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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES
SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §22.246

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §22.246, relating to Administrative Penalties.

This proposed rule will implement, in part, Public Utility Regulatory Act (PURA) §15.023 as revised by House Bill 1500 during the Texas 88th Regular Legislative Session. The amended rule adds whether a person complied with a voluntary mitigation plan as a factor for the commission to consider when determining the amount of an administrative penalty. The amended rule also removes redundant provisions and replaces them with a reference to §25.8 of this title (relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers).

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule will not create a new regulation;

(6) the proposed rule will expand an existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Barksdale English, Director, Division of Compliance and Enforcement, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the section.

Public Benefits

Mr. English has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will alignment of commission rules with the statutory requirement that the commission consider adherence with a voluntary mitigation plan when evaluating violations of PURA §39.157 or rules adopted by the commission under that section. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by February 22, 2024. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by February 22, 2024. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 55955. Parties may provide comments on the Chapter 22 and Chapter 25 proposals filed in this project in a single filing.

Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.

Statutory Authority

The amendment is proposed under Public Utility Regulatory Act (PURA) §14.001, which grants the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §15.023, which authorizes the commission to impose an administrative penalty of up to $1,000,000 for a violation of a voluntary mitigation plan.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001; 14.002; and 15.023.

§22.246. Administrative Penalties.

(a) - (b) (No change.)

(c) Amount of administrative penalty for violations of PURA or a rule or order adopted under PURA.

(1) (No change.)

(2) The administrative penalty for each separate violation of PURA or of a rule or order adopted under PURA may not exceed the limits established by §25.8 of this title (relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers) [~~PURA §35.0021, PURA §38.075, or a commission rule or commission order adopted under PURA §35.0021 or PURA §38.075 will be in an amount not to exceed $1,000,000 per violation per day. For all other violations, the administrative penalty for each separate violation will be in an amount not to exceed $25,000 per violation per day. An administrative penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system~~].

(3) The amount of the administrative penalty must be based on:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(B) the economic harm to property or the environment caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter future violations;

(E) efforts to correct the violation; [~~and~~]

(F) adherence with an applicable voluntary mitigation plan approved by the commission under §25.504 of this title (relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region); and

(G) [~~(F)~~] any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses, and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.

(d) - (f) (No change.)

(g) Options for response to notice of violation or continuing violation.

(1) - (4) (No change.)

(5) Opportunity to remedy a weather preparedness violation.

(A) - (C) (No change.)

(D) For purposes of this paragraph, the following provisions apply unless a provision conflicts with a commission rule or order adopted under PURA §35.0021 or §38.075, in which case, the commission rule or order applies.

(i) Not all violations to which this paragraph applies can be remedied. Subparagraph [~~Clauses~~] (C)(i) and [~~(C)~~](ii) of this paragraph do not apply to a violation that cannot be remedied.

(ii) For purposes of subparagraph [~~clauses~~] (C)(i) and [~~(C)~~](ii) of this paragraph, an entity that claims to have remedied an alleged violation and, if applicable, that the alleged violation was accidental or inadvertent has the burden of proving its claim to the commission. Proof that an alleged violation has been remedied and, if applicable, that the alleged violation was accidental or inadvertent must be evidenced in writing, under oath, and supported by necessary documentation.

(iii) (No change.)

(iv) If the independent organization certified under PURA §39.151 has not provided an entity with a deadline, the executive director will determine whether the deadline can be remedied and, if so, the deadline for remedying a violation within a reasonable period of time. The executive director will provide the entity with written notice of the violation and the deadline for remedying the violation within a reasonable period of time. This notice does not constitute notice under subsection [~~paragraph~~] (f)(2) of this section unless it fulfills the other requirements of that subsection. However, the provisions of subsection [~~subparagraph~~] (f)(2)(D) of this section apply to notice under this clause.

(v) - (vi) (No change.)

(vii) If the commission determines that the deadline for remedying a violation provided by the independent organization certified under PURA §39.151 or determined by the executive director is unreasonable, the commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of subparagraph [~~subclauses~~] (C)(i) and [~~(C)~~](ii) of this paragraph and, if appropriate, as a factor in determining the magnitude of administrative penalty to impose against the entity for the violation.

(h) - (k) (No change.)

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

Filed with the Office of the Secretary of State on January 19, 2024.

TRD-202400199
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 936-7322

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §25.8

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §25.8, relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers.

This proposed rule will implement, in part, Public Utility Regulatory Act (PURA) §15.023 as revised by H.B. 1500 during the Texas 88th Regular Legislative Session. The amended rule will increase the authorized penalty for violations of voluntary mitigation plans up to $1,000,000 per violation per day. The amendment also aligns violation definitions across classifications, consolidates violation descriptions, and adds a new description for "special violations."

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule will not create a new regulation;

(6) the proposed rule will expand an existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Barksdale English, Director, Division of Compliance and Enforcement, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the section.

Public Benefits

Mr. English has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to incentivize market participants who enter into voluntary mitigation plans to comply with those plans. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by February 22, 2024. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. *Comments must be filed by February 22, 2024.* Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 55955. Parties may file comments on the Chapter 22 and Chapter 25 proposals filed in this project in a single filing.

Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.

Statutory Authority

The amendment is proposed under Public Utility Regulatory Act (PURA) §14.001, which grants the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §15.023, which authorizes the commission to impose an administrative penalty of up to $1,000,000 for a violation of a voluntary mitigation plan.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001; 14.002; and 15.023.

§25.8. Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers.

(a) (No change.)

(b) Classification system.

(1) Class C violations.

(A) Penalties for Class C violations must [~~may~~] not exceed $1,000 per violation per day.

(B) (No change.)

(2) Class B violations.

(A) Penalties for Class B violations must [~~may~~] not exceed $5,000 per violation per day.

(B) All violations not specifically enumerated as a Class C, [~~or~~] Class A, or special violations [~~violation~~] are Class B violations.

(3) Class A violations.

(A) [~~Each separate violation of PURA §35.0021, PURA §38.075, or a commission rule or commission order adopted under PURA §35.0021 or PURA §38.075 is a Class A violation and the administrative penalty will not exceed $1,000,000 per violation per day.~~] Penalties for [~~all other~~] Class A violations must [~~will~~] not exceed $25,000 per violation per day.

(B) (No change.)

(4) Special violations.

(A) "Special violations" does not constitute a class of violations for purposes of PURA §15.023(d).

(B) The following types of violations are special violations for which a penalty must not exceed $1,000,000 per violation per day.

(i) A violation of PURA §39.157(a) or §25.503(g)(7) of this title (relating to Oversight of Wholesale Market Participants) in conjunction with not adhering to an applicable voluntary mitigation plan adopted under PURA §15.023(f) or §25.504 of this title (relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region);

(ii) A violation of PURA §35.0021 or a commission rule or order adopted under PURA §35.0021; and

(iii) A violation of PURA §38.075 or a commission rule or order adopted under PURA §38.075.

(c) - (d) (No change.)

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

Filed with the Office of the Secretary of State on January 19, 2024.

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Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 936-7322

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SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.504

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

This proposed rule will implement Public Utility Regulatory Act (PURA) §15.023 as revised by House Bill 1500 during the Texas 88th Regular Legislative Session. The proposed rule provides that adhering to a voluntary mitigation plan is one factor that must be considered by the commission to determine whether a generation entity abused market power, rather than constituting an absolute defense against an allegation of market power abuse. In addition, the proposed rule amends the standards, process, and timelines under which voluntary mitigation plans are reviewed and approved or denied by the commission.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule will not create a new regulation;

(6) the proposed rule will expand an existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of

implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Barksdale English, Director, Division of Compliance and Enforcement, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the section.

Public Benefits

Mr. English has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be that only voluntary mitigation plans that are in the public interest are approved, and that voluntary mitigation plans are kept up to date through a regular review process. There will be no economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by February 22, 2024. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by February 22, 2024. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 55948.

The commission also invites comments specifically on the following question:

Should the rule define "wholesale market design change," and if so, how should it be defined?

Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.

Statutory Authority

The amendment is proposed under Public Utility Regulatory Act (PURA) §14.001, which grants the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §15.023, which authorizes the commission and a person to enter into a voluntary mitigation plan relating to a violation of PURA §39.157.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001; 14.002; and 15.023.

§25.504. Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

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

(e) Voluntary mitigation plan. Any generation entity may submit to the commission a mitigation plan relating to [~~for ensuring~~] compliance with §25.503(g)(7) of this title or with the Public Utility Regulatory Act §39.157(a). Adherence to a commission-approved voluntary mitigation plan must be considered in a proceeding to determine whether the generation entity violated PURA §39.157 or §25.503(g)(7) of this title and, if so, the amount of the administrative penalty to be assessed for the violation. [~~Any plan that is submitted may be revised, with the agreement of the market participant, and approved or rejected by the commission. Adherence to a plan approved by the commission constitutes an absolute defense against an allegation of market power abuse with respect to behaviors addressed by the plan. Failure to adhere to a plan approved by the commission does not, of itself constitute a violation of §25.503(g)(7) of this title, but may be treated in the same manner as any other violation of a commission order.~~]

(1) The commission will approve the mitigation plan only if it finds that the plan is in the public interest.

(2) A generation entity or commission staff may apply to amend or terminate a voluntary mitigation plan that applies to the generation entity.

(3) The parties to a proceeding related to the approval or amendment of a voluntary mitigation plan are limited to the generation entity applying for the mitigation plan, commission staff, and the independent market monitor.

(4) The commission, on its own motion, may terminate, in whole or in part, a voluntary mitigation plan approved under this subsection. The executive director or the executive director's designee may also terminate a voluntary mitigation plan, in whole or in part, under the following conditions:

(A) The executive director or the executive director's designee must determine that continuation of the plan is no longer in the public interest.

(B) The executive director or the executive director's designee must provide notice of the termination to the generation entity with an approved voluntary mitigation plan at least three working days prior to the effective date of the termination.

(C) The commission must affirm or set aside the executive director or the executive director's designee's termination of a vol-

untary mitigation plan as soon as practicable after the effective date of the termination.

(f) Review of voluntary mitigation plans.

(1) The commission will review each mitigation plan adopted under subsection (e) of this section to determine whether the plan remains in the public interest at least once every two years and not later than 90 days after the implementation date of a wholesale market design change. Commission staff, in consultation with the independent market monitor, will determine when a wholesale market design change requiring review under this paragraph has occurred.

(2) At least 30 days prior to a deadline established by paragraph (1) of this subsection, commission staff must provide a recommendation on whether each voluntary mitigation plan remains in the public interest. As part of its recommendation, for each voluntary mitigation plan adopted prior to September 1, 2023, commission staff must address whether the plan complies with PURA §15.023(f) and this section.

(3) If the commission determines that all or a part of the plan is no longer in the public interest, the commission will terminate any part of the plan that it determines is no longer in the public interest. The generation entity may propose an amended plan for the commission's consideration.

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 January 19, 2024.

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Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 936-7322

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TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.62

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.62 concerning Other Professional Standards.

Background, Justification and Summary

The Board attempts to identify, as much as possible, all professional standards that a CPA is expected to adhere to. Forensic services is a professional standard that has not previously been identified.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed rule amendment will specifically identify a professional standard not previously listed.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on March 4, 2024.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board

may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151, which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.62. Other Professional Standards.

A person in the performance of consulting services, accounting and review services, any other attest service, financial advisory services, or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) AICPA issued standards, including but not limited to:

(A) Statements on Standards on Consulting Services (SSCS);

(B) Statements on Standards for Accounting and Review Services (SSARS);

(C) Statements on Standards for Attestation Engagements (SSAE);

(D) Statements on Standards for Tax Services (SSTS);

(E) Statements on Standards for Financial Planning Services (SSFPS); [~~or~~]

(F) Statements on Standards for Valuation Services (SSVS); or [~~.~~]

(G) Statements on Standards for Forensic Services (SSFS).

(2) Pronouncements by other professional entities having similar national or international authority recognized by the board including but not limited to the International Financial Reporting Standards (IFRS) promulgated by the International Accounting Standards Board (IASB).

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 January 18, 2024.

TRD-202400175
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 305-7842

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CHAPTER 521. FEE SCHEDULE

22 TAC §521.9

The Texas State Board of Public Accountancy (Board) proposes an amendment to §521.9, concerning Certificate Fee.

Background, Justification and Summary

Individuals applying for their initial CPA license are assessed a fee to cover the administrative costs of processing an application. The rule amendment clarifies that the fee will not be refunded for any reason.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The proposed rule amendment will put applicants on notice that if their application is not approved, or they don't pass the exam, or they don't complete their application for initial licensure the board will apply the fee toward the board's costs of processing the application and not refund the fee.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on March 4, 2024.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151, which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§521.9. Certificate Fee.

(a) The fee for the initial issuance of a CPA certificate pursuant to the Act will be established by the board. The fee is nonrefundable.

(b) A military service member or military veteran who is eligible for the issuance of the CPA certificate is exempt from this fee.

(c) The exemption from the certificate fee must be evidenced by an active ID, state-issued driver's license with a veteran designation or DD214.

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 January 18, 2024.

TRD-202400176
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 305-7842

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 88. STATE LONG-TERM CARE OMBUDSMAN PROGRAM

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §§88.2, 88.101, 88.102, 88.104, 88.105, 88.201, 88.305, 88.307, 88.403, 88.404, 88.406, and 88.501; new §§88.106, 88.107, 88.202, 88.405, 88.407, 88.408, 88.409, 88.601, 88.602, and 88.603; and the repeal of §§88.309, 88.405, and 88.407.

BACKGROUND AND PURPOSE

The State Long-Term Care Ombudsman Program (Ombudsman Program) is a federally and state funded program authorized by §711 and §712 of the Older Americans Act (Title 42 United States Code §3058f and §3058g). The Ombudsman program protects and advocates for the health, safety, welfare, and rights of residents of nursing facilities and assisted living facilities.

The proposed rules implement a recent change to §306(a)(9) of the Older Americans Act regarding the minimum expenditure an Area Agency on Aging must make under its area plan in carrying out the Ombudsman Program. The proposed rules also provide that certain state general revenue funds allocated for Ombudsman Program functions may not be included in determining the amount of funds spent to meet this expenditure requirement to ensure that a larger amount of funds is used for the Ombudsman Program. In addition, because the State Ombudsman has excluded these funds from the calculation of the minimum expenditure requirement since 2013, the proposed rule further ensures that host agencies do not reduce the funds used for the Ombudsman Program.

The proposed rules address Title 45, Code of Federal Regulations (45 CFR), §1324.19(b)(7) regarding a certified ombudsman's referral of a complaint about actions of a resident's legally authorized representative to the appropriate agency for investigation. The proposed rules address 45 CFR §1324.11(e) and §1324.19(b) regarding documentation of consent.

The proposed rules address a requirement in 45 CFR §1324.11(e)(2), regarding the Office of the State Long-Term Care Ombudsman (the Office) and a certified ombudsman obtaining a copy of a record from a long-term care facility upon request.

The proposed rules include the term "informed consent" to be consistent with 45 CFR Part 1324.

The proposed rules require a certified ombudsman to, at the request of a long-term care facility, provide a completed HHSC form to the facility at the time the certified ombudsman is requesting access to a confidential record concerning a facility resident to help ensure a record of the request for access exists.

The proposed rules require a host agency to submit a plan of correction to the Office for review and approval by the Office if, as the result of a desk review, the Office sends a written report containing a finding to the host agency and local ombudsman entity.

The proposed rules describe the actions taken if the Office determines that a host agency is not in compliance with Chapter 88, Subchapter E and the determination is not based on onsite monitoring or a desk review.

The proposed rules describe the sanctions that may be imposed on a host agency if the host agency does not complete an action in accordance with an approved plan of correction or an approved modified plan of correction resulting from onsite monitoring, a desk review, or a determination of non-compliance not based on onsite monitoring or a desk review.

The proposed rules include additional performance measures that relate to current Ombudsman Program requirements so that the Office can more thoroughly monitor the progress of a local ombudsman entity's compliance with the requirements. In addition, the proposed rules remove a performance measure regarding the number of assisted living facilities that will receive at least one visit by a certified ombudsman. This performance measure is being removed because it is not as meaningful a marker of compliance as the performance measure regarding the number of visits to assisted living facilities by certified ombudsmen that will occur during a federal fiscal year.

The proposed rules remove the process that allows a host agency to request that an approved performance measure projection be revised. This process was established by the HHSC Office of Area Agencies on Aging and is being removed because the process is no longer in place.

The proposed rules change the term "state fiscal year" to "federal fiscal year" to make time periods consistent and to make compliance with requirements related to the time periods less complicated. The proposed rules increase the variance that measures whether a local ombudsman entity is in compliance with certain performance measures and performance measure projections. This increase in variance will help compensate for unforeseen circumstances that hinder compliance by a local ombudsman entity.

The proposed rules include a process for the submission of a grievance about the performance of the State Ombudsman or a representative of the Office who is an employee or volunteer of HHSC.

The proposed rules change the timeframe by which a local ombudsman entity must enter information about activities and casework into the ombudsman database to help ensure the accuracy and completeness of the information entered.

The proposed rules incorporate current policies and procedures related to the Ombudsman Program, including the submission and review of an Ombudsman Staffing Plan form and not reimbursing a host agency if the form is not approved by the Office, the process for investigating a complaint about the conduct of a legally authorized representative, and documentation of consent related to a complaint.

The proposed rules restructure and reorganize some of the current rules to consolidate subject matters.

The proposed rules repeal several rules and replace them with new rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §88.2, Definitions, adds definitions for the following new terms: "grievance;" "grievant;" "informed consent;" and "ombudsman database." The proposed amendment removes the term "state fiscal year" because this term is no longer used in the rules. The proposed amendment also renumbers the definitions.

The proposed amendment to §88.101, Responsibilities of the State Ombudsman and the Office, references Subchapter G related to Grievances instead of §88.309 relating to Grievances Regarding Performance of a Representative of the Office or Certification Decisions by the State Ombudsman because §88.309 is proposed for repeal. The proposed amendment makes minor editorial changes.

The proposed amendment to §88.102, Certification of an Ombudsman, makes edits to clarify the type of employee or independent contractor the State Ombudsman certifies as a staff ombudsman. The proposed amendment also corrects a rule reference regarding §88.2 because the proposed amendment to §88.2 renumbers the definitions.

The proposed amendment to §88.104, Designation of a Local Ombudsman Entity, in subsection (b)(1) and (2) of the rule updates references regarding §88.2 because the proposed amendment to §88.2 renumbers the definitions. The proposed amendment in subsection (c)(2) references proposed new §§88.106, 88.107, and 88.409 instead of §88.105 because the content in §88.105 related to onsite monitoring, desk review, and non-compliance is addressed in proposed new §§88.106, 88.107, and 88.409. The proposed amendment in subsection (c)(2)(B) of the rule adds "written" before "plan of correction" and reformats the rule for clarity. The proposed amendment in subsection (c)(2)(C) clarifies that the State Ombudsman may remove the designation of a local ombudsman entity if the local ombudsman entity does not complete the actions in accordance with an approved plan of correction or an approved modified plan of correction. The proposed amendment in subsection (f) of the rule updates a rule reference.

The proposed amendment to §88.105, Fiscal Management and Monitoring of a Local Ombudsman Entity, retitles the rule as "Fiscal Management of a Local Ombudsman Entity." The proposed amendment in subsection (b) of the rule adds "through the HHSC Office of the Area Agencies on Aging" to clarify how the State Ombudsman distributes funds to a host agency, corrects a reference to the Older Americans Act, removes outdated funding formulas, clarifies the description of state general revenue funds and their allocation by the State Ombudsman for the performance of Ombudsman Program functions, changes the term "state fiscal year" to "federal fiscal year" and reformats the rule to improve readability and clarity. The proposed amendment removes subsections (c) - (k) related to onsite monitoring, desk review, and non-compliance because these topics are addressed in proposed new §§88.106, 88.107, and 88.409.

