] the carrier's copy of moving services contract covering the shipment. Weight tickets shall contain:

(A) the complete name and location of the scale;

(B) the date of each weighing;

(C) identification of the weight entries as being tare, gross, or net weights;

(D) the company or carrier identification of the vehicle;

(E) the last name of the shipper as it appears on the moving services contract.

(2) This ticket must be retained by the carrier as part of the records for ~~[file on]~~ the shipment. A bill presented to collect any ship-

ment charges dependent on the weight transported must be accompanied by true copies of all weight tickets in either a printed or electronic format obtained in the determination of the shipment weight.

(d) Reweighing of shipments. Before unloading a shipment weighed at origin and after the shipper is informed of the billing weight and total charges, the shipper may request a reweigh. The charges shall be based on the reweigh weight.

(e) Stored shipments. If a shipment is weighed and placed in storage in transit or delivered out of storage to destination by another vehicle, then no additional weighing shall be required unless the shipment has been decreased or increased in weight subsequent to the original weighing of the shipment.

(f) Constructive weight. Where no certified scale is available at origin, at a point en route, or at destination, a constructive weight, based on seven pounds per cubic foot of properly loaded space may be used to determine the weight of the household goods shipment.

§218.61. Claims.

(a) Filing of claims. A household goods carrier must act on all claims filed by a shipper on shipments of household goods according to this section.

(1) A claim must be filed in writing or by electronic format ~~[document transfer]~~ with the household goods carrier or the household goods carrier's agent whose name appears on the moving services contract. A claim is considered filed on the date the claim is received by the household goods carrier. A shipper must file a ~~[written]~~ claim either in writing or by electronic format within 90 days:

(A) of delivery of the shipment to the final destination;

or
(B) after a reasonable time for delivery has elapsed in the case of failure to make delivery.

(2) The claim must include enough facts to identify the shipment. The claim must also describe the type of claim and request a specific type of remedy.

(3) Shipping documents may be used as evidence to support a claim, but cannot be substituted for a written claim.

(4) A claim submitted by someone other than the owner of the household goods must be accompanied by a written explanation of the claimant's interest in the claim.

(b) Acknowledgment and disposition of filed claims.

(1) A household goods carrier shall send an [a written] acknowledgment of the claim either in writing or by electronic format to the claimant within 20 days (excluding Sundays and nationally recognized holidays) after receipt of the claim by the carrier or his agent.

(A) The claim acknowledgment shall include the statement, "Household goods carriers have 90 days from receipt of a claim to pay, decline to pay, or make a firm settlement offer, in writing, to a claimant. Questions or complaints concerning the household goods carrier's claims handling should be directed to the Texas Department of Motor Vehicles (TxDMV), ~~[department's]~~ Enforcement Division, via the toll-free consumer helpline as listed on the department's website. Additionally, a claimant has the right to request mediation from TxDMV within 30 days (excluding Sundays and nationally recognized holidays) after any portion of the claim is denied by the carrier, the carrier makes a firm settlement offer that is not acceptable to the claimant, or 90 days has elapsed since the carrier received the claim and the claim has not been resolved."

(B) The household goods carrier is not required to issue the acknowledgment letter prescribed in this subsection if the claim has been resolved or the household goods carrier has initiated communication regarding the claim with the claimant within 20 days (excluding Sundays and nationally recognized holidays) after receipt of the claim. However, the burden of proof of the claim resolution or communication with the claimant is the responsibility of the household goods carrier.

(2) After a thorough investigation of the facts, the household goods carrier shall pay, decline to pay, or make a firm settlement offer in writing to the claimant within 90 days after receipt of the claim by the household goods carrier or its household goods agent. The settlement offer or denial shall state, "A claimant has the right to seek mediation through the Texas Department of Motor Vehicles (TxDMV) [TxDMV] within 30 days (excluding Sundays and nationally recognized holidays) after any portion of the claim is denied by the carrier, the carrier makes a firm settlement offer that is not acceptable to the claimant, or 90 days has elapsed since the carrier received the claim and the claim has not been resolved."

(3) A household goods carrier must provide a copy of the shipping documents to the shipper's insurance company upon request. The carrier may assess a reasonable fee for this service.

(c) Documenting loss or damage to household goods.

(1) Inspection. If a loss or damage claim is filed and the household goods carrier wishes to inspect the items, the carrier must complete any inspection as soon as possible, but no later than 30 calendar days, after receipt of the claim.

(2) Payment of shipping charges. Payment of shipping charges and payment of claims shall be handled separately, and one shall not be used to offset the other unless otherwise agreed upon by both the household goods carrier and claimant.

(d) Claim records. A household goods carrier shall maintain a record of every claim filed. Claim records shall be retained for two years as required by §218.32 of this title (relating to Motor Carrier Records). At a minimum, the following information on each claim shall be maintained in a systematic, orderly and easily retrievable manner:

(1) claim number (if assigned), date received, and amount of money or the requested remedy;

(2) number (if assigned) and date of the moving services contract;

(3) name of the claimant;

(4) date the carrier issued its claim acknowledgment letter;

(5) date and total amount paid on the claim or date and reasons for disallowing the claim; and

(6) dates, time, and results of any mediation coordinated by the department.

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