Proposed new §88.106, Onsite Monitoring of a Local Ombudsman Entity and a Host Agency, describes what the Office monitors when it conducts an onsite visit of a local ombudsman entity and a host agency. The proposed rule specifies that the Office conducts at least one onsite visit every three years and describes the activities performed in an onsite visit. The proposed rule describes how the Office schedules a date for an onsite visit and notifies the host agency of a scheduled visit at least 30 days before the visit. The proposed rule provides that the Office gives the local ombudsman entity and the host agency a written report that may contain findings and recommendations from the onsite visit within 45 days after the visit. Currently, §88.105(e)(3) allows the Office 30 days after the onsite visit to provide the report. The proposed rule extends the time frame to 45 days to give the Office adequate time to review information obtained from the visit. The proposed rule requires the host agency to submit a written plan of correction to the Office within 45 days after receipt of the written report that contains one or more findings, instead of within 30 days after receipt of the report as provided by the current rule. This change in timeframe allows the host agency adequate time to develop a plan of correction. The proposed rule provides that the Office notifies the local ombudsman entity and host agency of whether the plan is approved or requires modification within 45 days after receipt of the plan of correction, instead of 30 days after receipt of the plan of correction. This change in timeframe

allows the Office adequate time to review the plan of correction. The proposed rule requires the local ombudsman entity or host agency to complete the actions contained in the plan of correction by the dates in the plan and requires the host agency to, if the Office determines that the plan requires modification, submit a modified written plan of correction within a time period determined by the Office for approval by the Office. The proposed rule describes the actions the Office may take to determine if the local ombudsman or host agency entity has completed the actions in accordance with an approved plan of correction or approved modified plan of correction. The proposed rule provides that if the Office determines that the local ombudsman entity or host agency did not complete an action in accordance with an approved plan of correction or an approved modified plan of correction, the Office may allow the local ombudsman entity or host agency additional time to complete the action, HHSC may impose a Level Two sanction in accordance with 26 TAC §213.5, or the State Ombudsman may remove the designation of a local ombudsman entity. The proposed rule provides that if the Office allows a local ombudsman entity or host agency additional time to complete an action and the Office determines that the local ombudsman entity did not complete the action within the time allowed, HHSC may impose a Level Two sanction in accordance with 26 TAC §213.5, or the State Ombudsman may remove the designation of a local ombudsman entity. The proposed rule provides that, at the request of a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction.

Proposed new §88.107, Desk Review Monitoring of a Local Ombudsman Entity, describes the purpose of a desk review, which includes determining if a local ombudsman entity has conducted at least one visit to each long-term care (LTC) facility in the ombudsman service area each quarter of a federal fiscal year. The proposed rule also describes how often the Office conducts a desk review and that if the Office identifies a finding from a desk review, the Office provides to the local ombudsman entity and the host agency a written report that contains the finding and may include recommendations. Currently, §88.105(j) allows the Office to provide the report within 30 days after the desk review. The proposed rule does not include a time frame to allow the Office a flexible timeline to provide the report. The proposed rule requires a host agency to submit a written plan of correction containing certain information to the Office within 14 days after receipt of a report. The proposed rule provides a time frame for the Office to notify the local ombudsman entity and host agency of whether the plan is approved or requires modification. The proposed rule requires the local ombudsman entity to complete the actions contained in the plan of correction by the dates in the plan if the Office approves the plan. The proposed rule requires the host agency to submit a modified written plan of correction within a time period determined by the Office for approval by the Office, if the Office determines that the plan requires modification. The proposed rule describes the actions the Office takes to determine if the local ombudsman entity has completed the actions in an approved plan of correction or approved modified plan of correction. The proposed rule provides that, if the Office determines that the local ombudsman entity did not complete an action in an approved plan of correction or a modified plan of correction, the Office may allow the local ombudsman entity additional time to complete the action, HHSC may impose a Level Two sanction in accordance with 26 TAC §213.5, or the State Ombudsman may remove the designation of a local ombudsman entity. The proposed rule also provides that if the Office allows a local ombudsman entity additional time to complete an action in the approved plan and the Office determines that the local ombudsman entity did not complete the action within the time allowed, HHSC may impose a Level Two sanction in accordance with 26 TAC §213.5 or the State Ombudsman may remove the designation of the local ombudsman entity. The proposed rule also provides that upon request by a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction.

The proposed amendment to §88.201, Access to Facilities, Residents, and Resident Records, in subsection (c)(1) of the rule adds a reference to 45 CFR §1324.11(e)(2) and uses language from 45 CFR §1324.11(e)(2) instead of the Older Americans Act for a more specific description of the records to which a certified ombudsman has access, including that a certified ombudsman has access to records regardless of format. The proposed amendment in subsection (c)(1)(A) and (B) of the rule uses the term "informed consent" instead of "consent" to be consistent with 45 CFR Part 1324. The proposed amendment adds a new subsection (d) to provide that, in accordance with 45 CFR §1324.11(e)(2), access by the State Ombudsman and a certified ombudsman to a record as described in subsection (c) of this section, includes obtaining a copy of the record upon request.

Proposed new §88.202, Notification to LTC Facility of Authorization to Access Resident Records, requires a certified ombudsman to, at the request of an LTC facility, provide a completed HHSC form "Acknowledgement of Ombudsman Access to Confidential Record" to the facility at the time the certified ombudsman is requesting access to a confidential record concerning a resident of the facility to help to ensure a record of the request for access exists.

The proposed amendment to §88.305, Complaints, in subsection (b)(1) and (2) of the rule uses the term "informed consent" instead of "consent" to be consistent with 45 CFR Part 1324. The proposed amendment requires a certified ombudsman to inform a complainant that one of the situations in which a complaint will be investigated is when the resident is unable to communicate informed consent to investigate the complaint, has a legally authorized representative, and (1) the complaint relates to an action, inaction, or decision of the legally authorized representative that may adversely affect the health, safety, welfare, or rights of the resident; (2) the certified ombudsman does not have evidence that the resident would object to the complaint being investigated; (3) the certified ombudsman has reasonable cause to believe that it is in the best interest of the resident to investigate the complaint; and (4) the State Ombudsman approves the request of the certified ombudsman to investigate the complaint. The proposed amendment requires a certified ombudsman to request approval from the State Ombudsman to investigate the complaint if this situation exists. The proposed amendment adds a new paragraph (5) in subsection (b) of the rule to require a certified ombudsman to, if the State Ombudsman gives approval, make the referral to the appropriate agency; and determine whether the complaint is satisfactorily resolved. The proposed amendment requires the certified ombudsman to follow the instruction of the State Ombudsman if the State Ombudsman does not approve the request to investigate the complaint. The proposed amendment also requires a certified ombudsman to document the type of consent or authority that allows for a complaint to be investigated. The amendments related to requesting approval from the State Ombudsman to investigate a complaint, making a referral to an appropriate agency, following State Om-

budsman instruction if approval is not given, and documenting consent or authority reflect current policies of the Ombudsman Program. The proposed amendment renumbers the paragraphs in subsection (b) because a new paragraph (5) is added.

The proposed amendment to §88.307, changes the title of the rule from "Requirements Regarding LTC Visits and Submitting Information to the Office" to "Requirements Regarding LTC Facility Visits and Submitting Information to the Office." The change is made to use the defined term "LTC facility" in the title of this rule. The proposed amendment requires a local ombudsman entity to enter activities and casework into the ombudsman database within 14 days after completion of the activity or receipt of the complaint instead of on the 16th day of each month if the 16th is a business day or the first business day after the 16th if the 16th is not a business day. This change in the deadline to enter the information was made to help ensure the accuracy and completeness of the information entered.

The proposed repeal of §88.309, Grievances Regarding Performance of a Representative of the Office or Certification Decisions by the State Ombudsman, deletes the rule as no longer necessary, because the content of the rule is addressed in proposed new Subchapter G.

The proposed amendment to §88.403, Conflicts of Interest Regarding a Host Agency, updates references regarding §88.2 because the proposed amendment to §88.2 renumbers the definitions. The proposed amendment also changes a reference to "§88.2(19)(B)" to specify a governmental entity or nonprofit organization contracting with a host agency.

The proposed amendment to §88.404, Provision of Records to the Office, Disclosure of Confidential Information, and Allegations of Abuse, Neglect, or Exploitation, updates a reference regarding §88.2 because the proposed amendment to §88.2 renumbers the definitions. The proposed amendment also changes a reference to "§88.2(19)(B)" to specify a governmental entity or nonprofit organization contracting with a host agency.

Proposed new §88.405, Performance Measures, describes the performance measures of a local ombudsman entity in proposed subsection (a) including the number of visits to nursing facilities by certified ombudsmen that will occur during a state fiscal year; compliance with the complaint response requirements; compliance with the requirement to submit activities and casework; and compliance with the minimum expenditure requirement. Proposed subsection (b) of the rule requires a host agency to work with the local ombudsman entity to develop projections for certain performance measures for a state fiscal year as directed by the HHSC Office of the Area Agencies on Aging and submit the projections to the Office by July 31st of each year using the HHSC form "Ombudsman Performance Measure Projections." The proposed rule provides that the Office reviews a form submitted by the host agency and approves the form or recommends modifications to the form. If the Office recommends modifications to the form, the proposed rule requires the host agency to submit a revised form to the Office for approval within a time period determined by the Office. The current rule requires that a host agency submit the performance measure projections to the HHSC Office of the Area Agencies on Aging but the proposed rule makes the recipient of the projections the Office because the projections concern the Ombudsman Program. Proposed subsections (c) and (d) of the rule require a host agency to ensure that a local ombudsman entity, by the end of each state fiscal year, meets the performance measure projections approved by the Office as described in subsection (b) and certain performance measures by (1) being within a variance of minus ten percent of the projections or performance measures; or (2) exceeding the projections or performance measures. Proposed subsection (e) of the rule requires that a host agency meets or exceeds the performance measure in subsection (a)(7) of the rule regarding the minimum funding requirement because this requirement is in §306(a)(9) of the Older Americans Act. The term "state fiscal year" is changed to "federal fiscal year" in all subsections of the rule.

The proposed repeal of §88.405, Meeting Performance Measure Projections, deletes the rule as no longer necessary because the content of the rule has been addressed in proposed new §88.405.

The proposed amendment to §88.406, Requirements Regarding Expenditures for the Ombudsman Program, requires a host agency to expend for a federal fiscal year at least the amount of federal funds expended in federal fiscal year 2019, instead of in federal fiscal year 2000, to be in compliance with §306(a)(9) of the Older Americans Act. The proposed amendment provides that in determining the amount of funds expended, the host agency may include all funds except the state general revenue funds allocated to the host agency described in proposed §88.105(b)(3). The proposed amendment also removes a title to a federal regulation for brevity.

Proposed new §88.407, Requirement for Approval of Ombudsman Staffing Plan Form, provides that the Office sends a host agency an Ombudsman Staffing Plan form each year and requires a host agency to complete and submit the Ombudsman Staffing Plan form as specified in the form. The proposed rule also provides that the Office reviews the form and notifies the host agency if the staffing plan form is approved. The proposed rule provides that the Office will not reimburse a host agency for expenditures made by the host agency for Ombudsman Program functions until the Office approves an Ombudsman Staffing Plan form submitted by the host agency.

The proposed repeal of §88.407, Prohibition of Interference and Retaliation by a Host Agency, deletes the rule as no longer necessary because the content of the rule is addressed in proposed new §88.408.

Proposed new §88.408, Prohibition of Interference and Retaliation by a Host Agency, in proposed subsection (a) of the rule, prevents a host agency from willfully interfering with the State Ombudsman or a representative of the Office performing any of the functions of the Ombudsman Program, retaliating against the State Ombudsman or a representative of the Office, and having personnel policies or practices that prohibit a representative of the Office from performing the functions of the Ombudsman Program or from adhering to the requirements of the Older Americans Act, §712. Proposed subsection (b) of the rule requires a host agency to ensure that a governmental entity or nonprofit organization contracting with a host agency, complies with §88.408(a) of this section as if the entity or organization is a host agency. Proposed subsection (c) of the rule allows a host agency to require a representative of the Office to notify the host agency of comments or recommendations made in accordance with §88.302(a)(1)(F) and of certain information relating to a legislator or the media.

Proposed new §88.409, Noncompliance by a Host Agency, in proposed subsection (a) of the rule provides that if the Office determines that a host agency is not in compliance with Subchapter E, relating to Requirements of a Host Agency, and the

determination is not based on onsite monitoring or a desk review, the Office sends the local ombudsman entity and host agency a written notice describing the determination of non-compliance. Proposed subsection (b) of the rule requires the host agency or local ombudsman entity to respond to the written notice within 14 days with a plan of correction describing the action that will be taken to address the non-compliance and the date the action will be completed. Proposed subsection (c) of the rule provides that the Office will notify the host agency within 14 days if the plan of correction is approved or requires modification. Proposed subsection (d) of the rule provides that the Office will determine compliance with the plan of correction by reviewing information in the ombudsman database, requesting that the host agency submit evidence of correction to the Office, or visiting the host agency or local ombudsman entity. Proposed subsection (e) of the rule provides that if the Office determines that the host agency did not complete an action in accordance with an approved plan of correction or an approved modified plan of correction, the Office may allow the host agency additional time to complete the action, HHSC may impose a Level Two or Level Three sanction in accordance with 26 TAC §213.5, or the State Ombudsman may remove the designation of a local ombudsman entity. Proposed subsection (f) of the rule provides that if the Office allows a host agency additional time to complete an action and the Office determines that the host agency did not complete the action within the time allowed, HHSC may impose a Level Two or Level Three sanction in accordance with §213.5 of this title, or the State Ombudsman may remove the designation of the local ombudsman entity. Proposed subsection (g) of the rule provides that the Office will provide technical assistance, upon request, to the host agency or local ombudsman entity regarding the plan of correction.

The proposed amendment to §88.501, HHSC Responsibilities Regarding Individual Conflicts of Interest, corrects a rule reference regarding §88.2 because the proposed amendment to §88.2 renumbers the definitions.

New Subchapter G, Grievances

Proposed new §88.601, Grievances Regarding Performance of a Representative of the Office Who is an Employee, Independent Contractor, or Volunteer of a Host Agency, Including a Managing Local Ombudsman, describes the process and requirements for a local ombudsman entity in receiving and investigating a grievance about the performance of Ombudsman Program functions by a representative of the Office, other than a grievance about a managing local ombudsman. The proposed rule also describes the actions the Office takes regarding a grievance about the performance of Ombudsman Program functions by a managing local ombudsman.

Proposed new §88.602, Grievances Regarding the Performance of the State Ombudsman or a Representative of the Office Who Is an Employee or Volunteer of HHSC, describes the actions taken by the Office for a grievance about the performance of Ombudsman Program functions by the State Ombudsman. The proposed rule requires a grievance about the State Ombudsman that is not related to fraud, waste, or abuse to be submitted to the Director of the Office of the Ombudsman and a grievance about the State Ombudsman related to fraud, waste, or abuse to be submitted to the Office of the Inspector General. The proposed rule also describes the actions taken by the Office for a grievance about the performance of Ombudsman Program functions by a representative of the Office who is an employee or volunteer of HHSC.

Proposed new §88.603, Grievances Regarding Certification Decisions by the State Ombudsman, provides that if the State Ombudsman refuses, suspends, or terminates certification of a representative of the Office, the person whose certification was refused, suspended, or terminated may file a grievance to request a reconsideration of the decision. The proposed rule describes how the grievance must be submitted and the actions the Office takes in reviewing the grievance.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new regulations;

(6) the proposed rules will expand and repeal existing regulations;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

HHSC does not expect an adverse economic effect on small businesses, micro-businesses, or rural communities from this proposal because there are no small businesses, micro-businesses, or rural communities included in those required to comply.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; and are necessary to receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

Hailey Kemp, Chief Public Affairs Officer, has determined that for each year of the first five years the rules are in effect, the public will benefit from the implementation of federal requirements regarding the Ombudsman Program that help ensure the protection of and advocacy for the health, safety, welfare, and rights of long-term care facility residents. The public will also benefit from clearer rules regarding the requirements of the Ombudsman Program.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because there are no new fees or costs imposed on those required to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Alexa Schoeman (512) 438-4281 in the Office of the State Long-Term Care Ombudsman.

Written comments on the proposal may be submitted to Alexa Schoeman, Deputy State Ombudsman, P.O. Box 149030, Mail Code W250, Austin, Texas 78714, or street address 4601 W. Guadalupe Street, Austin, Texas 78751; or by e-mail to ltc.ombudsman@hhs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 23R030" in the subject line.

SUBCHAPTER A. PURPOSE AND DEFINITIONS

26 TAC §88.2

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.2. Definitions.

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

(1) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code, §662.021.

(2) Certified ombudsman--A staff ombudsman or a volunteer ombudsman.

(3) CFR--Code of Federal Regulations.

(4) Complainant--A person who makes a complaint.

(5) Complaint--A statement of dissatisfaction or concern made by or on behalf of a resident, that relates to action, inaction, or a decision by any of the following entities or persons, that may adversely affect the health, safety, welfare, or rights of the resident:

(A) a long-term care (LTC) [~~an LTC~~] facility or LTC facility staff;

(B) a governmental entity, including a health and human services agency; or

(C) any other person who provides care or makes decisions related to a resident.

(6) DAHS facility--A day activity and health services facility. A facility licensed in accordance with Texas Human Resources Code, Chapter 103.

(7) Day--A calendar day.

(8) Federal fiscal year--A 12-month period of time from October 1 through September 30.

(9) Governmental entity--An entity that is:

(A) a state agency;

(B) a district, authority, county, municipality, regional planning commission, or other political subdivision of the state; or

(C) an institution of higher education, as defined in Texas Education Code, §61.003.

(10) Grievance--A statement of dissatisfaction or concern regarding a representative of the Office of the State Long-Term Care Ombudsman (Office) or the State Ombudsman and the performance of their functions, responsibilities, and duties described in 45 CFR §1324.13, 45 CFR §1324.19, and this chapter.

(11) Grievant--A person who makes a grievance.

(12) [~~(10)~~] HCSSA--Home and community support services agency. An entity licensed in accordance with Texas Health and Safety Code [~~,~~] Chapter 142.

(13) [~~(11)~~] HHSC--The Texas Health and Human Services Commission or its designee.

(14) [~~(12)~~] Host agency--A governmental entity or nonprofit organization that contracts with HHSC to ensure that the local ombudsman entity implements the State Long-Term Care Ombudsman Program (Ombudsman Program) [~~Ombudsman Program~~] in an ombudsman service area.

(15) [~~(13)~~] Immediate family member--A member of the same household or a relative with whom there is a close personal or significant financial relationship.

(16) Informed consent--Consent from a resident or legally authorized representative after the State Ombudsman or a representative of the Office explains the options for ombudsman action and possible outcomes of such options in a manner and language in which the resident or legally authorized representative understands, as determined by the State Ombudsman or a representative of the Office.

(17) [~~(14)~~] Individual conflict of interest--A situation in which a person is involved in multiple interests, financial or otherwise, that could affect the effectiveness and credibility of the Ombudsman Program and includes a person:

(A) having direct involvement in the licensing, surveying, or certification of an LTC facility, a HCSSA, a DAHS facility, a nursing facility administrator, or a nurse aide;

(B) having ownership or investment interest (represented by equity, debt, or other financial relationship) in an LTC facility, a HCSSA, or a DAHS facility;

(C) managing or being employed in an LTC facility, a HCSSA, or a DAHS facility;

(D) being employed by an LTC facility within the 12 months before performing functions of the Ombudsman Program;

(E) accepting gifts, gratuities, or other consideration from an LTC facility or from a resident of such an LTC facility or the resident's family;

(F) accepting money or any other consideration from anyone other than the local ombudsman entity or host agency for performing functions of the Ombudsman Program;

(G) receiving or having the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of an LTC facility, a HCSSA, or a DAHS facility;

(H) being involved in PASRR screenings for LTC facility placements other than responding to a complaint made to the Ombudsman Program;

(I) determining eligibility regarding Medicaid or other public benefits for residents;

(J) being employed by a managed care organization that provides services to residents;

(K) serving as a representative of the Office for an LTC facility in the ombudsman service area and in which a relative of the representative resides or works;

(L) acting as a decision-maker or legally authorized representative for a resident in the ombudsman service area, including providing adult protective services as described in Texas Human Resources Code, Chapter 48;

(M) being a resident;

(N) being a member of a board or council that represents the interests of an LTC facility; or

(O) having an immediate family member who meets any of the descriptions in subparagraphs (A) - (N) of this paragraph.

(18) [~~(15)~~] Legally authorized representative--A person authorized by law to act on behalf of another person with regard to a matter described in this chapter, including:

(A) a parent, guardian, or managing conservator of a minor;

(B) the guardian of an adult;

(C) an agent to whom authority to make health care decisions is delegated under a medical power of attorney or durable power of attorney in accordance with state law; or

(D) the representative of a deceased person.

(19) [~~(16)~~] Local ombudsman entity--One of the following:

(A) an identifiable unit of a host agency that:

(i) consists of representatives of the Office who are employees, independent contractors, or volunteers of the host agency; and

(ii) implements the Ombudsman Program in an ombudsman service area; or

(B) an identifiable unit of a governmental entity or nonprofit organization that:

(i) consists of representatives of the Office who are employees, independent contractors, or volunteers of the governmental entity or nonprofit organization; and

(ii) contracts with a host agency to implement the Ombudsman Program in an ombudsman service area.

(20) [~~(17)~~] LTC facility--Long-term care facility. A nursing facility licensed or required to be licensed in accordance with Texas Health and Safety Code, Chapter 242, and or an assisted living facility licensed or required to be licensed in accordance with Texas Health and Safety Code, Chapter 247.

(21) [~~(18)~~] Managing local ombudsman--A person who:

(A) is certified as a staff ombudsman to serve as a managing local ombudsman in accordance with §88.102 of this chapter (relating to Certification of an Ombudsman); and

(B) works with a host agency and the Office to oversee the implementation of the Ombudsman Program in an ombudsman service area.

(22) [~~(19)~~] Office--The Office of the State Long-Term Care Ombudsman. An organizational unit within HHSC that:

(A) is headed by the State Ombudsman;

(B) consists of representatives of the Office who are employees of HHSC; and

(C) oversees the statewide implementation of the Ombudsman Program.

(23) [~~(20)~~] Older Americans Act--A federal law (Title 42, United States Code, §3011 et seq.) that establishes and funds a comprehensive service system for persons 60 years of age or older and certain caregivers and family members of persons 60 years of age or older.

(24) Ombudsman database--The statewide reporting system required by §712(c) of the Older Americans Act that is a web-based application in which Ombudsman Program data is entered, stored, maintained, and analyzed.

(25) [~~(21)~~] Ombudsman intern--A person who is being trained to be a volunteer ombudsman in accordance with the Ombudsman Certification Training Manual but has not been certified as a volunteer ombudsman.

(26) [~~(22)~~] Ombudsman Program--The State Long-Term Care Ombudsman Program as defined in 45 CFR §1324.1. The program through which the functions of the Office are carried out by the State Ombudsman and representatives of the Office.

(27) [~~(23)~~] Ombudsman Program records--The files, records, and other information created or maintained by the State Ombudsman or a representative of the Office in the performance of functions of the Ombudsman Program, including:

(A) information relating to complaint investigations;

(B) emails and documentation of phone conversations;

(C) documentation related to the budget and expenditures for the Ombudsman Program; and

(D) information contained in the ombudsman database.

(28) [~~(24)~~] Ombudsman service area--The county or counties, specified in the contract between HHSC and a host agency, in

which the local ombudsman entity performs functions of the Ombudsman Program.

(29) [~~(25)~~] Organizational conflict of interest-- A situation in which an organization is involved in multiple interests, financial or otherwise, that could affect the effectiveness and credibility of the Ombudsman Program and includes an organization:

(A) having any ownership, operational, or investment interest in, or receiving grants or donations from, an LTC facility;

(B) being an association of LTC facilities or an affiliate of such an association;

(C) having responsibility for licensing, surveying, or certifying LTC facilities;

(D) having a governing board member with an ownership, investment, or employment interest in an LTC facility;

(E) providing long-term care to residents of LTC facilities, including the provision of personnel for LTC facilities or the operation of programs that control access to, or services of, LTC facilities;

(F) providing long-term care coordination or case management for residents of LTC facilities;

(G) setting reimbursement rates for LTC facilities;

(H) providing adult protective services, as described in Texas Human Resources Code, Chapter 48;

(I) determining eligibility regarding Medicaid or other public benefits for residents of LTC facilities;

(J) conducting PASRR screening for LTC facility placements;

(K) making decisions regarding admission of residents to, or discharge of residents from, LTC facilities; or

(L) providing guardianship, conservatorship, or other fiduciary or surrogate decision-making services for residents of LTC facilities.

(30) [~~(26)~~] PASRR--Preadmission Screening and Resident Review. A review performed in accordance with 42 CFR Part 483, Subpart C.

(31) [~~(27)~~] Private and unimpeded access--Has the following meanings:

(A) as used in §88.201(a)(1) of this chapter (relating to Access to Facilities, Residents, and Resident Records), access to enter an LTC facility without interference or obstruction from facility employees, volunteers, or contractors; and

(B) as used in §88.201(a)(2) of this chapter, access to communicate with a resident outside of the hearing and view of other persons without interference or obstruction from facility employees, volunteers, or contractors.

(32) [~~(28)~~] Representative of the Office--A staff ombudsman, volunteer ombudsman, or ombudsman intern.

(33) [~~(29)~~] Resident--A person of any age who resides in an LTC facility.

(34) [~~(30)~~] Resident representative--A person chosen by a resident, through formal or informal means, to act on behalf of the resident to:

(A) support the resident in decision-making;

(B) access medical, social, or other personal information of the resident;

(C) manage financial matters; or

(D) receive notifications.

(35) [~~(31)~~] Staff ombudsman--A person who meets the following criteria, including a managing local ombudsman:

(A) is certified as a staff ombudsman in accordance with §88.102 of this chapter;

(B) performs functions of the Ombudsman Program; and

(C) is an employee or independent contractor of:

(i) a host agency;

(ii) a governmental entity or nonprofit organization that contracts with a host agency, as described in paragraph (16)(B) of this section; or

(iii) HHSC.

~~[(32) State fiscal year--A 12-month period of time from September 1 through August 31.]~~

(36) [~~(33)~~] State Ombudsman--The State Long-term Care Ombudsman, as defined in 45 CFR §1324.1. The person who heads the Office and performs the functions, responsibilities, and duties described in §88.101 of this chapter (relating to Responsibilities of the State Ombudsman and the Office).

(37) [~~(34)~~] Volunteer ombudsman--A person who:

(A) is certified as a volunteer ombudsman in accordance with §88.102 of this chapter;

(B) performs functions of the Ombudsman Program; and

(C) is not an employee or independent contractor of:

(i) HHSC;

(ii) a host agency; or

(iii) a governmental entity or nonprofit organization that contracts with a host agency, as described in paragraph (16)(B) of this section.

(38) [~~(35)~~] Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.

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

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SUBCHAPTER B. ESTABLISHMENT OF THE OFFICE

26 TAC §§88.101, 88.102, 88.104 - 88.107

STATUTORY AUTHORITY

The amendments and new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendments and new sections affect Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.101. Responsibilities of the State Ombudsman and the Office.

(a) The Office is headed by the State Ombudsman.

(b) The State Ombudsman, directly or through a designee:

(1) may designate a local ombudsman entity to perform the functions of the Ombudsman Program in an ombudsman service area;

(2) certifies ombudsmen as described in §88.102 of this subchapter (relating to Certification of an Ombudsman), and refuses, suspends, and terminates certification, as described in §88.103 of this subchapter (relating to Refusal, Suspension, and Termination of Certification of an Ombudsman);

(3) designates local ombudsman entities, and refuses, suspends, or terminates designation in accordance with §88.104 of this subchapter (relating to Designation of a Local Ombudsman Entity);

(4) approves the allocation of federal and state funds provided to a host agency for the local ombudsman entity and determines that program budgets and expenditures of the Office, host agency, and local ombudsman entities are consistent with laws, rules, policies, and procedures governing the Ombudsman Program;

(5) is responsible for the programmatic oversight of a representative of the Office, which includes:

(A) screening a representative of the Office who is employed by HHSC for individual conflicts of interest as described in subsection (d) of this section;

(B) screening a host agency for organizational conflicts of interest, as described in §88.403 of this chapter (relating to Conflicts of Interest Regarding a Host Agency) at least once a year;

(C) directing a representative of the Office to investigate a complaint or take other action related to a complaint; and

(D) providing advice and consultation to a representative of the Office in the performance of functions of the Ombudsman Program;

(6) identifies, investigates, and resolves complaints, made by or on behalf of residents, that relate to action, inaction, or decisions that may adversely affect the health, safety, welfare, and rights of residents;

(7) represents the interests of residents before governmental agencies and pursues administrative, legal, and other remedies to protect residents;

(8) provides administrative and technical assistance to representatives of the Office, local ombudsman entities, and host agencies regarding performance of the functions of the Ombudsman Program;

(9) consults with host agencies and representatives of the Office in the establishment of Ombudsman Program policies and procedures;

(10) monitors the performance of local ombudsman entities, including providing information to a host agency regarding the performance of a staff ombudsman;

(11) investigates grievances made against a representative of the Office regarding the performance of the functions of the Ombudsman Program, as described in Subchapter G [~~§88.309~~] of this chapter (relating to Grievances [~~Regarding Performance of a Representative of the Office or Certification Decisions by the State Ombudsman~~]);

(12) coordinates with a local ombudsman entity and, if appropriate, a host agency about concerns the State Ombudsman has regarding a representative of the Office, as described in §88.103(e) of this subchapter (relating to Refusal, Suspension, and Termination of Certification of an Ombudsman); and

(13) publishes an annual report in accordance with 45 CFR §1324.13(g).

(c) For purposes of determining if a representative of the Office has an individual conflict of interest in accordance with this section, the state of Texas is the ombudsman service area.

(d) The State Ombudsman:

(1) requires an applicant for a position within the Office to complete HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" to identify an individual conflict of interest of the applicant;

(2) requires a representative of the Office employed by HHSC to complete HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" at least once a year and if the representative of the Office identifies an individual conflict of interest; and

(3) reviews a form required by paragraphs (1) and (2) of this subsection to determine if an identified conflict of interest can be removed or remedied.

(e) The Office makes decisions independent of HHSC, including decisions about:

(1) the disclosure of confidential information maintained by the Ombudsman Program;

(2) recommendations to changes in federal, state, and local laws, rules, regulations, and other governmental policies and actions that relate to the health, safety, welfare, and rights of residents; and

(3) the provision of information to public and private agencies, legislators, the media, and other persons regarding problems and concerns about residents and recommendations related to the problems and concerns.

(f) In accordance with the Older Americans Act, §712(a)(3), [~~and~~] 45 CFR §1324.11(e)(5), and §1324.13(a)(7) - (9), the Office is responsible for:

(1) analyzing, commenting on, and monitoring the development and implementation of federal, state, and local laws, regulations, and other governmental policies and actions that pertain to LTC

facilities and services and to the health, safety, welfare, and rights of residents;

(2) recommending any changes in such laws, rules, regulations, policies, and actions as the Office determines to be appropriate;

(3) providing information to public and private agencies, legislators, the media, and other persons regarding problems and concerns about residents and providing recommendations related to the problems and concerns;

(4) overseeing activities described in paragraphs (1) - (3) of this subsection, including coordination of such activities carried out by representatives of the Office, as described in §88.302(a)(2)(A) of this chapter (relating to Requirement to Ensure a Representative of the Office Performs Functions of the Ombudsman Program);

(5) coordinating with and promoting the development of citizen organizations that have a purpose consistent with the interests of residents;

(6) promoting and providing technical support for the development of resident and family councils; and

(7) providing ongoing support as requested by resident and family councils to protect the well-being and rights of residents.

§88.102. Certification of an Ombudsman.

(a) The State Ombudsman initially certifies a person described in §88.2(35)(C)(i) or (ii) of this chapter (relating to Definitions) as a staff ombudsman [~~described in §88.2(31)(C)(i) or (ii) of this chapter (relating to Definitions)~~] , other than a managing local ombudsman, if:

(1) the person has one of the following:

(A) a bachelor's or advanced degree from an accredited college or university; or

(B) a high school diploma or a certificate recognized by the state in which it was issued as the equivalent of a high school diploma and at least four years of one, or a combination, of the following:

(i) paid experience in a social, behavioral, health, or human service field; or

(ii) experience as a certified ombudsman;

(2) the person has not been convicted of an offense listed under Texas Health and Safety Code §250.006 during the time periods set forth in Texas Health and Safety Code §250.006, according to a criminal history record of the person obtained by the Office from the Texas Department of Public Safety;

(3) the person:

(A) does not have an individual conflict of interest according to HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" completed by the person; or

(B) has an individual conflict of interest that has been remedied, as described in §88.303 of this chapter (relating to Individual Conflicts of Interest Regarding a Local Ombudsman Entity);

(4) the person successfully completes the certification training provided by the local ombudsman entity in accordance with the Ombudsman Policies and Procedures Manual; and

(5) the local ombudsman entity recommends to the Office, using HHSC form "Certified Ombudsman Application," that the person be approved as a certified ombudsman in accordance with §88.301(a) of this chapter (relating to Requirements to Recommend Certification as an Ombudsman).

(b) The State Ombudsman initially certifies a person as a staff ombudsman to serve as the managing local ombudsman if:

(1) the person meets the criteria in subsection (a)(1) - (3) of this section;

(2) the person successfully completes certification training provided by the Office; and

(3) the person demonstrates competency to serve as a managing local ombudsman.

(c) The State Ombudsman initially certifies a person as a volunteer ombudsman if:

(1) the person meets the criteria in subsection (a)(2) - (4) of this section;

(2) the local ombudsman entity recommends to the Office, using HHSC form "Certified Ombudsman Application," that the person be approved as a certified ombudsman in accordance with §88.301(b) of this chapter; and

(3) the person successfully completes an internship in accordance with the Ombudsman Policies and Procedures Manual.

(d) The State Ombudsman initially certifies a person to be a staff ombudsman or volunteer ombudsman by signing HHSC form "Certified Ombudsman Application."

(e) The State Ombudsman certifies a person to be a staff ombudsman or volunteer ombudsman for a period of two years. After initial certification, the Office renews the certification of a staff ombudsman or volunteer ombudsman if:

(1) for a staff ombudsman, the staff ombudsman:

(A) meets the requirements in subsection (a)(1) - (3) of this section;

(B) completes continuing education provided by the Office; and

(C) demonstrates compliance with the Ombudsman Certification Training Manual and the Ombudsman Policies and Procedures Manual; and

(2) for a volunteer ombudsman, the volunteer ombudsman:

(A) meets the requirements in subsection (a)(2) and (3) of this section;

(B) completes continuing education provided by the local ombudsman entity in accordance with the Ombudsman Policies and Procedures Manual; and

(C) demonstrates compliance with the Ombudsman Certification Training Manual and the Ombudsman Policies and Procedures Manual.

(f) The State Ombudsman certifies a person described in §88.2(35)(C)(iii) of this chapter as a staff ombudsman [~~described in §88.2(31)(C)(iii) of this chapter~~] if the person:

(1) has not been convicted of an offense listed under Texas Health and Safety Code §250.006 during the time periods set forth in Texas Health and Safety Code §250.006, according to a criminal history record of the person obtained by the Office from the Texas Department of Public Safety;

(2) meets one of the following;

(A) does not have an individual conflict of interest according to HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" completed by the person; or

(B) has an individual conflict of interest that has been remedied by the State Ombudsman; and

(3) successfully completes the certification training provided by the Office.

§88.104. Designation of a Local Ombudsman Entity.

(a) The State Ombudsman may designate a local ombudsman entity to perform the functions of the Ombudsman Program in an ombudsman service area.

(b) The State Ombudsman does not designate a local ombudsman entity if the host agency or a governmental entity or nonprofit organization contracting with the host agency, as described in §88.2(19)(B) [~~§88.2(16)(B)~~] of this chapter (relating to Definitions):

(1) has an organizational conflict of interest described in §88.2(29)(A) - (C) [~~§88.2(25)(A) - (C)~~] of this chapter; or

(2) has an organizational conflict of interest described in §88.2(29)(D) - (L) [~~§88.2(25)(D) - (L)~~] of this chapter that has not been removed or remedied as approved by the State Ombudsman in accordance with §88.403(d) of this chapter (relating to Conflicts of Interest Regarding a Host Agency).

(c) The State Ombudsman may remove the designation of a local ombudsman entity if:

(1) the host agency or local ombudsman entity has policies, procedures, or practices that the State Ombudsman determines to be in conflict with the laws, rules, policies, or procedures governing the Ombudsman Program; or

(2) the host agency or local ombudsman entity fails to comply with the requirements of this chapter including:

(A) not removing or remedying an organizational or individual conflict of interest as described in §88.303 of this chapter (relating to Individual Conflicts of Interest Regarding a Local Ombudsman Entity) and §88.403 of this chapter;

(B) not submitting: [~~a plan of correction required by §88.105(f) of this subchapter (relating to Fiscal Management and Monitoring of a Local Ombudsman Entity) or a modified plan of correction required by §88.105(g) of this subchapter; or~~]

(i) a written plan of correction required by:

(I) §88.106(d) of this subchapter (relating to On-site Monitoring of a Local Ombudsman Entity and a Host Agency);

(II) §88.107(d) of this subchapter (relating to Desk Review Monitoring of a Local Ombudsman Entity); and

(III) 88.409(b) of this chapter (relating to Non-compliance by a Host Agency); or

(ii) a modified written plan of correction required by:

(I) §88.106(e) of this subchapter;

(II) §88.107(e) of this subchapter; and

(III) §88.409(c) of this chapter; or

(C) not completing actions in accordance with an approved [~~obtaining approval by the Office of a~~] plan of correction or an approved modified plan of correction as required by: [~~§88.105(f) of this subchapter or a modified plan of correction required by §88.105(g) of this subchapter~~]

(i) §88.106(d) of this subchapter;

(ii) §88.107(d) of this subchapter; and

(iii) §88.409(b) of this chapter.

(d) If the State Ombudsman removes the designation of a local ombudsman entity, the Office notifies the local ombudsman entity and host agency, in writing, of the decision to remove the designation.

(e) A host agency may request reconsideration of the State Ombudsman's decision to remove the designation of the local ombudsman entity. To request a reconsideration of the decision, the host agency must, within 10 days after receiving the notification of removal of the designation, submit a written request for reconsideration and additional information supporting the request to the State Ombudsman.

(f) If the removal of designation of a local ombudsman entity results in termination of the contract between HHSC and the host agency, the host agency may appeal the termination in accordance with §213.7 of this title [~~40 TAC §81.15~~] (relating to Appeal Procedures for Area Agency on Aging Contractors).

§88.105. Fiscal Management [~~and Monitoring~~] of a Local Ombudsman Entity.

(a) The State Ombudsman:

(1) determines the use of the federal and state funds appropriated for the operation of the Office;

(2) approves the allocation of federal and state funds to a host agency for the operation of the Ombudsman Program in accordance with subsection (b) of this section; and

(3) determines that Ombudsman Program budgets and expenditures are for an appropriate amount and relate to functions of the Ombudsman Program.

(b) The [~~This subsection describes how the~~] State Ombudsman distributes funds through the HHSC Office of the Area Agencies on Aging to a host agency for the operation of the Ombudsman Program in accordance with the Older Americans Act, §712(a)(2) [~~§306(a)(9)~~]. Annually, a host agency is allocated:

(1) [~~A host agency is allocated~~] a base amount of $3,000 from federal funds appropriated or otherwise available for the Ombudsman Program; [~~. Additional federal funds are allocated as follows:~~]

[~~(A) for state fiscal year 2019:~~]

~~*(i)* 55 percent of the additional funds is allocated based on the licensed capacity of nursing facilities in the ombudsman service area;~~]

~~*(ii)* 20 percent of the additional funds is allocated based on the number of assisted living facilities in the ombudsman service area; and~~]

~~*(iii)* 25 percent of the additional funds is allocated based on the number of certified ombudsmen in the ombudsman service area who actively performed functions of the Ombudsman Program during the previous state fiscal year;~~]

[~~(B) for state fiscal year 2020:~~]

~~*(i)* 65 percent of the additional funds is allocated based on the licensed capacity of nursing facilities in the ombudsman service area;~~]

~~*(ii)* 10 percent of the additional funds is allocated based on the number of assisted living facilities in the ombudsman service area; and~~]

~~*(iii)* 25 percent of the additional funds is allocated based on the number of certified ombudsmen in the ombudsman service area who actively performed functions of the Ombudsman Program during the previous state fiscal year; and~~]

[(C) for state fiscal year 2021 and later:]

[(i) 75 percent of the additional funds is allocated based on the licensed capacity of nursing facilities in the ombudsman service area; and]

[(ii) 25 percent of the additional funds is allocated based on the number of certified ombudsmen in the ombudsman service area who actively performed functions of the Ombudsman Program during the previous state fiscal year.]

(2) additional federal funds:

(A) 75 percent of which is based on the licensed capacity of nursing facilities in the ombudsman service area; and

(B) 25 percent of which is based on the number of certified ombudsmen in the ombudsman service area who actively performed functions of the Ombudsman Program during the previous federal fiscal year; and

(3) [(2) A host agency is allocated funds from] state general revenue funds for the performance of [appropriated or otherwise available for the] Ombudsman Program functions based on the following factors:

(A) the number of assisted living facilities in the ombudsman service area on or about July 1 of each year;

(B) the number of assisted living facilities in the ombudsman service area located in a rural area, as determined by the State Ombudsman, on or about July 1 of each year; and

(C) the type and licensed capacity of assisted living facilities in the ombudsman service area on or about July 1 of each year.

[(c) The Office conducts an onsite visit or a desk review to monitor:]

[(1) the performance of functions of the Ombudsman Program by a representative of the Office;]

[(2) the compliance by a local ombudsman entity with Subchapter D of this chapter (relating to Requirements of a Local Ombudsman Entity); and]

[(3) the compliance by a host agency with Subchapter E of this chapter (relating to Requirements of a Host Agency).]

[(d) The Office conducts at least one onsite visit every three years. An onsite visit includes:]

[(1) observing and evaluating a visit of a managing local ombudsman to an LTC facility; and]

[(2) reviewing information regarding a local ombudsman entity's compliance with subchapter D of this chapter, including documentation regarding:]

[(A) the training of representatives of the Office;]

[(B) identification of individual conflicts of interest; and]

[(C) expenditures for the Ombudsman Program, such as timesheets and evidence supporting mileage reimbursement for representatives of the Office.]

[(e) The Office:]

[(1) selects a date for an onsite visit in consultation with the managing local ombudsman;]

[(2) notifies the host agency of a scheduled onsite visit at least 30 days before the visit; and]

[(3) within 30 days after the Office completes an onsite visit, provides to the local ombudsman entity and the host agency a written report containing findings from the visit.]

[(f) The host agency must, within 30 days after receipt of the written report described in subsection (e)(3) of this section, submit a written plan of correction to the Office that describes:]

[(1) the action that will be taken to correct each finding; and]

[(2) the date by which each action will be completed.]

[(g) Within 30 days after the date the Office receives the plan of correction required by subsection (f) of this section, the Office notifies the local ombudsman entity and host agency of whether the plan is approved or requires modification. If the Office approves the plan, the local ombudsman entity must complete the actions contained in the plan of correction by the dates in the plan. If the Office determines that the plan requires modification, the host agency must submit a modified written plan of correction within a time period determined by the Office for approval by the Office.]

[(h) The Office may take one or both of the following actions to determine if the local ombudsman entity has completed the actions in accordance with an approved plan of correction or approved modified plan of correction:]

[(1) request that the local ombudsman entity submit evidence of correction to the Office; or]

[(2) visit the local ombudsman entity.]

[(i) The Office:]

[(1) may conduct a desk review at any time; and]

[(2) conducts at least one desk review every three months to determine if a local ombudsman entity:]

[(A) is in compliance with §88.305(a)(3) and (c)(2) of this chapter (relating to Complaints) and §88.307(a) of this chapter (relating to Requirements Regarding LTC Visits and Submitting Information to the Office); and]

[(B) is making progress toward meeting performance measure projections required by §88.405(a) of this chapter (relating to Meeting Performance Measure Projections).]

[(j) If the Office identifies an issue of non-compliance or other concern from a desk review, the Office sends the local ombudsman entity and host agency written results of the desk review within 30 days after the Office completes the desk review.]

[(k) Upon request by a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction or addressing an issue of non-compliance or other concern from a desk review.]

§88.106. Onsite Monitoring of a Local Ombudsman Entity and a Host Agency.

(a) The Office conducts an onsite visit of a local ombudsman entity and a host agency to monitor:

(1) the performance of functions of the Ombudsman Program by a representative of the Office;

(2) the compliance by a local ombudsman entity with Subchapter D of this chapter (relating to Requirements of a Local Ombudsman Entity);

(3) the compliance by a host agency with Subchapter E of this chapter (relating to Requirements of a Host Agency);and

(4) the compliance by a local ombudsman entity and a host agency with Subchapter G of this chapter (relating to Grievances).

(b) The Office conducts at least one onsite visit every three years. An onsite visit includes:

(1) observing and evaluating a visit of a managing local ombudsman to an LTC facility; and

(2) reviewing information regarding a local ombudsman entity's compliance with Subchapter D of this chapter, including documentation regarding:

(A) the training of representatives of the Office;

(B) identification of individual conflicts of interest; and

(C) expenditures for the Ombudsman Program, such as timesheets and evidence supporting mileage reimbursement for representatives of the Office.

(c) The Office:

(1) selects a date for an onsite visit in consultation with the managing local ombudsman;

(2) notifies the host agency of a scheduled onsite visit at least 30 days before the visit; and

(3) within 45 days after the Office completes an onsite visit, provides to the local ombudsman entity and the host agency a written report that may contain findings and recommendations from the visit.

(d) The host agency must, within 45 days after receipt of the written report described in subsection (c)(3) of this section that contains one or more findings, submit a written plan of correction to the Office that describes:

(1) the action that will be taken to correct each finding; and

(2) the date by which each action will be completed.

(e) Within 45 days after the date the Office receives the plan of correction required by subsection (d) of this section, the Office notifies the local ombudsman entity and host agency of whether the plan is approved or requires modification. If the Office approves the plan, the local ombudsman entity must complete the actions contained in the plan of correction by the dates in the plan. If the Office determines that the plan requires modification, the host agency must submit a modified written plan of correction within a time period determined by the Office for approval by the Office.

(f) To determine if the local ombudsman entity or host agency has completed the actions in accordance with an approved plan of correction or approved modified plan of correction, the Office takes one or more of the following actions:

(1) reviews information in the ombudsman database;

(2) requests that the local ombudsman entity or host agency submit evidence of correction to the Office; and

(3) visits the local ombudsman entity.

(g) If the Office determines that the local ombudsman entity or host agency did not complete an action in accordance with an approved plan of correction or an approved modified plan of correction:

(1) the Office may allow the local ombudsman entity or host agency additional time to complete the action;

(2) HHSC may impose a Level Two sanction in accordance with §213.5 of this title (relating to Compliance with Contractor Responsibilities, Rewards and Sanctions); or

(3) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this subchapter (relating to Designation of a Local Ombudsman Entity).

(h) If the Office allows a local ombudsman entity additional time to complete an action as described in subsection (g)(1) of this section and the Office determines that the local ombudsman entity or host agency did not complete the action within the time allowed:

(1) HHSC may impose a Level Two sanction in accordance with §213.5 of this title; or

(2) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this subchapter.

(i) Upon request by a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction.

§88.107. Desk Review Monitoring of a Local Ombudsman Entity.

(a) The Office conducts a desk review of a local ombudsman entity to determine if the local ombudsman entity:

(1) is in compliance with §88.305(a)(3) and (c)(2) of this chapter (relating to Complaints) and §88.307(a) of this chapter (relating to Requirements Regarding LTC Facility Visits and Submitting Information to the Office);

(2) is making progress toward meeting:

(A) performance measures required by §88.405(a)(3) - (6) of this chapter (relating to Performance Measures); and

(B) performance measure projections required by §88.405(b) of this chapter; and

(3) has conducted at least one visit to each LTC facility in the ombudsman service area each quarter of a federal fiscal year as required by the Ombudsman Policies and Procedures Manual.

(b) The Office:

(1) conducts at least one desk review of a local ombudsman entity every three months; and

(2) may conduct a desk review of a local ombudsman entity at any time.

(c) If the Office identifies a finding from a desk review, the Office provides to the local ombudsman entity and the host agency a written report that contains the finding and may include recommendations.

(d) If a local ombudsman entity or host agency receives a written report described in subsection (c) of this section, the host agency, within 14 days after receipt of the report, must submit a written plan of correction to the Office that describes:

(1) the action that will be taken to correct each finding in the report; and

(2) the date by which each action will be completed.

(e) Within 14 days after the date the Office receives the plan of correction required by subsection (d) of this section, the Office notifies the local ombudsman entity and host agency of whether the plan is approved or requires modification. If the Office approves the plan, the local ombudsman entity must complete the actions contained in the plan of correction by the dates in the plan. If the Office determines that the plan requires modification, the host agency must submit a modified written plan of correction within a time period determined by the Office for approval by the Office.

(f) To determine if the local ombudsman entity has completed the actions in accordance with an approved plan of correction or approved modified plan of correction, the Office takes one or more of the following actions:

(1) reviews information in the ombudsman database;

(2) requests that the local ombudsman entity submit evidence of correction to the Office; and

(3) visits the local ombudsman entity.

(g) If the Office determines that the local ombudsman entity did not complete an action in accordance with an approved plan of correction or a modified plan of correction:

(1) the Office may allow the local ombudsman entity additional time to complete the action;

(2) HHSC may impose a Level Two sanction in accordance with §213.5 of this title (relating to Compliance with Contractor Responsibilities, Rewards and Sanctions); or

(3) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this subchapter (relating to Designation of a Local Ombudsman Entity).

(h) If the Office allows a local ombudsman entity additional time to complete an action as described in subsection (g)(1) of this section and the Office determines that the local ombudsman entity did not complete the action within the time allowed:

(1) HHSC may impose a Level Two sanction in accordance with §213.5 of this title; or

(2) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this subchapter.

(i) Upon request by a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction.

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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Karen Ray
Chief Counsel
Health and Human Services Commission
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SUBCHAPTER C. ACCESS BY THE STATE OMBUDSMAN AND REPRESENTATIVES OF THE OFFICE

26 TAC §88.201, §88.202

STATUTORY AUTHORITY

The amendment and new section are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendment and new section affect Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.201. Access to Facilities, Residents, and Resident Records.

(a) The State Ombudsman and a representative of the Office have:

(1) immediate, private, and unimpeded access to enter an LTC facility, in accordance with the Older Americans Act, §712(b)(1)(A) and 45 CFR §1324.11(e)(2)(i):

(A) at any time during a facility's regular business hours or regular visiting hours; and

(B) at a time other than regular business hours or visiting hours, if the State Ombudsman or a certified ombudsman determines access may be required by the circumstances to be investigated;

(2) immediate, private, and unimpeded access to a resident, in accordance with the Older Americans Act, §712(b)(1)(A) and 45 CFR §1324.11(e)(2)(ii); and

(3) access to the name and contact information of a resident representative, if any, when the State Ombudsman or representative of the Office determines the information is needed to perform functions of the Ombudsman Program, in accordance with 45 CFR §1324.11(e)(2)(iii).

(b) Disclosure of information by the State Ombudsman or a representative of the Office related to any complaint, including a description of the circumstances to be investigated, is subject to requirements in the Ombudsman Policies and Procedures Manual related to disclosure of confidential information.

(c) The State Ombudsman and a certified ombudsman have immediate access:

(1) in accordance with the Older Americans Act, §712(b)(1)(B) and 45 CFR §1324.11(e)(2), to all medical, social and other [~~files,~~] records relating to a resident regardless of format, [~~and other information concerning a resident,~~] including an incident report involving the resident, if:

(A) in accordance with 45 CFR §1324.11(e)(2)(iv)(A) or (B), the State Ombudsman or certified ombudsman has the informed consent of the resident or legally authorized representative;

(B) in accordance with the Older Americans Act, §712(b)(1)(B)(i)(II), the resident is unable to communicate informed consent to access and has no legally authorized representative; or

(C) in accordance with 45 CFR §1324.11(e)(2)(iv)(C), such access is necessary to investigate a complaint and the following occurs:

(i) the resident's legally authorized representative refuses to give consent to access to the records, files, and other information;

(ii) the State Ombudsman or certified ombudsman has reasonable cause to believe that the legally authorized representative is not acting in the best interests of the resident; and

(iii) if it is the certified ombudsman seeking access to the records, files, or other information the certified ombudsman obtains the approval of the State Ombudsman to access the records, files,

or other information without the legally authorized representative's consent; and

(2) in accordance with 45 CFR §1324.11(e)(2)(v), to the administrative records, policies, and documents of an LTC facility to which the residents or general public have access.

(d) In accordance with 45 CFR §1324.11(e)(2), access by the State Ombudsman and a certified ombudsman to a record, as described in subsection (c) of this section, includes obtaining a copy of the record upon request.

(e) [~~(d)~~] The rules adopted under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR Part 160 and 45 CFR Part 164, subparts A and E, do not preclude an LTC facility from releasing protected health information or other identifying information regarding a resident to the State Ombudsman or a certified ombudsman if the requirements of subsections (a)(3) and (c) of this section are otherwise met. The State Ombudsman and a certified ombudsman are each a "health oversight agency" as that phrase is defined in 45 CFR §164.501.

§88.202. Notification to LTC Facility of Authorization to Access Resident Records.

A certified ombudsman must, at the request of an LTC facility, provide a completed HHSC form "Acknowledgement of Ombudsman Access to Confidential Record" to the facility at the time the certified ombudsman is requesting access to a confidential record concerning a resident from the facility as described in §88.201(c) of this subchapter (relating to Access to Facilities, Residents, and Resident Records).

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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Karen Ray
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SUBCHAPTER D. REQUIREMENTS OF A LOCAL OMBUDSMAN ENTITY

26 TAC §88.305, §88.307

STATUTORY AUTHORITY

The amendment and new section are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendment and new section affect Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.305. Complaints.

(a) A local ombudsman entity must:

(1) ensure that a person is allowed to make a complaint as follows:

(A) in writing, including by email;

(B) in person; and

(C) by telephone;

(2) initiate a complaint if the local ombudsman entity becomes aware of circumstances that may adversely affect the health, safety, welfare, or rights of a resident;

(3) respond to the complainant within two business days after receipt of the complaint, except as provided in subsection (c)(2) of this section regarding a complaint that is an allegation of abuse, neglect, or exploitation of a resident; and

(4) ensure that a certified ombudsman initiates an investigation of a complaint as soon as practicable after receipt of the complaint.

(b) A local ombudsman entity must ensure that a certified ombudsman investigates complaints in accordance with this subsection.

(1) If a certified ombudsman receives a complaint, the certified ombudsman must:

(A) document the nature of the complaint;

(B) determine:

(i) whether the complaint is appropriate for the certified ombudsman to investigate;

(ii) if any attempts have been made to resolve the complaint; and

(iii) the outcome sought by the complainant;

(C) if the complainant is not the resident, inform the complainant that the complaint will be investigated only if:

(i) the resident or legally authorized representative communicates informed consent [~~consents~~] to the investigation; [~~or~~]

(ii) in accordance with 45 CFR §1324.19(b)(2)(iii), the resident is unable to communicate informed consent and has no legally authorized representative; or [~~and~~]

(iii) in accordance with 45 CFR §1324.19(b)(7), the resident is unable to communicate informed consent to investigate the complaint, has a legally authorized representative, and:

(I) the complaint relates to an action, inaction, or decision of the legally authorized representative that may adversely affect the health, safety, welfare, or rights of the resident;

(II) the certified ombudsman does not have evidence that the resident would object to the complaint being investigated;

(III) the certified ombudsman has reasonable cause to believe that it is in the best interest of the resident to investigate the complaint; and

(IV) the State Ombudsman approves the request of the certified ombudsman to investigate the complaint; and

(D) in accordance with the Ombudsman Policies and Procedures Manual:

(i) seek the informed consent of the resident or legally authorized representative to investigate the complaint; [~~or~~]

(ii) determine if authority exists to investigate the complaint because, in accordance with 45 CFR §1324.19(b)(2)(iii), the resident is unable to communicate informed consent and has no legally authorized representative; [.]

(iii) request approval from the State Ombudsman for the certified ombudsman to investigate the complaint by making a referral to the appropriate agency for investigation in accordance with 45 CFR §1324.19(b)(7), if:

(I) the resident has a legally authorized representative;

(II) based on the reasonable belief of the certified ombudsman, the complaint relates to an action, inaction or decision by the legally authorized representative that may adversely affect the health, safety, welfare, or rights of the resident;

(III) the resident is unable to communicate informed consent to investigate the complaint;

(IV) the certified ombudsman does not have evidence that the resident would object to the complaint being investigated; and

(V) the certified ombudsman has reasonable cause to believe that it is in the best interest of the resident to investigate the complaint; and

(iv) document one of the following in the ombudsman database:

(I) whether a resident who is able to communicate informed consent communicated informed consent to investigate the complaint;

(II) whether the legally authorized representative communicated informed consent to investigate the complaint;

(III) whether the certified ombudsman has authority to investigate the complaint without consent because the resident is unable to communicate informed consent and does not have a legally authorized representative; or

(IV) whether the State Ombudsman has given approval to investigate the complaint in accordance with clause (iii) of this subparagraph.

(2) If the complainant is the resident and the certified ombudsman has determined the complaint is appropriate for ombudsman investigation and has obtained informed consent to investigate the complaint or has authority to investigate the complaint in accordance with 45 CFR §1324.19(b)(2)(iii), the certified ombudsman must:

(A) determine what, if any, federal or state law or rule applies to the complaint;

(B) observe the environment of the resident and situations in the LTC facility related to the complaint;

(C) interview relevant witnesses;

(D) review relevant records, if necessary, including confidential information if consent or other authority is obtained in accordance with the Ombudsman Policies and Procedures Manual;

(E) if the complaint relates to a regulatory violation, inform the resident of the option to report the complaint to the appropriate regulatory or law enforcement authority;

(F) work with the resident to develop a plan of action for resolution of the complaint;

(G) encourage the resident to participate in the process to resolve the complaint; and

(H) determine the resident's satisfaction with the outcome of the investigation.

(3) If the complainant is not the resident and the certified ombudsman has determined the complaint is appropriate for ombudsman investigation and has obtained consent to investigate the complaint, the certified ombudsman must:

(A) communicate with the resident about the complaint and obtain the resident's perspective about the complaint, if the resident is able to communicate;

(B) determine what, if any, federal or state law or rule applies to the complaint;

(C) inform the resident or legally authorized representative of the residents' rights and other law related to the complaint;

(D) observe the environment of the resident and situations in the LTC facility related to the complaint;

(E) interview relevant witnesses;

(F) review relevant records, if necessary, including confidential records if consent or other authority is obtained in accordance with the Ombudsman Policies and Procedures Manual;

(G) if the complaint relates to a regulatory violation, inform the resident or the legally authorized representative of the option to report the complaint to the appropriate regulatory or law enforcement authority;

(H) work with the resident or legally authorized representative to develop a plan of action for resolution of the complaint;

(I) encourage the resident or legally authorized representative to participate in the process to resolve the complaint; and

(J) determine the resident's or legally authorized representative's satisfaction with the outcome.

(4) If the complainant is not the resident and the certified ombudsman has determined the complaint is appropriate for ombudsman investigation and has authority to investigate the complaint in accordance with 45 CFR §1324.19(b)(2)(iii), the certified ombudsman must:

(A) determine what, if any, federal or state law, regulation, or rule applies to the complaint;

(B) determine how many residents are potentially affected by the complaint;

(C) observe the environment of the resident and situations in the LTC facility related to the complaint;

(D) interview relevant witnesses;

(E) review relevant records, if necessary, including confidential records if consent or other authority is obtained in accordance with the Ombudsman Policies and Procedures Manual; and

(F) determine whether the complaint is satisfactorily resolved.

(5) As described in paragraph (1)(D)(iii) of this subsection, if the complainant is not the resident and the certified ombudsman requests approval to investigate the complaint by making a referral to the appropriate agency for investigation in accordance with 45 CFR §1324.19(b)(7), the certified ombudsman must:

(A) if the State Ombudsman approves the request:

(i) make the referral to the appropriate agency; and

(ii) determine whether the complaint is satisfactorily resolved; or

(B) if the State Ombudsman does not approve the request, follow the instruction of the State Ombudsman.

(6) [~~(5)~~] If the resident or legally authorized representative declines to consent to have the complaint investigated, the certified ombudsman must:

(A) not investigate the complaint;

(B) inform the complainant that the complaint will not be investigated because the resident or legally authorized representative declined to consent; and

(C) advise the complainant of his or her options to pursue resolution.

(7) [~~(6)~~] If a certified ombudsman identifies a complaint that affects a substantial number of residents in an LTC facility, the certified ombudsman may investigate and work to resolve the complaint without obtaining consent from each resident to investigate the complaint. In investigating the complaint, a certified ombudsman may review confidential records only if consent or other authority is obtained in accordance with the Ombudsman Policies and Procedures Manual.

(8) [~~(7)~~] A certified ombudsman must document the complaint investigation in the ombudsman database in accordance with the Ombudsman Policies and Procedures Manual.

(c) If a complaint is an allegation of abuse, neglect, or exploitation of a resident, a certified ombudsman:

(1) must not investigate whether abuse, neglect, or exploitation of a resident has occurred;

(2) within one business day after receipt of the complaint, inform the complainant of the appropriate investigative authority to report the allegation; and

(3) comply with the Ombudsman Policies and Procedures Manual.

(d) In accordance with 45 CFR §1324.11(e)(3)(iv), a representative of the Office must not, except as provided in §1324.19(b)(5) - (8), report allegations of abuse, neglect, or exploitation under state law, including Texas Human Resources Code, Chapter 48, without appropriate consent or court order.

(e) Confidential information described in §88.304(a) of this subchapter (relating to Disclosure of Confidential Information; Exclusion from Reporting Requirements Regarding Abuse, Neglect, or Exploitation; and Provision of Records to the Office) may only be disclosed in accordance with §88.304 of this subchapter.

§88.307. Requirements Regarding LTC Facility Visits and Submitting Information to the Office.

(a) A local ombudsman entity must ensure each LTC facility in the ombudsman service area is visited by a certified ombudsman in accordance with the Ombudsman Policies and Procedures Manual during each federal fiscal year to:

(1) monitor residents' health, safety, welfare, and rights; and

(2) receive, investigate, and resolve complaints on behalf of residents.

(b) A local ombudsman entity must submit activities and casework, as described in the Ombudsman Policies and Procedures Manual, to the Office by entering information into the ombudsman database within 14 days after completion of the activity or receipt of a complaint. [~~by 8:00 a.m. on:~~]

[~~(1) the 16th day of each month if the 16th is a business day; or~~]

[~~(2) if the 16th day of the month is not a business day, the first business day immediately following the 16th.~~]

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26 TAC §88.309

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The repeal affects Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.309. Grievances Regarding Performance of a Representative of the Office or Certification Decisions by the State Ombudsman.

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. REQUIREMENTS OF A HOST AGENCY

26 TAC §§88.403 - 88.409

STATUTORY AUTHORITY

The amendments and new sections authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and

provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendments and new sections affect Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.403. Conflicts of Interest Regarding a Host Agency.

(a) If a host agency, or a governmental entity or nonprofit organization contracting with a host agency, as described in §88.2(19)(B) [~~§88.2(16)(B)~~] of this chapter (relating to Definitions), has an organizational conflict of interest, the host agency must, within 30 days after identifying the conflict of interest:

(1) complete HHSC form "Conflict of Interest Identification, Removal, and Remedy," including a recommended action to:

(A) remove a conflict of interest described in §88.2(29)(A) - (C) [~~§88.2(25)(A) - (C)~~] of this chapter (relating to Definitions); and

(B) remove or remedy a conflict of interest described in §88.2(29)(D) - (L) [~~§88.2(25)(D) - (L)~~] of this chapter; and

(2) submit the completed form to the Office.

(b) A host agency must ensure that HHSC form "Individual Conflict of Interest Screening of a Representative of the Office," is completed by a managing local ombudsman:

(1) at least once a year; and

(2) if the host agency identifies an individual conflict of interest involving the managing local ombudsman.

(c) Within five business days after identifying an individual conflict of interest regarding a managing local ombudsman, the host agency must:

(1) complete HHSC form "Conflict of Interest Identification, Removal, and Remedy," including a recommended action to remove or remedy the conflict of interest; and

(2) submit the completed form to the Office.

(d) If the Office receives a completed form described in subsection (a) or (c) of this section, the State Ombudsman reviews the form and approves, modifies, or rejects the recommended action to remove or remedy the conflict of interest.

(1) If it is not possible to remove or remedy an organizational conflict of interest of the host agency, the State Ombudsman removes the designation of the local ombudsman entity, as described in §88.104(c)(2)(A) of this chapter (relating to Designation of a Local Ombudsman Entity).

(2) If it is not possible to remove or remedy an individual conflict of interest of the managing local ombudsman, the State Ombudsman refuses to initially certify or terminates certification of the managing local ombudsman as described in §88.103(a)(2) and (d)(4) of this chapter (relating to Refusal, Suspension, and Termination of Certification of an Ombudsman).

§88.404. Provision of Records to the Office, Disclosure of Confidential Information, and Allegations of Abuse, Neglect, or Exploitation.

(a) In accordance with the Older Americans Act, §712(d)(2)(A) and 45 CFR §1324.13(e)(1), the State Ombudsman has the sole authority to make determinations concerning the disclosure of confidential information, as described in §88.304(a) of this chapter (relating to Disclosure of Confidential Information, Exclusion from Reporting Requirements Regarding Abuse, Neglect, and Exploitation, and Provision of Records to the Office).

(b) A request to disclose written confidential information is responded to in accordance with this subsection.

(1) If a person who is not a representative of the Office but works for a host agency or governmental entity or nonprofit organization contracting with a host agency, as described in §88.2(19)(B) [~~§88.2(16)(B)~~] of this chapter (relating to Definitions), receives a request to disclose written confidential information, as described in §88.304(a) of this chapter, the host agency must ensure that the State Ombudsman is immediately:

(A) notified of the request; and

(B) provided any communication from the requestor.

(2) If the State Ombudsman receives a request to disclose written confidential information, the State Ombudsman:

(A) sends written acknowledgement of receipt of the request to the host agency;

(B) reviews the request and responds to the requestor within a time frame required by applicable state or federal law; and

(C) sends a copy of the response to the host agency.

(c) A host agency must ensure that, except as provided in 45 CFR §1324.19(b)(5) - (8), a representative of the Office is not required to report allegations of abuse, neglect, or exploitation under state law, including Texas Human Resources Code, Chapter 48, without appropriate consent or court order.

(d) A host agency must, at the request of the Office, immediately provide Ombudsman Program records that do not contain confidential information, such as timesheets and evidence supporting mileage reimbursement for representatives of the Office, to the Office.

§88.405. Performance Measures.

(a) The performance measures of a local ombudsman entity are described in this subsection.

(1) The number of certified ombudsmen who will, during a federal fiscal year:

(A) conduct visits at LTC facilities; and

(B) identify and investigate complaints.

(2) The percentage of complaints that will be resolved or partially resolved in a federal fiscal year.

(3) The number of visits to assisted living facilities by certified ombudsmen that will occur during a federal fiscal year, as required by the Ombudsman Policies and Procedures Manual.

(4) The number of visits to nursing facilities by certified ombudsmen that will occur during a federal fiscal year, as required by the Ombudsman Policies and Procedures Manual.

(5) Compliance with the complaint response requirements described in §88.305(a)(3) and §88.305(c)(2) of this chapter (relating to Complaints).

(6) Compliance with the requirement described in §88.307(b) of this chapter (relating to Requirements Regarding LTC Facility Visits and Submitting Information to the Office).

(7) Compliance with the minimum expenditure requirement described in §88.406(a) of this subchapter (relating to Requirements Regarding Expenditures for the Ombudsman Program).

(b) A host agency must work with the local ombudsman entity to develop projections for the performance measures described in subsection (a)(1) - (2) of this section for a federal fiscal year and submit the projections to the Office by July 31st of each year using the HHSC form "Ombudsman Performance Measure Projections." The Office reviews a form submitted by the host agency and approves the form or recommends modifications to the form. If the Office recommends modifications to the form, the host agency must submit a revised form to the Office for approval within a time period determined by the Office.

(c) A host agency must ensure that a local ombudsman entity, by the end of each federal fiscal year, meets the performance measure projections approved by the Office as described in subsection (b) of this section by:

(1) being within a variance of minus ten percent of the projections; or

(2) exceeding the projections.

(d) A host agency must ensure that a local ombudsman entity, by the end of each federal fiscal year, meets the performance measures required by subsection (a)(3) - (6) of this section by:

(1) being within a variance of minus ten percent of the measures; or

(2) exceeding the measures.

(e) A host agency must ensure that a local ombudsman entity, by the end of each federal fiscal year, meets or exceeds the performance measure required by subsection (a)(7) of this section.

§88.406. Requirements Regarding Expenditures for the Ombudsman Program.

(a) A host agency must, for the Ombudsman Program implemented by a local ombudsman entity, expend for a federal fiscal year at least the amount of federal funds expended in the federal fiscal year 2019 [~~2000~~]. In determining the amount of funds expended, the host agency may include all funds except the state general revenue funds allocated to the host agency described in §88.105(b)(3) of this chapter (relating to Fiscal Management of a Local Ombudsman Entity).

(b) A function of the Ombudsman Program performed by a local ombudsman entity that is paid for with funds allocated by HHSC must be an allowable activity in accordance with the Ombudsman Policies and Procedures Manual.

(c) A purchase of a service, material, equipment, or good by a host agency for the Ombudsman Program implemented by a local ombudsman entity with funds allocated by HHSC must meet the criteria described in 45 CFR Part 75 [(~~relating to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards~~)].

§88.407. Requirement for Approval of Ombudsman Staffing Plan Form.

(a) The Office sends a host agency an Ombudsman Staffing Plan form on or about July 31st of each year.

(b) A host agency must complete and submit the Ombudsman Staffing Plan form sent to the host agency by the Office as specified in the form.

(c) The Office reviews a completed Ombudsman Staffing Plan form submitted by the host agency and notifies the host agency in writing of whether the form is approved. If the form is not approved by the Office, a host agency may submit a revised form to the Office.

(d) The Office will not reimburse a host agency for expenditures made by the host agency for Ombudsman Program functions until the Office approves an Ombudsman Staffing Plan form submitted by the host agency.

§88.408. Prohibition of Interference and Retaliation by a Host Agency.

(a) A host agency must not:

(1) willfully interfere with the State Ombudsman or a representative of the Office performing any of the functions of the Ombudsman Program, which includes:

(A) prohibiting a representative of the Office from:

(i) commenting or recommending changes, as described in §88.302(a)(1)(F) of this chapter (relating to Requirement to Ensure a Representative of the Office Performs Functions of the Ombudsman Program);

(ii) submitting comments to the Office regarding proposed legislation; or

(iii) responding to a question from a legislator or the media regarding a problem that pertains to an LTC facility or service, or to the health, safety, welfare, and rights of residents; and

(B) requiring a representative of the Office to obtain approval from the host agency before submitting testimony at a legislative hearing;

(2) retaliate against the State Ombudsman or a representative of the Office:

(A) with respect to a resident, employee of an LTC facility, or other person filing a complaint with, providing information to, or otherwise cooperating with, a representative of the Office; or

(B) for performance of the functions, responsibilities, or duties described in 45 CFR §1324.13 and §1324.19 and this chapter; or

(3) have personnel policies or practices that prohibit a representative of the Office from performing the functions of the Ombudsman Program or from adhering to the requirements of the Older Americans Act, §712.

(b) A host agency must ensure that a governmental entity or nonprofit organization contracting with a host agency, as described in §88.2(19)(B) of this chapter (relating to Definitions), complies with subsection (a) of this section as if the entity or organization is a host agency.

(c) A host agency may require a representative of the Office to notify the host agency of:

(1) comments or recommendations made in accordance with §88.302(a)(1)(F) of this chapter; and

(2) subject to disclosure requirements in §88.304 of this chapter (relating to Disclosure of Confidential Information; Exclusion from Reporting Requirements Regarding Abuse, Neglect, or Exploitation; and Provision of Records to the Office):

(A) information being sent to a legislator or the media regarding a problem or concern about a resident or a recommendation related to the problem or concern, as described in §88.302(a)(2)(A)(ii) of this chapter; and

(B) a response to a request for information from a legislator or the media, as described in §88.302(a)(2)(C) of this chapter.

§88.409. Noncompliance by a Host Agency.

(a) If the Office determines that a host agency is not in compliance with this subchapter and the determination is not based on onsite

monitoring or a desk review, the Office sends the local ombudsman entity and host agency a written notice describing the determination of non-compliance.

(b) If a local ombudsman entity or host agency receives a written notice described in subsection (a) of this section, the host agency, within 14 days after the date of the receipt of the notice, must submit a written plan of correction to the Office that describes:

(1) the action that will be taken to correct the noncompliance described in the notice; and

(2) the date by which each action will be completed.

(c) Within 14 days after the date the Office receives the plan of correction required by subsection (b) of this section, the Office notifies the local ombudsman entity and host agency of whether the plan is approved or requires modification. If the Office approves the plan, the host agency must complete the actions contained in the plan of correction by the dates in the plan. If the Office determines that the plan requires modification, the host agency must submit a modified written plan of correction within a time period determined by the Office for approval by the Office.

(d) To determine if the host agency has completed the actions in accordance with an approved plan of correction or approved modified plan of correction, the Office takes one or more of the following actions:

(1) reviews information in the ombudsman database;

(2) requests that the host agency submit evidence of correction to the Office; and

(3) visits the host agency or local ombudsman entity.

(e) If the Office determines that the host agency did not complete an action in accordance with an approved plan of correction or a modified plan of correction:

(1) the Office may allow the host agency additional time to complete the action;

(2) HHSC may impose a Level Two sanction in accordance with §213.5 of this title (relating to Compliance with Contractor Responsibilities, Rewards and Sanctions);

(3) HHSC may impose a Level Three sanction in accordance with §213.5 of this title; or

(4) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this chapter (relating to Designation of a Local Ombudsman Entity).

(f) If the Office allows a host agency additional time to complete an action as described in subsection (e)(1) of this section and the Office determines that the host agency did not complete the action within the time allowed, HHSC may:

(1) impose a Level Two sanction in accordance with §213.5 of this title;

(2) impose a Level Three sanction in accordance with §213.5 of this title; or

(3) the State Ombudsman may remove the designation of the local ombudsman entity as described in §88.104(c)(2)(B) of this chapter.

(g) Upon request by a local ombudsman entity or host agency, the Office provides technical assistance to a local ombudsman entity or host agency regarding developing a plan of correction.

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 January 18, 2024.

TRD-202400165
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 438-4281

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26 TAC §88.405, §88.407

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.405. Meeting Performance Measure Projections.

§88.407. Prohibition of Interference and Retaliation by a Host Agency.

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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Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 438-4281

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SUBCHAPTER F. REQUIREMENTS OF HHSC

26 TAC §88.501

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code, §101A.051.

§88.501. HHSC Responsibilities Regarding Individual Conflicts of Interest.

(a) For purposes of determining if the State Ombudsman or a representative of the Office has an individual conflict of interest, the state of Texas is the ombudsman service area.

(b) HHSC requires an applicant for the position of State Ombudsman to complete HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" to identify an individual conflict of interest of the applicant.

(c) HHSC requires the State Ombudsman to complete HHSC form "Individual Conflict of Interest Screening of a Representative of the Office" on or about January 15th of each year and if the State Ombudsman identifies an individual conflict of interest.

(d) The Executive Commissioner or designee reviews a form completed by an applicant or the State Ombudsman as described in subsection (b) or (c) of this section to determine if an identified conflict of interest can be removed or remedied.

(e) Except as provided in subsection (f) of this section, HHSC does not employ the State Ombudsman or a representative of the Office who has an individual conflict of interest.

(f) HHSC may employ the State Ombudsman or a representative of the Office who has an individual conflict of interest described in §88.2(16)(K), [~~§88.2(14)(K),~~] (L), or (O) of this chapter (relating to Definitions) if:

(1) the Executive Commissioner or designee approves a remedy for the conflict of interest of the State Ombudsman; or

(2) the State Ombudsman approves a remedy for the conflict of interest of a representative of the Office.

(g) HHSC ensures that no person involved in selecting or terminating the State Ombudsman has an individual conflict of interest.

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

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SUBCHAPTER G. GRIEVANCES

26 TAC §§88.601 - 88.603

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §101A.051, which provides that the HHSC Executive Commissioner shall adopt rules regarding the administration by HHSC of programs and services for older individuals.

The new sections affect Texas Government Code 531.0055 and Texas Human Resources Code, §101A.051.

§88.601. Grievances Regarding Performance of a Representative of the Office Who is an Employee, Independent Contractor, or Volunteer of a Host Agency, Including a Managing Local Ombudsman.

(a) A grievance regarding the performance of functions of the Ombudsman Program by a representative of the Office, other than a grievance about the managing local ombudsman, is addressed in accordance with this subsection. A host agency must ensure that a local ombudsman entity complies with this section.

(1) The local ombudsman entity must:

(A) ensure that a grievance may be submitted:

(i) in writing, in person, or by telephone; and

(ii) anonymously;

(B) request, but not require disclosure of, the name and contact information of a grievant;

(C) document the nature of the grievance in detail;

(D) document the name of the person who conducted the investigation required by subparagraph (F)(ii) of this paragraph;

(E) document the name of persons contacted during the investigation; and

(F) within 30 days after receiving the grievance:

(i) notify the representative of the Office who is the subject of the grievance that a grievance was submitted;

(ii) investigate the grievance;

(iii) develop a proposed response to the grievant, including actions to be taken, if any; and

(iv) submit the following information to the Office:

(I) the information described in subparagraphs (C) - (E) of this paragraph;

(II) a description of the activities conducted during the investigation; and

(III) the proposed response to the grievant as required by clause (iii) of this subparagraph.

(2) If the Office receives the information regarding a grievance described in paragraph (1)(F)(iv) of this subsection, the State Ombudsman:

(A) reviews the information; and

(B) approves or modifies the proposed response to the grievant developed by the local ombudsman entity.

(3) The local ombudsman entity must send a response to the grievant as approved or modified by the State Ombudsman.

(b) A grievance regarding the performance of functions of the Ombudsman Program by a managing local ombudsman is addressed in accordance with this subsection.

(1) A grievance about the managing local ombudsman must be submitted to the Office.

(2) If the Office receives a grievance about a managing local ombudsman, the Office, within 90 days after receiving the grievance:

(A) investigates the grievance;

(B) informs the host agency of the actions to be taken, if any; and

(C) sends a response to the grievant.

§88.602. Grievances Regarding the Performance of the State Ombudsman or a Representative of the Office Who is an Employee or Volunteer of HHSC.

(a) A grievance regarding the performance of functions of the Ombudsman Program by the State Ombudsman is addressed in accordance with this subsection.

(1) A grievance about the State Ombudsman that is not related to fraud, waste, or abuse must be submitted to the Director of the Office of the Ombudsman.

(2) A grievance about the State Ombudsman related to fraud, waste, or abuse must be submitted to the Office of the Inspector General.

(b) A grievance regarding the performance of functions of the Ombudsman Program by a representative of the Office who is an employee or volunteer of HHSC is addressed in accordance with this subsection.

(1) The State Ombudsman:

(A) ensures that a grievance may be submitted:

(i) in writing, in person, or by telephone; and

(ii) anonymously;

(B) requests, but does not require disclosure of, the name and contact information of a grievant;

(C) documents the nature of the grievance in detail;

(D) documents the name of persons contacted during the investigation; and

(E) within 30 days after receiving the grievance:

(i) notifies the representative of the Office who is the subject of the grievance that a grievance was submitted;

(ii) investigates the grievance; and

(iii) develops and submits a response to the grievant, including actions to be taken, if any.

(2) The State Ombudsman submits a grievance about a representative of the Office who is an employee or volunteer of HHSC related to fraud, waste, or abuse to the Office of the Inspector General.

§88.603. Grievances Regarding Certification Decisions by the State Ombudsman.

If the State Ombudsman refuses, suspends, or terminates certification of a representative of the Office, the person whose certification was refused, suspended, or terminated may file a grievance to request that the State Ombudsman reconsider the decision to refuse, suspend, or terminate certification in accordance with this section.

(1) To request a grievance under this section, the grievant must complete HHSC form "Grievance Regarding Ombudsman Certification Decision" and submit the completed form to the Office within 30 days of a decision.

(2) If the Office receives a completed form described in paragraph (1) of this section, the State Ombudsman:

(A) reviews the form;

(B) determines whether the decision to refuse, suspend, or terminate certification is affirmed, modified, or reversed;

(C) sends a response to the grievant which includes a description of the State Ombudsman's determination; and

(D) takes any necessary action in accordance with the determination.

(3) In accordance with 45 CFR §1324.11(e)(7), the State Ombudsman makes the final determination regarding the refusal, suspension, or termination of certification of a representative of the Office.

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

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Karen Ray
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL
SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §34.815

INTRODUCTION. The Texas Department of Insurance (TDI) proposes to amend 28 TAC §34.815, concerning retail fireworks sale permits. Section 34.815 implements House Bill 2259, 88th Legislature, 2023.

EXPLANATION. The proposed amendments to §34.815 enact changes in accordance with HB 2259, which revised Occupations Code §2154.202 by removing language providing for the purchase of retail fireworks permits from licensed manufacturers, distributors, or jobbers or directly from the State Fire Marshal's Office (SFMO) and specifying that TDI is required to enable the sale of retail fireworks permits through a webpage that is linked from TDI's website.

Prior to HB 2259, the Occupations Code allowed various methods for obtaining and distributing retail permits to sell fireworks. These permits could either be acquired directly from SFMO or purchased through distributors, manufacturers, or jobbers. They were typically sold in booklets containing 20 permits. However, these booklets, which included carbon copies of each retail permit sold, proved to be cumbersome for both the industry and SFMO. The information within these booklets had to be manually typed, causing delays in SFMO's receipt of information regarding firework sales. This manual process was also prone to data entry errors and required SFMO to process refunds for unused retail permits in an outdated and slow manner. To simplify and streamline this process, HB 2259 requires that retail firework permits be available for purchase through TDI's website, eliminating the need to obtain them from manufacturers, distributors, or jobbers.

The proposed amendments to the section are described in the following paragraphs.

Section 34.815. Proposed amendments revise and restructure §34.815 using plain language to implement HB 2259. Previously, the rule's steps to get a retail permit were interrupted by bulk storage rules, which added confusion, and the new structure will make the rule more understandable by providing a natural, sequential order of steps necessary to obtain a retail permit to sell fireworks that reflects the new requirements.

New subsection (b) specifies the requirement that an applicant have a sales tax permit number, which must be entered on the retail firework permit in order to receive a permit. This is an existing requirement currently addressed in subsection (b)(5), but the new text more clearly and plainly addresses it.

Current subsection (b) is redesignated as subsection (c), and the text of the subsection is revised to reflect the changes in how retail fireworks permits may now be obtained. In addition, the requirement that a retail permit be signed is deleted from the text and addressed in new subsection (d).

Paragraphs (1) and (4) of subsection (b) are removed, because this text pertains to fireworks sales permit purchases from manufacturers, distributors, or jobbers, which is no longer allowed, and because copies of Occupations Code Chapter 2154 and the firework rules are readily available online. Paragraphs (2), (3), and (6) of subsection (b) are removed and their contents are included as new text in new subsections (e) - (g).

Current subsection (c) is deleted because it relates to the purchase of retail fireworks permits in ways no longer allowed under HB 2259.

New subsection (d) provides that once issued, a retail permit be printed, signed, and posted in a visible place. The requirements to print and post the retail permit are new, reflecting that permits may now only be obtained through a website; this provides documentary evidence of the retail permit, similar to how participating manufacturers, distributors, or jobbers would formerly provide evidence of the valid issuance of a permit.

New subsection (e) provides that retail permits may be issued only to those individuals or groups engaged in the retail sale of fireworks. This requirement is currently addressed in subsection (b)(6); it is relocated here to facilitate the clarity of the rule.

New subsection (f) provides that bulk storage of Fireworks 1.4G must be done in compliance with 28 TAC §34.823. This provision is relocated from current subsection (b)(2) to facilitate the clarity of the rule.

New subsection (g) provides that Fireworks 1.4G must be sold only through permitted sites and within the selling periods defined in Occupations Code §2154.202. This provision is relocated from current subsection (b)(3) to facilitate the clarity of the rule.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Linda Villarreal, director of Licensing Administration, SFMO, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments because of enforcing or administering the amendments, other than that imposed by the statute. Ms. Villarreal made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Villarreal does not anticipate any measurable effect on local employment or the local economy because of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Villarreal expects that administering the proposed amendments will have the public benefit of ensuring that TDI's rules conform to Occupations Code §2154.202 as amended by HB 2259. The proposed amendments streamline the permit sales process by providing for all retail fireworks permits to be sold online.

Ms. Villarreal expects that the proposed amendments will not increase the cost of compliance with Occupations Code Chapter 2154 because the amendments do not impose requirements beyond those in the statute. The statute as amended by HB 2259 requires the commissioner to provide for the sale of a retail fireworks permit through a website. TDI must also post a link to the retail sales permit website on its website. As a result, any cost associated with compliance does not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a possible cost on regulated persons. Therefore, no additional rule amendments are required under Government Code §2001.0045. In addition, the proposal is necessary to implement legislation, which is an exception under §2001.0045(c).

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will not expand, limit, or repeal an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later

than 5:00 p.m., central time, on March 4, 2024. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., central time, on March 4, 2024. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes amendments to §34.815 under Occupations Code §2154.052(a) and (b), and Insurance Code §36.001.

Occupations Code §2154.052(a) provides that the commissioner will administer Occupations Code Chapter 2154 through the state fire marshal and may issue rules to administer the chapter.

Occupations Code §2154.052(b) provides that the commissioner adopt, and the state fire marshal must administer, rules necessary for the protection, safety, and preservation of life and property, including rules regulating the issuance of licenses and permits to persons engaged in manufacturing, selling, storing, possessing, or transporting fireworks in this state.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Section 34.815 implements Occupations Code §2154.202 and HB 2259.

§34.815. Retail Permits.

(a) A retail permit is required for each retail stand or other retail sales location.

(b) Prior to the issuance of a retail permit, an applicant must present evidence of a valid current sales tax permit issued by the state comptroller.

(c) [~~(b)~~] Retail permits may be obtained at the department's website at www.tdi.texas.gov. [~~any time from any participating manufacturer, distributor, or jobber holding a valid license to do business in Texas or from the state fire marshal and must be signed by the applicant prior to the permit becoming effective.~~]

[~~(1) A retail permittee must purchase Fireworks 1.4G only from a distributor or jobber licensed in this state.~~]

[~~(2) Bulk storage of Fireworks 1.4G by a retail permittee must be in compliance with §34.823 of this title (relating to Bulk Storage of Fireworks 1.4G).~~]

[~~(3) Fireworks 1.4G must be sold to the general public only at legally permitted retail fireworks sites and during the legal selling periods defined in the Occupations Code §2154.202.~~]

[~~(4) A copy of Occupations Code Chapter 2154 and the fireworks rules, or a condensed version thereof, must be provided to the purchaser of a retail permit by the participating licensee at the time the permit is issued. Copies of Occupations Code Chapter 2154 and the fireworks rules will be made available through the State Fire Marshal's Office.~~]

[~~(5) Prior to the issuance of a retail permit, the applicant must present evidence of a valid current sales tax permit issued by the state comptroller, and the sales tax permit number must be entered on the retail fireworks permit by the person issuing the permit.~~]

[~~(6) Retail permits may only be issued to individuals or groups engaged in the retail sales of fireworks.~~]

[~~(c) Any licensee purchasing books of permits for sale to retail operators shall properly account for all permits received.~~]

[~~(1) The licensee who issues retail permits shall return books containing duplicate copies of each issued permit to the State Fire Marshal's Office within a week from the time the last permit in each book has been issued. All used and unused permits shall be returned no later than March 1 of each year.~~]

[~~(2) The returned copies in each book are considered the official record of retail permits sold.~~]

[~~(3) A licensee may exchange any unissued retail permit which has not been voided or otherwise rendered unusable for a new permit at the end of each year following expiration.~~]

(d) The retail permit, once issued, must be printed, signed, and posted in a place visible to the public within the retail space to be effective.

(e) Retail permits will only be issued to individuals or groups engaged in the retail sale of fireworks.

(f) Bulk storage of Fireworks 1.4G by a retail permittee must be in compliance with §34.823 of this title (relating to Bulk Storage of Fireworks 1.4G).

(g) Fireworks 1.4G must be sold to the general public only at legally permitted retail fireworks sites and during the legal selling periods defined in the Occupations Code §2154.202.

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 January 18, 2024.

TRD-202400198
Jessica Barta
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 676-6555

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 360. DESIGNATION OF RIVER AND COASTAL BASINS

31 TAC §§360.1 - 360.3

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) §§360.1 - 360.3, concerning Designation of River and Coastal Basins.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

Chapter 360 contains the agency's rules related to the designation of river and coastal basins in accordance with the requirement of Texas Water Code Section 16.051(c). The TWDB proposes to amend the rules to modernize the rule language and reflect the new manner in which the TWDB stores the digital files of the maps of that designate the state's river and coastal basins.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

In §360.1, the section is proposed to be amended to modernize the rule language.

In §360.2, the section is proposed to be amended to modernize the rule language.

In §360.3, the section is proposed to be amended to update how the TWDB stores the digital files of the state's designated river and coastal basins. The section is proposed to be amended to remove references to the storage of a "quad map" on a CD-ROM, because CD-ROMs are no longer the medium the TWDB uses to store digital files. The proposed amendments to this section do not change any of the state's designations of its river and coastal basins.

Additionally, in §360.3, subsections (a) though (w) contain figures that are not proposed to be amended in this rulemaking and will not be republished with the rule.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration, nor is there any expected reduction in costs to either state or local governments. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. There are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to implement legislation.

The TWDB invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as the amendment reflects how the TWDB stores the digital files designating state's coastal and river basins and modernizes the rule language for the public's understanding of the rule's effect. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as these requirements do not impose an economic cost on persons required to comply with the rule.

ECONOMIC AND LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §§2001.022, 2006.002); REGULATORY FLEXIBILITY ANALYSIS (Texas Government Code §2006.002)

The TWDB has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The TWDB also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The TWDB also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act.

A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the proposed rulemaking is to modernize the rule language and to update how the TWDB stores the digital files of the designations of the state's coastal and river basins.

Even if the proposed rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather the specific statutory authorization for this specific rulemaking is authorized by Texas Water Code §16.051(c). Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to

the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this proposed amendment is to update how the TWDB stores the digital files of the designations of the state's coastal and river basins and modernize the rule language.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation under state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency charged with designating the state's coastal and river basins in accordance with Chapter 16, Texas Water Code.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this proposed rule is merely an amendment to reflect how the TWDB stores the digital files of the designations of the state's coastal and river basins and modernize the rule language. It does not require regulatory compliance with any persons or political subdivisions. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register.* Include "Chapter 360" in the subject line of any comments submitted.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §16.051(c).

This rulemaking affects Water Code, §16.051(c).

§360.1. Scope of Chapter.

This chapter serves [~~shall serve~~] as the board's designation [~~delineation~~] of river basins and coastal basins pursuant to the requirement of the Texas Water Code, §16.051(c).

§360.2. Definitions of Terms.

The following words and terms, when used in this chapter, have [~~shall have~~] the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 16 and not defined here have [~~shall have~~] the meanings provided in Chapter 16. Quad map--Official 1 to 24,000 foot maps produced by the United States Geological Survey on which river basin and coastal basin boundaries are delineated.

§360.3. Designation of River Basins and Coastal Basins.

(a) The Canadian River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(a) (No change.)

(b) The Red River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(b) (No change.)

(c) The Sulphur River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(c) (No change.)

(d) The Cypress Creek basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(d) (No change.)

(e) The Sabine River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(e) (No change.)

(f) The Neches River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(f) (No change.)

(g) The Neches-Trinity coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~]

with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(g) (No change.)

(h) The Trinity River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(h) (No change.)

(i) The Trinity-San Jacinto coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(i) (No change.)

(j) The San Jacinto River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(j) (No change.)

(k) The San Jacinto-Brazos coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(k) (No change.)

(l) The Brazos River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(l) (No change.)

(m) The Brazos-Colorado coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(m) (No change.)

(n) The Colorado River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(n) (No change.)

(o) The Colorado-Lavaca coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(o) (No change.)

(p) The Lavaca River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(p) (No change.)

(q) The Lavaca-Guadalupe coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(q) (No change.)

(r) The Guadalupe River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(r) (No change.)

(s) The San Antonio River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(s) (No change.)

(t) The San Antonio-Nueces coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(t) (No change.)

(u) The Nueces River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored on CD-Rom of these quad maps with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(u) (No change.)

(v) The Nueces-Rio Grande coastal basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(v) (No change.)

(w) The Rio Grande River basin boundary is designated by lines delineated on quad maps listed in the following table. Digital files of these quad maps are stored [~~on CD-Rom of these quad maps~~] with the basin lines drawn thereon, are adopted by reference, and are located in the offices of the Texas Water Development Board.
Figure: 31 TAC §360.3(w) (No change.)

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

Filed with the Office of the Secretary of State on January 18, 2024.

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Ashley Harden
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 463-7686

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES
SUBCHAPTER C. PROGRAM SERVICES
DIVISION 4. HEALTH CARE SERVICES

37 TAC §380.9188

The Texas Juvenile Justice Department (TJJD) proposes to amend Texas Administrative Code, Chapter 380, Subchapter C, §380.9188.

SUMMARY OF CHANGES

The amendments to §380.9188, Suicide Alert for High-Restriction Facilities, will change the requirement for mental health professionals at high-restriction TJJD facilities to consult with the designated mental health professional (i.e., the local clinical director) when determining whether changes will be made to a youth's observation level or suicide precautions to apply only when: (1) the assessing mental health professional is not licensed to practice independently, and (2) the youth's observation level or precautions would be lowered. The amendments will also specify that, when a youth on suicide alert is transferred to another high-restriction TJJD facility, the mental health professional at the receiving facility communicates (rather than consults) with the designated mental health professional or designee regarding the plan for treatment and assessment.

FISCAL NOTE

Emily Anderson, Deputy Executive Director: Support Operations and Finance, has determined that, for each year of the first five years the amended section is in effect, there will be no significant fiscal impact for state government or local governments as a result of enforcing or administering the section.

PUBLIC BENEFITS/COSTS

Cameron Taylor, Senior Strategic Advisor, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of administering the section will be to better leverage staffing resources in addressing the mental health needs of TJJD youth who are on suicide alert.

Ms. Anderson has also determined that there will be no effect on small businesses, micro-businesses, or rural communities. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this section.

GOVERNMENT GROWTH IMPACT

TJJD has determined that, during the first five years the proposed section is in effect, the section will have the following impacts.

(1) The proposed section does not create or eliminate a government program.

(2) The proposed section does not require the creation or elimination of employee positions at TJJD.

(3) The proposed section does not require an increase or decrease in future legislative appropriations to TJJD.

(4) The proposed section does not impact fees paid to TJJD.

(5) The proposed section does not create a new regulation.

(6) The proposed section does not expand, limit, or repeal an existing regulation.

(7) The proposed section does not increase or decrease the number of individuals subject to the section's applicability.

(8) The proposed section will not positively or adversely affect this state's economy.

PUBLIC COMMENTS

Comments on the proposal may be submitted within 30 days after publication of this notice to Texas Juvenile Justice Department, Policy and Standards Section, P.O. Box 12757, Austin, Texas 78711, or via email to policy.proposals@tjjd.texas.gov.

STATUTORY AUTHORITY

The amended section is proposed under §242.003, Human Resources Code, which requires the TJJD Board to adopt rules appropriate to properly accomplish TJJD's functions and to adopt rules for governing TJJD schools, facilities, and programs.

No other statute, code, or article is affected by this proposal.

§380.9188. Suicide Alert for High-Restriction Facilities.

(a) Purpose. This rule establishes procedures for identification, assessment, treatment, and protection of youth in high-restriction facilities who may be at risk for suicide.

(b) Applicability. This rule applies to all youth currently placed in high-restriction facilities operated by the Texas Juvenile Justice Department (TJJD).

(c) Definitions. Definitions pertaining to this rule are under §380.9187 of this chapter.

(d) General Provisions.

(1) Treatment for youth determined to be at risk for suicide is provided within the least restrictive environment necessary to ensure safety.

(2) Youth determined to be at risk for suicide participate in regular programming to the extent possible, as determined by a mental health professional. Only a mental health professional may make exceptions to the provision of regular programming, housing placement, or clothing.

(3) Using force to remove clothing shall be avoided whenever possible and used only as a last resort when the youth is physically engaging in suicidal and/or self-harming behavior.

(4) Designated staff carry rescue kits at all times while on duty for use in the event of a medical emergency caused by a suicide attempt. Rescue kits are also placed in designated buildings or areas of the campus that are not accessible to youth.

(5) As soon as possible, but not to exceed two hours, after a suicide attempt, the youth's parent or guardian is notified (with the youth's consent if the youth is age 18 or older).

(e) Intake Screening and Assessment.

(1) Upon Initial Admission to TJJD.

(A) Upon arrival to a TJJD orientation and assessment unit, designated intake staff keep youth within direct line-of-sight supervision until the youth is screened or assessed for suicide risk.

(B) Within one hour after the youth's arrival to a TJJD orientation and assessment unit, a mental health professional initiates an initial mental health screening and documents the results.

(C) If the mental health professional identifies the youth as potentially at risk for suicide, the mental health professional immediately conducts a suicide risk assessment.

(D) Within 14 days after arrival at the orientation and assessment unit, all youth receive a comprehensive mental health evaluation conducted by a mental health professional. The mental health evaluation will include a suicide risk assessment if one has not already been completed.

(E) The suicide risk assessment completed upon initial admission includes, at a minimum:

(i) a mental status exam;

(ii) a review of all mental health and medical records submitted from the courts, county juvenile detention facilities, or any other medical or mental health provider, to include any assessments by mental health professionals relating to prior suicide alerts during confinement;

(iii) a review of all other available screenings and assessments; and

(iv) referrals for follow-up treatment or further assessment, as indicated.

(F) The designated mental health professional reviews the suicide risk assessment.

(2) Upon Arrival at a TJJD Facility after Intake.

(A) Except for youth who are on suicide alert at the time of arrival, the following actions must occur within one hour after a youth's arrival at a high-restriction facility following an intrasystem transfer, any period of time spent out of TJJD's physical custody due to a significant life event, or a period of at least 48 hours spent out of TJJD's physical custody for any reason:

(i) a trained designated staff member initiates a suicide risk screening; or

(ii) a mental health professional initiates a suicide risk assessment.

(B) The youth is kept within direct line-of-sight supervision until the youth is screened or assessed.

(C) If a screening is conducted:

(i) the trained designated staff member immediately contacts a mental health professional to assign an observation level, if appropriate, based on results of the screening; and

(ii) the youth is immediately placed on the observation level directed by the mental health professional; and

(iii) the mental health professional conducts a suicide risk assessment within an appropriate time frame, as established in agency procedures. Procedures will assign time frames based on the youth's assigned observation level and screening result.

(D) The suicide risk assessment conducted upon a youth's arrival at a TJJD facility includes, at a minimum:

(i) a mental status exam;

(ii) a review of the youth's masterfile and medical record, as indicated;

(iii) referrals for follow-up treatment or further assessment, as indicated;

(iv) a determination of whether to place the youth on suicide alert, and if placed, designation of the appropriate observation level and other safety precautions; and

(v) a review by the designated mental health professional of the assessment.

(3) Additional Screening by Infirmary for Intrasystem Transfers.

(A) Upon arrival of a youth from another high-restriction TJJD facility, a nurse completes an intrasystem health screening, including questions relating to suicidal ideation and suicidal behavior.

(B) If the youth is identified by the screening as potentially at risk for suicide, the nurse immediately contacts a mental health professional and communicates the results of the screening.

(f) Responding to Suicidal Ideation, Self-Harming Behavior, or Suicidal Behavior.

(1) A staff member who has reason to believe that a youth has verbalized suicidal ideation or demonstrated self-harming or suicidal behavior must:

(A) immediately use the rescue kit if appropriate and seek medical attention if there is a medical emergency;

(B) verbally engage the youth;

(C) provide constant observation unless a mental health professional directs a higher observation level;

(D) begin a suicide observation log to document status checks of the youth;

(E) immediately notify the campus shift supervisor and document the notification; and

(F) refer the youth for a suicide screening.

(2) As soon as possible, but no later than one hour after notification, the campus shift supervisor ensures a trained designated staff member initiates a suicide risk screening or a mental health professional initiates a suicide risk assessment. This screening or assessment is not required when deemed inappropriate due to a medical emergency.

(3) If a screening is conducted:

(A) the trained designated staff member immediately contacts a mental health professional to assign an observation level based on results of the screening; and

(B) the mental health professional conducts a suicide risk assessment within an appropriate time frame, as established in agency procedures. Procedures will assign time frames based on the youth's assigned observation level and screening result.

(4) If the youth is transported to the emergency room:

(A) upon return to the facility, the youth is placed on one-to-one observation until assessed by a mental health professional; and

(B) a mental health professional initiates a suicide risk assessment within four hours after the youth's return to the facility.

(5) The suicide risk assessment conducted in response to suicidal behavior or ideation includes:

(A) a mental status exam;

(B) a review of the youth's masterfile and medical record, as indicated;

(C) referrals for follow-up treatment or further assessment, as indicated;

(D) a determination of whether to place the youth on suicide alert, and if placed, designation of the appropriate observation level and other safety precautions; and

(E) a review by the designated mental health professional of the assessment.

(6) Whenever possible, suicide risk screenings and assessments are conducted in a confidential setting.

(g) Actions Taken Upon Completion of Suicide Risk Assessment.

(1) Documentation Requirements.

(A) Upon completion of a suicide risk assessment, the mental health professional documents the results of the assessment, including any changes in the youth's observation level.

(B) If the youth is placed on suicide alert, the mental health professional ensures the youth's name is placed on the facility's suicide alert list. The designated mental health professional ensures the updated list is distributed to facility staff.

(2) Notification of Assessment Results.

(A) If the youth is placed on suicide alert:

(i) as soon as possible, infirmary staff, the youth's case manager, staff responsible for supervising the youth, and the campus shift supervisor are notified of the youth's observation level, other safety precautions, and any additional instructions; and

(ii) the youth's parent or guardian is notified as soon as possible after the youth is placed on suicide alert (with the youth's consent if the youth is age 18 or older).

(B) If the youth is not placed on suicide alert, the mental health professional notifies the referring staff and the youth's case manager that the youth was assessed but not placed on suicide alert.

(3) Assignment of Staff to Monitor Youth. If the youth is placed on suicide alert, the campus shift supervisor ensures a specific staff member is assigned to monitor the youth and carry the suicide observation folder.

(h) Supervision of Youth on Suicide Alert.

(1) Unless the youth is already placed in a suicide-resistant room, the campus shift supervisor or trained designated staff member coordinates a search of the youth's room or personal area and removes any potentially dangerous items.

(2) The suicide observation folder must be in the possession of the monitoring staff member at all times while the youth is on suicide alert.

(A) At no time may the youth possess the suicide observation folder.

(B) Each time the youth is transferred to the supervision of another staff member, the receiving staff member must take possession of the folder and document the transfer of supervision in the folder.

(3) As required by the suicide observation level and other safety precautions assigned to the youth, the monitoring staff member must:

(A) maintain direct visual observation of the youth;

(B) document the youth's status at the required interval; and

(C) follow any precautions set by the mental health professional.

(4) The monitoring staff member must not leave a youth assigned to one-to-one observation unattended or let the youth out of the staff member's sight.

(5) During waking hours, the monitoring staff must not leave a youth assigned to constant observation unattended or let the youth out of the staff member's sight.

(6) Any time a youth on one-to-one or constant observation is in the bathroom or shower, the monitoring staff must remain within six feet of the youth, and:

(A) observe at least a portion of the youth's body (i.e., head, feet, or other observable parts, excluding genitalia, breasts, and buttocks); and/or

(B) maintain verbal contact.

(7) When a youth on one-to-one or constant observation is engaged in regular programming (e.g., education, group sessions, recreation), the monitoring staff will accompany the youth to the activity and remain within the required distance (i.e., 6 or 12 feet). If the youth cannot be maintained within the required distance without disrupting the program, a mental health professional must be consulted to consider possible modifications to the youth's supervision plan or scheduled routine to ensure the youth can be appropriately monitored.

(8) Issuing suicide-resistant clothing and removing a youth's clothing, as well as canceling programming and routine privileges, will be avoided whenever possible and used only as a last resort for periods during which the youth is physically engaging in suicidal and/or self-harming behavior.

(A) Decisions regarding issuance of suicide-resistant clothing and restrictions in programming and/or routine privileges may be made only by a mental health professional.

(B) A decision to conduct a strip search if criteria in §380.9709 of this chapter are met may be made only in consultation with a mental health professional.

(C) A decision to use force in order to remove a youth's regular clothing after a youth has been issued suicide-resistant clothing may occur only upon the recommendation of a mental health professional and with the approval of the directors over treatment and facility operations or the directors' designees.

(D) If force is used to remove a youth's regular clothing as provided by subparagraph (C) of this paragraph, a mental health professional must evaluate the youth's need for trauma symptom care and ensure the care is provided if appropriate.

(9) Unless approved by the designated mental health professional in consultation with the facility administrator, youth on suicide alert are not allowed access to off-campus activities or non-medical appointments. Decisions regarding off-campus medical appointments are made by medical staff.

(i) Treatment and Reassessment of Youth on Suicide Alert.

(1) A mental health professional develops a written treatment plan (or revises an existing care plan) that includes treatment goals and specific interventions designed to address and reduce suicidal ideation and threats, suicidal and/or self-harming behavior, and suicidal threats perceived to be based upon attention-seeking or manipulative behavior. The treatment plan describes:

(A) signs, symptoms, and circumstances under which the risk for suicide or other self-harming behavior is likely to reoccur;

(B) how reoccurrence of suicidal and other self-harming behavior can be avoided; and

(C) actions the youth and staff can take if the suicidal and other self-harming behavior does occur.

(2) The mental health professional consults with the youth's case manager, as needed, to recommend modifications to the youth's individual case plan based on issues identified in the treatment plan. The mental health professional consults with staff responsible for supervising the youth regarding the youth's progress.

(3) While the youth is on suicide alert, a mental health professional assesses the youth at least once every 48 hours, unless the youth is placed on one-to-one observation, in which case the mental health professional assesses the youth at least once every 24 hours.

(4) For each assessment, the mental health professional:

(A) reviews the contents of the suicide observation folder, as well as suicide risk assessments and progress notes from other mental health professionals as applicable;

(B) determines whether any changes should be made to the youth's observation level or other safety precautions [;] (in consultation with the designated mental health professional if the assessing mental health professional is not licensed to practice independently and recommends lowering the observation level or precautions);

(C) documents any changes in the observation level or other safety precautions in the suicide observation folder; and

(D) documents the assessment, including a sufficient description of the youth's emotional status, observed behavior, recommended observation level, justification for decision, and any special instructions for staff.

(5) Each time a change is made to the youth's observation level or other safety precautions, staff responsible for supervising the youth are notified and updated information regarding the youth is distributed to designated facility staff, including infirmary staff.

(6) During routine meetings between the psychology department and the psychiatric provider, the designated mental health professional or designee discusses information concerning youth on suicide alert who are on the psychiatric caseload.

(j) Protective Custody or Emergency Psychiatric Placement.

(1) Youth who cannot be safely managed in their assigned living units may be referred for placement in a suicide-resistant room in the protective custody program, in accordance with §380.9745 of this chapter. All treatment, reassessment, and observation requirements established in this rule will continue to apply while a youth is assigned to protective custody unless otherwise noted in §380.9745 of this chapter.

(2) If the designated mental health professional or psychiatric provider determines that a youth is in serious and imminent risk of suicidal and/or self-harming behavior and cannot be safely or appropriately managed within TJJD custody, the designated mental health professional or psychiatric provider may seek emergency psychiatric placement in accordance with §380.8771 of this chapter. The youth will be placed on one-to-one observation until received at the emergency placement.

(k) Intrasystem Transfer of Youth on Suicide Alert.

(1) Prior to transferring a youth on suicide alert to another high-restriction TJJD facility:

(A) within 24 hours prior to transfer, a mental health professional at the sending facility sends a summary of the youth's suicidal and/or self-harming behavior, assessments, and treatment to the designated mental health professional and facility administrator or their designees at the receiving facility and any stopover facilities en route to the receiving facility; and

(B) staff assigned to monitor the youth at the sending facility provide the suicide observation folder to the transporting staff.

(2) A mental health professional at the receiving facility:

(A) as soon as possible, but no later than four hours after the youth's arrival, reviews the transfer summary and initiates a suicide risk assessment;

(B) places the youth on the facility's suicide alert list;

(C) ensures the suicide observation log is provided to the staff assigned to monitor the youth; and

(D) communicates [~~consults~~] with the designated mental health professional or designee regarding the plan for treatment and assessment.

(3) Before the youth is moved to the assigned dorm or living unit at the receiving facility, staff responsible for supervising the youth and nursing staff are notified of the youth's suicide observation level.

(l) Moving a Youth on Suicide Alert to a Less Restrictive Placement.

(1) Prior to moving a youth on suicide alert to a less restrictive placement (i.e., medium-restriction facility or home placement), the mental health professional:

(A) provides the youth (or parent/guardian if the youth is under age 18) with a referral for follow-up care;

(B) coordinates with appropriate clinical staff to schedule a follow-up appointment;

(C) communicates observation level and precautions to facility staff, if applicable;

(D) identifies emergency resources, if needed; and

(E) notifies the youth's parole officer, if applicable.

(2) Mental health records are sent to the receiving mental health provider upon request.

(m) Reduction of Observation Level and Removal from Suicide Alert.

(1) The observation level for a youth on suicide alert may be lowered or discontinued only after a suicide risk assessment by a mental health professional.[;] If the assessing mental health professional is not licensed to practice independently, the decision to lower or discontinue a youth's observation level may be made only in consultation with the designated mental health professional.

(2) A mental health professional may lower a youth's suicide observation level by no more than one level every 24 hours unless otherwise approved by the designated mental health professional on a case-by-case basis.

(3) Only a mental health professional or the designated mental health professional may authorize removal of a youth's name from the suicide alert list. Only youth on the lowest available observation level may be removed from suicide alert.

(4) The mental health professional notifies appropriate staff when a youth's observation level is lowered and when a youth

is removed from suicide alert. Infirmary staff notify the psychiatric provider of all such changes for youth on the psychiatric caseload.

(5) The youth's parent or guardian is notified when the youth is removed from suicide alert (with the youth's consent if the youth is age 18 or older).

(6) Upon removal from suicide alert, the mental health professional identifies in the treatment plan any needed follow-up mental health services.

(n) Training.

(1) All staff who have regular, direct contact with youth (including, but not limited to, security, direct care, nursing, mental health, and education staff) receive initial training in suicide prevention and response during new-hire training. Training addresses topics including, but not limited to:

(A) identifying the warning signs and symptoms of suicidal and/or self-harming behavior;

(B) high-risk periods for suicidal and/or self-harming behavior;

(C) juvenile suicide research, to include the demographic and cultural parameters of suicidal behavior, incidence, and precipitating factors;

(D) responding to suicidal youth and youth experiencing mental health symptoms;

(E) communication between correctional and health care personnel;

(F) referral procedures;

(G) housing, observation, and suicide alert procedures; and

(H) follow-up monitoring of youth who engage in suicidal behavior, self-harming behavior, and/or suicidal ideation.

(2) All staff who have regular, direct contact with youth receive annual suicide prevention training.

(3) Staff designated to conduct suicide screenings receive annual training from a mental health professional regarding suicide alert policy, suicide indicators, and suicide screening.

(4) All training described by this subsection shall be accompanied by a test or demonstration to establish competency in the subject matter.

(o) Post-Incident Debriefing and Analysis.

(1) After a completed suicide or a life-threatening suicide attempt, the facility administrator or designee coordinates a debriefing with appropriate facility staff as soon as possible after the situation has been stabilized, in accordance with agency procedures.

(2) After a completed suicide, the executive director or designee may dispatch a critical incident support team to provide counseling for youth and staff, coordination of facility activities, and assistance with follow-up care.

(3) After a completed suicide, the medical director conducts a morbidity and mortality review in coordination with appropriate clinical staff. The medical director may conduct a morbidity and mortality review after a life-threatening suicide attempt.

(4) After a completed suicide or a life-threatening suicide attempt, a critical incident review is convened to determine if the incident reveals system-wide deficiencies and to recommend improvements to agency policies, operational procedures, the physical plant, and/or training requirements.

(5) In the event of a completed suicide, all actions, notifications, and reports required under §385.9951 of this title [~~chapter~~] must be completed.

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 January 18, 2024.

TRD-202400169
Cameron Taylor
Senior Strategic Advisor
Texas Juvenile Justice Department
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For further information, please call: (512) 490-7278

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 7. RAIL FACILITIES
SUBCHAPTER E. RAIL FIXED GUIDEWAY SYSTEM STATE SAFETY OVERSIGHT PROGRAM

The Texas Department of Transportation (department) proposes the repeal of §§7.82, 7.83, and 7.86, new §§7.82, 7.83, and 7.86, and amendments to §§7.80, 7.84, 7.85, and 7.87 - 7.95, concerning Rail Fixed Guideway System State Safety Oversight Program.

Recent changes to Federal program requirements as a result of the Infrastructure Investment and Jobs Act (IIJA) necessitate an update to department rules. The IIJA updated 49 U.S.C §5329(d) and (k) to add additional requirements related to risk-based inspections (RBI), rail agency safety committees, training requirements, and public transportation agency safety plan contents. The United States Department of Transportation (USDOT) requires each State Safety Oversight Agency (SSOA) to develop and implement a risk-based inspection (RBI) program. The Federal Transit Administration (FTA) requires the department's draft RBI program document to be incorporated into the State Safety Oversight Program Standard and submitted for review no later than May 2024, to meet the October 21, 2024, FTA approval deadline. As a result of these updates and FTA requirements, amendments to Chapter 7 which establish standards for and implement state oversight of safety practices of rail fixed guideway systems are required.

Amendments to §7.80, Purpose, update the United States Code (U.S.C) reference to §5329 from the outdated §5330 reference.

Section §7.82, System Safety Program Plan, is repealed, as the contents of the section are obsolete.

New §7.82, Public Transportation Agency Safety Plan, contains the substance of existing §7.83, which is repealed by this rulemaking. The new section deletes as unnecessary the 11

listed requirements of former §7.83, substituting a reference to 49 U.S.C. §5329(d).

New §7.83, Modifications to a Public Transportation Agency Safety Plan, contains the substance of former §7.86, which is being repealed by this rulemaking.

Amendments to §7.84, Hazard Management Process, change the heading to "Safety Risk Management Process." Amendments to subsection (a) substitutes "public transportation agency safety plan" for "safety system program plan." Amendments to subsection (b) replace "hazard management process" with "safety risk management process" to align with federal requirements, while amendments to subsection (c) clarify the reporting standard for hazards in accordance with the State Safety Oversight Program Standard.

Amendments to §7.85, New State Rail Transit Agency Responsibilities, change the heading to "Ensuring Safety In New Rail Systems." The term "system safety program plan" is replaced with "public transportation agency safety plan" throughout the section. Changes are necessary to comply with new federal requirements for public transportation agency safety plans.

New §7.86, Risk Based Inspections, lays out requirements of the risk-based inspection (RBI) program document. It details requirements for conducting inspections in accordance with the RBI, to include using proper protective and safety equipment. The new section requires immediate reporting of safety concerns revealed through inspection activities and requires the department to issue a draft inspection report within 30 days after completion of a safety inspection. It also allows for a rail transit agency to submit written comments to the department's draft inspection report and requires the department to issue a final inspection report within 10 days of the comment deadline. Further, subsection (e) of the new section details the required elements of the inspection report. New subsection (f) requires rail transit authorities to submit data to the department for purposes of detecting changes in safety performance. Requirements for data submission are based on each agency's unique public transportation agency safety plan. The data format, type of data and submission schedule for rail transit agencies to follow will be identified in the risk-based inspection program document. New subsection (g) requires the department to review each rail agency's data at least annually. New subsection (h) requires the department to conduct on-going monitoring, to include at least four on-site inspections per year and other monitoring activities under 49 C.F.R. Part 674. The contents of this new section are necessary to comply with new federal requirements for risk-based inspections in 49 U.S.C §5329.

Amendments to §7.87, Rail Transit Agency's Annual Review, change the heading to "Rail Transit Agency's Annual Internal Safety Review." References to the system safety program plan are updated to public transportation agency safety plan throughout the section. Amendments also delete subsection (f) to remove the requirement for annual reports to be submitted with a formal letter from the chief executive. Changes are necessary to align with new federal requirements in 49 C.F.R. Part 674 that remove the requirement of a formal letter from the chief executive.

Amendments to §7.88, Department System Safety Program Plan Audit, change the heading to "Triennial Review of Rail Transit Agencies." This update conforms to State Safety Oversight Program Standard terminology in 49 C.F.R. Part 674 and FTA program documentation. Amendments also include replacing system safety program plan throughout the section with public transportation agency safety plan. The timeframe for which an agency must provide corrective audit plans to the department after receipt of its final audit plan is reduced from the existing 45 days to 30 days. The timeframe is reduced from 45 to 30 days for increased clarity and to be consistent with the timeframe associated with the development of all other corrective action plans.

Amendments to §7.89, Accident Notification, changes the title to "Event Notification." In addition, amendments to §7.89 (a)(3) replace the reference to "property damage" with "substantial damage" to align the rule with FTA's clarified program guidance that details thresholds requiring reporting to the TxDOT State Safety Oversight Program. Amendments to subsection(a)(3) also delete the reporting of the derailment of a transit vehicle as derailments are already cited in subsection (a)(6). Edits to subsection (d) include reporting each incident to FTA instead of the department and replace accident with incident throughout. Subsection (f) edits clarify reference to the State Safety Oversight Program Standard. Changes are necessary due to new federal requirements in 49 C.F.R. Part 674.

Amendments to §7.90, Accident Investigations, clarify that the department will investigate any accident as required under §7.89 (a) or (b) but remove the reference to (d). Amendments also clarify that investigation personnel must be certified in accordance with the public transportation safety certification training program provided by the U.S. Department of Transportation. These amendments are necessary as a result of updates to federal rail safety requirements.

Amendments to §7.91, Corrective Action Plan, update the reference to safety reviews for clarity by removing the word "safety." These amendments are necessary as a result of updates to federal rail safety requirements.

Amendments to §7.92, Administrative Actions by the Department, remove the reference to 49 C.F.R. part 659 as this is an outdated federal reference and update the reference to system safety program plan in subsection (e) to public transportation agency safety plan. Changes are necessary to align with federal requirements in 49 C.F.R. Part 674.

Amendments to §7.93, Administrative Review, §7.94, Escalation of Enforcement Action, and §7.95, Emergency Order to Address Imminent Public Safety Concerns remove references to "system safety program plan" and replace them with "public transportation agency safety plan." Changes are necessary to align with federal requirements in 49 C.F.R. Part 674.

FISCAL NOTE

Stephen Stewart, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of the department's or commission's enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Eric Gleason, Director, Public Transportation Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Eric Gleason has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be enhanced safety reporting, monitoring and hazard mitigation among rail transit agencies throughout the state.

COSTS ON REGULATED PERSONS

Eric Gleason has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Eric Gleason has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. He expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Eric Gleason has determined that a written takings impact assessment is not required under Government Code, §2007.043.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:30 a.m. on February 15, 2024, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 9:00 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact the General Counsel Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8630 at least five working days before the date of the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the repeal of §§7.82, 7.83, and 7.86, new §§7.82, 7.83, and 7.86, and amendments to §§7.80, 7.84, 7.85, and 7.87 - 7.95, may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line *"Rail Fixed Guideway System State Safety Oversight Program Rules."* The deadline for receipt of comments is 5:00 p.m. on March 4, 2024. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

43 TAC §§7.80, 7.82 - 7.95

STATUTORY AUTHORITY

The new sections, and amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department and more specifically Transportation Code, §455.060, which authorizes the commission to adopt rules for the oversight of rail fixed guideway systems.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING Transportation Code, Chapter 455, Subchapter B.

§7.80. Purpose.

Transportation Code, Chapter 455 requires the Texas Transportation Commission to establish standards for and implement state oversight of safety practices of rail fixed guideway systems in compliance with 49 U.S.C. §5329 [~~§5330~~]. This subchapter prescribes the policies and procedures governing state oversight of rail fixed guideway systems' safety practices.

§7.82. Public Transportation Agency Safety Plan.

A transit agency, other than a small public transportation provider governed by Title 43, Chapter 31 of the Texas Administrative Code, must establish a public transportation agency safety plan that meets the requirements of 49 U.S.C. §5329(d), 49 C.F.R. Part 673, and the State Safety Oversight Program Standard.

§7.83. Modifications to a Public Transportation Agency Safety Plan.

(a) If a rail transit agency determines, or is notified by the department, that the public transportation agency safety plan needs to be modified, the rail transit agency shall submit the modified plan and any subsequently modified procedures to the department for review and approval.

(b) Except as provided by subsection (c) of this section, the rail transit agency may not implement the proposed modifications before the modified plan is approved by the department.

(c) If the rail transit agency determines that a modification is necessary to address an imminent safety hazard, the rail transit agency may make a temporary modification to its public transportation agency safety plan before that modification is approved by the department, but the modification must be approved by the department before it may become permanent.

§7.84. Safety Risk [~~Hazard~~] Management Process.

(a) Each rail transit agency shall develop, and document in its public transportation agency safety plan [~~system safety program plan~~], a process to identify and resolve hazards during its operation, including any hazards resulting from a subsequent system extension, rehabilitation, or modification, from operational changes, or from other changes within the rail transit environment.

(b) The safety risk [~~hazard~~] management process must, at a minimum:

(1) define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process;

(2) specify the mechanisms used for the on-going identification of hazards;

(3) define the process used to evaluate identified hazards and prioritize them for elimination or control;

(4) identify the mechanism used to track through resolution the identified hazards;

(5) define minimum thresholds for the notification and reporting of hazards to the department; and

(6) specify the process used by the rail transit agency to provide on-going reporting of hazard resolution activities to the department.

(c) A rail transit agency shall report to the department hazards in accordance with the State Safety Oversight Program Standard [~~each identified hazard within 24 hours of the time that the hazard is identified~~].

§7.85. Ensuring Safety In New Rail Systems [~~New State Rail Transit Agency Responsibilities~~].

(a) A rail transit agency may not begin operation before a public transportation agency safety plan [~~system safety program plan~~] is approved by the department.

(b) Each new rail transit agency is required to submit its public transportation agency safety plan [~~system safety program plan~~] to the department not later than 180 days before the target date of pre-revenue operations.

(c) The department will conduct an on-site pre-revenue review of each new rail transit agency's public transportation agency safety plan [~~system safety program plan~~] within 60 days after the date that the plan is received by the department under subsection (b) of this section.

(d) The department may request additional information or clarification related to, or revisions of, the public transportation agency safety plan [~~system safety program plan~~].

(e) On approval, the department will issue to the chief executive of the rail transit agency a formal letter of approval of the initial public transportation agency safety plan [~~system safety program plan~~].

§7.86. Risk Based Inspections.

(a) In addition to the generally applicable State Safety Oversight Program Standard, the department will develop and maintain an individual risk-based inspection program document in consultation with each rail transit agency in the State Safety Oversight Program. The program documents will be incorporated into the State Safety Oversight Program Standard and the rail transit agency safety plans. The program standard is detailed in the subsections below.

(b) The department will conduct inspections, with or without notice, of rail transit agency infrastructure, equipment, records, personnel, and data, including the data that the rail agency collects when identifying and evaluating safety risks, in accordance with the State Safety Oversight Program Standard. A rail transit agency shall provide access to department State Safety Oversight Program (SSOP) staff and contractors to conduct inspections as prescribed in the State Safety Oversight Program Standard.

(c) Department SSOP staff and contractors will comply with a rail transit agency's protective equipment policy and other safety requirements in the conduct of all inspections.

(d) Department personnel will immediately report safety concerns revealed through inspection activities to the rail transit agency staff upon discovery.

(e) The department will issue a draft inspection report to the rail transit agency within 30 days after the date of the completion of the inspection. The rail transit agency may submit written comments on the draft inspection report within 10 days of receiving the draft inspection report. The department will issue the final inspection report not later than 10 days after the rail transit agency's deadline to submit comments. The inspection report will contain:

(1) Date and time of inspection;

(2) Department personnel present;

(3) Inspection purpose, functional area, and locations or items inspected;

(4) Issues or deficiencies observed, if applicable;

(5) Recommendations, if applicable;

(6) Photographs, documentation, or diagrams, if available; and

(7) Corrective actions required which may include remedial actions.

(f) Rail transit agencies shall submit data to the department for qualitative and quantitative analysis to detect changes in rail transit safety performance, shifts in risk, and assure policy adherence. Data submission requirements for each rail transit agency are based on that agency's Safety Management System (SMS) hazard identification and risk assessment policies and procedures identified in the agency's public transportation agency safety plan. The type of data, format for submission, and schedule of submission shall be identified for each agency in its public transportation agency safety plan.

(g) The department will review rail transit agency data to prioritize inspection activities at least annually for each rail transit agency.

(h) The department will conduct on-going monitoring which will include at least four onsite inspections per year and other monitoring activities pursuant to 49 C.F.R. Part 674 and as described in the State Safety Oversight Program Standard.

§7.87. Rail Transit Agency's Annual Internal Safety Review.

(a) Annually, each rail transit agency shall conduct an internal review of its public transportation agency safety plan [~~system safety program plan~~] to ensure that all elements of the public transportation agency safety plan [~~system safety program plan~~] are performing as intended.

(b) The internal review process must, at a minimum:

(1) describe the process used by the rail transit agency to determine if all identified elements of its public transportation agency safety plan [~~system safety program plan~~] are performing as intended;

(2) ensure that all elements of the public transportation agency safety plan [~~system safety program plan~~] are reviewed in an ongoing manner; and

(3) include checklists or procedures that the rail transit agency will use for the review.

(c) The rail transit agency shall notify the department at least 60 days before the day of conducting the internal safety review. This notification must include any checklists or procedures that will be used during the review.

(d) The rail transit agency shall permit the department to participate in or observe the on-site portions of the rail transit agency's internal review.

(e) Before February 1 of each year, the rail transit agency shall submit a report documenting internal safety review activities that have been performed since the last report and the findings and status of corrective actions.

~~[(f) The annual report must be accompanied by a formal letter, signed by the rail transit agency's chief executive, that:]~~

~~[(1) certifies that the rail transit agency is in compliance with its system safety program plan; or]~~

~~[(2) if the rail transit agency determines that the findings from its internal safety review indicate that it is not in compliance with its system safety program plan, states that the rail transit agency is not in compliance with its system safety program plan, specifies each non-compliance issue, the activities that the rail transit agency will take to achieve compliance, the date that those activities will be completed, and the projected date that compliance with the plan will be achieved.]~~

§7.88. Triennial Review of Rail Transit Agencies [~~Department System Safety Program Plan Audit~~].

(a) The department will conduct an audit of the rail transit agency at least once every three years. The audit will evaluate whether the rail transit agency has implemented a public transportation agency safety plan [~~system safety program plan~~] that meets the requirements of [~~49 C.F.R. Part 659~~], 49 C.F.R. Part 674.27, the department's State Safety Oversight Program Standard [~~program standards~~], and the National Public Transportation Safety Plan, and whether the rail transit agency complies with the plan.

(b) The department will provide an audit checklist based on the required elements of the public transportation agency safety plan [~~system safety program plan~~].

(c) The department will verify the required elements by;

(1) interviews;

(2) document review;

(3) field observations;

(4) testing;

(5) measurements;

(6) spot checks; and

(7) demonstrations provided by the rail transit agency staff.

(d) To determine compliance with the public transportation agency safety plan [~~system safety program plan~~], the department will sample accident reports, internal review reports, and the agency's hazard management program.

(e) The audit may be conducted as a single on-site assessment or in an ongoing manner over a three-year cycle.

(f) In planning the audit the department will:

(1) develop the audit schedule in coordination with the rail transit agency;

(2) designate the audit team and an audit team lead;

(3) prepare an audit plan that includes all elements identified in the rail transit agency's public transportation agency safety plan [~~system safety program plan~~];

(4) prepare audit checklists and templates;

(5) identify methods of verification for each checklist item; and

(6) request and review the rail transit agency's safety documents.

(g) In conducting the audit, the department will:

(1) conduct an entrance meeting with the rail transit agency's administration;

(2) conduct interviews with appropriate rail transit staff;

(3) observe on-site operations;

(4) evaluate documents and data maintained on-site;

(5) take measurements and conduct spot checks;

(6) review all checklist items for compliance; and

(7) inform the rail transit agency of initial findings and observations.

(h) The rail transit agency shall cooperate with the department during the audit review and provide access to all documents, records, equipment, and property necessary to complete the audit.

(i) The department will issue a draft report to the rail transit agency within 60 days after the date of the completion of the audit.

(j) The rail transit agency may submit written comments on the draft audit report. The department will include in the final audit report any comments received within 30 days after the date that the draft report was issued.

(k) The department will prepare a final audit report and deliver a copy to the rail transit agency.

(l) Within 30 [~~45~~] days after the date of its receipt of the final audit report, the rail transit agency shall provide to the department all corrective action plans necessary to address the findings in the report.

(m) The department will notify the rail transit agency when all findings have been addressed and the audit is closed.

§7.89. Event [~~Accident~~] Notification.

(a) Each rail transit agency shall notify the department and FTA within two hours of any accident involving a rail transit vehicle or taking place on property used by rail transit agency if the accident:

(1) results in a fatality at the scene;

(2) results in one or more persons suffering serious injury;

(3) results in substantial [~~property~~] damage from a collision involving a rail transit vehicle [~~or derailment of a rail transit vehicle~~];

(4) results in an evacuation for life safety reasons;

(5) is a collision at a grade crossing resulting in serious injury or a fatality;

(6) is a main-line or yard derailment;

(7) is a collision with an individual resulting in serious injury or a fatality;

(8) is a collision with an object resulting in serious injury or a fatality;

(9) is a runaway train;

(10) is a fire resulting in a serious injury or a fatality; or

(11) is a collision between rail transit vehicles.

(b) If an accident involving a rail transit vehicle or taking place on property used by rail transit agency results in a fatality away from the scene of the accident but within 30 days after the accident, the rail transit agency shall notify the department within two hours of the confirmation of the death of the individual.

(c) A rail transit agency that shares track over the general railroad system of transportation and is subject to the Federal Railroad Administration notification requirements, shall notify the department within two hours of an incident for which the rail transit agency must notify the Federal Railroad Administration.

(d) A rail transit agency must track and report to FTA [~~and the department~~] each incident [~~accident~~] that does not qualify for reporting under subsection (a) of this section and that results in one or more non-serious injuries that require medical transportation from the incident [~~accident~~] scene or that results in non-collision related damage to equipment, rolling stock, or infrastructure that disrupts operation. The report must be filed within 30 days after the date of the incident [~~accident~~].

(e) A rail transit agency must track and make the resulting information available when requested by the department or FTA any [~~accident or~~] event that does not qualify for reporting under subsection (a), (b), or (d) of this section.

(f) Notification to the department under this section must be provided in the method specified by the department in the State Safety Oversight Program Standard [~~program standards and must contain all the information required in the program standards~~].

§7.90. Accident Investigations.

(a) The department will investigate any accident that is required to be reported under §7.89(a) or[~~,~~](b) [~~and (d)~~] of this subchapter (relating to Event [~~Accident~~] Notification).

(b) The department may authorize the rail transit agency to conduct the investigation on the department's behalf or may join the investigation being conducted by the National Transportation Safety Board through the NTSB's Party System.

(c) If the department authorizes the rail transit agency to conduct the investigation, all personnel and contractors in the investigation must be certified [~~trained~~] in accordance with the Public Transportation Safety Certification Training Program provided by the U.S. Department of Transportation, and department-approved procedures shall be followed.

(d) An investigation conducted by a rail transit agency shall be documented in a final report and submitted to the department within 30 days after the date of the accident. The final report must be in the form prescribed in the department's State Safety Oversight Program Standard [~~program standard~~].

(e) If the department does not agree with the rail safety agency's accident report, the department will conduct an accident investigation and will issue a separate accident report.

(f) The department may conduct an independent accident investigation for any accident required to be reported under §7.89(a), (b), or [~~and~~] (d) of this subchapter. The rail transit agency shall provide all information and access to all property necessary for the department to conduct the investigation. The department's investigation report will be submitted to the rail transit agency within 45 days after the date of the completion of the report.

(g) If the National Transportation Safety Board conducts the accident investigation, the department and the rail transit agency shall cooperate and provide information to the board when requested.

§7.91. Corrective Action Plan.

(a) Each rail transit agency shall develop a corrective action plan for:

(1) results from investigations in which identified causal and contributing factors are determined by the rail transit agency or the department to require corrective actions; and

(2) findings from safety [~~and security~~] reviews performed by the department that require corrective action.

(b) Each corrective action plan must identify the action to be taken by the rail transit agency, an implementation schedule, and the individual or department responsible for implementation of the plan.

(c) The department will review the corrective action plan within 30 days after the date of receipt. If a plan is not approved, the department will work with the rail transit agency to develop appropriate corrective action plans.

(d) The rail transit agency shall provide the department with verification that corrective actions have been implemented, as described in the corrective action plan, or that proposed alternate actions will be implemented, subject to department review and approval.

(e) If the rail transit agency disputes the department's decision related to a corrective action plan, the rail transit agency shall submit an application for administrative review under §7.93 of this subchapter (relating to Administrative Review) not later than 30 days after the date of receipt of the written decision.

(f) Failure to complete a corrective action plan is a violation under this subchapter.

§7.92. Administrative Actions by the Department.

(a) If the department determines that a rail transit agency violates this subchapter, [~~49 C.F.R. Part 659,~~] 49 C.F.R. Part 674.27, or Transportation Code, Chapter 455, the department may initiate an administrative action.

(b) The department will notify the rail transit agency in writing of any findings of violations.

(c) Notification under subsection (b) of this section will specify each violation identified by the department, the administrative action to be taken by the department, the compliance action needed to address the violation, and the information concerning the process for requesting administrative review of the department's determination.

(d) Within 45 days after the date of receipt of notification under subsection (b) of this section, the rail transit agency shall submit documentation showing compliance with the action needed to address the violation or shall request administrative review under §7.93 of this subchapter (relating to Administrative Review).

(e) Failure to act as required by subsection (d) of this section will lead to the escalation of an enforcement action under §7.94 of this subchapter (relating to Escalation of Enforcement Action) and may lead to the removal of the department's approval of the rail transit agency's public transportation agency safety plan [~~system safety program plan~~].

§7.93. Administrative Review.

(a) If a rail transit agency disagrees with a decision by the department regarding the corrective action plan under §7.91 of this subchapter (relating to Corrective Action Plan) or a violation finding under §7.92 of this subchapter (relating to Administrative Actions by the Department), the rail transit agency may file a request for an administrative review with the executive director.

(b) The request for administrative review must:

(1) be in writing; and

(2) specify the reasons that the department's action is in error and provide evidence that supports the rail transit agency's position.

(c) The executive director or the executive director's designee, who is not below the level of division director, will make a final determination on the appeal within 60 days after the date the executive director receives the request for the appeal and will notify the rail transit agency of the determination. If the final determination upholds the department's decision under §7.91 of this subchapter or finding under §7.92 of this subchapter, the executive director or the executive director's designee will send the final determination to the rail transit agency stating the reason for the decision and setting a deadline for compliance with the department's violation notice or the corrective action plan.

(d) The determination of executive director or the executive director's designee under subsection (c) of this section is final. The rail transit agency is not entitled to a contested case hearing and has no right to appeal the decision of the executive director or the executive director's designee.

(e) Failure of a rail transit agency to comply with a deadline provided by the executive director or the executive director's designee under subsection (c) of this section may result in the rescission of the department's approval of the rail transit agency's public transportation agency safety plan [~~system safety program plan~~] and the department may petition a court of competent jurisdiction to halt the operation of the rail transit agency's rail fixed guideway system program.

§7.94. Escalation of Enforcement Action.

(a) If a rail transit agency fails to comply with an administrative action notification, the department will notify the executive director.

(b) The executive director will notify the rail transit agency's governing body of the violation and the failure of the rail transit agency's correction of the violation.

(c) Within 45 days after the date on which the rail transit agency's governing body receives notice under subsection (b) of this section, the governing body shall provide to the executive director evidence that the violation has been resolved.

(d) If the rail transit agency's governing body is unable to show that the corrective action has been satisfactorily completed, the department shall rescind approval of the rail transit agency's public transportation agency safety plan [~~system safety program plan~~].

(e) If the department rescinds approval of a rail transit agency's public transportation agency safety plan [~~system safety program plan~~], the department may petition a court of competent jurisdiction to halt the operation of the rail transit agency's rail fixed guideway system program.

§7.95. Emergency Order to Address Imminent Public Safety Concerns.

(a) Notwithstanding §7.92 of this subchapter (relating to Administrative Actions by the Department), §7.93 of this subchapter (relating to Administrative Review), and §7.94 of this subchapter (relating to Escalation of Enforcement Action), if there is good cause for the executive director, or the executive director's designee, to believe that the operations of a rail transit agency poses an imminent threat to the safety of the general public, the executive director or the executive director's designee immediately will notify the governing body of the rail transit agency.

(b) If the rail transit agency is unable to immediately eliminate the threat identified under subsection (a) of this section, the executive director will rescind approval of the public transportation agency safety plan [~~system safety program plan~~] and order the rail transit agency to cease all operations of its rail fixed guideway public transportation system until the rail transit agency eliminates the threat.

(c) If the rail transit agency fails to cease operation of its rail fixed guideway public transportation system in accordance with an order issued under subsection (b) of this section, the department may seek a temporary injunction to enforce the executive director's order.

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

Filed with the Office of the Secretary of State on January 17, 2024.

TRD-202400152
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 463-3164

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43 TAC §§7.82, 7.83, 7.86

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department and more specifically Transportation Code, §455.060, which authorizes the commission to adopt rules for the oversight of rail fixed guideway systems.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING Transportation Code, Chapter 455, Subchapter B.

§7.82. System Safety Program Plan.

§7.83. Public Transportation Agency Safety Plan.

§7.86. Modifications to a System Safety Program Plan.

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

Filed with the Office of the Secretary of State on January 17, 2024.

TRD-202400153
Becky Blewett
Deputy General Counsel
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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER B. CONTRACTS FOR HIGHWAY PROJECTS

43 TAC §§9.11, 9.12, 9.15 - 9.18, 9.23 - 9.25, 9.27

The Texas Department of Transportation (department) proposes the amendments to §§9.11, 9.12, 9.15 - 9.18, and §§9.23 - 9.25, and new §9.27 concerning Contracts for Highway Projects.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Senate Bill (S.B.) 1021, 88th Regular Session, 2023, amended Transportation Code, Chapter 223 to increase the value of contracts for highway projects that the Texas Transportation Commission (commission) may permit a district engineer to let and award locally, from an estimated amount of less than $300,000 to less than $1 million. Similarly, S.B. 1021 increased the value of contracts for building construction projects that the commission may permit a division director to let and award locally, from an estimated amount of less than $300,000 to less than $1 million. The department's procedures for letting and awarding these contracts, given in Title 43, Part 1, Chapter 9, Subchapter B of the Texas Administrative Code, must be amended to use the additional authority provided by the changes made by S.B. 1021.

In conjunction with the increased threshold in Transportation Code, the department is making the corresponding update to the threshold for highway projects for which the highest level of bidder qualification may be waived.

Additional amendments include increasing the minimum bidding capacities granted for the differing levels of bidder qualification; removing the requirement for bids opened at the state level to be read publicly, in conformance with Transportation Code; updating Performance Review Committee rules regarding affiliates and appeal of remedial action; and aligning the rules with current business practices.

Amendments to §9.11, Definitions, repeal the definition of "routine maintenance contract," which is no longer used in these rules.

Amendments to §9.12, Qualification of Bidders, allow the highest level of bidder qualification to be waived for projects with an engineer's estimate of $1 million or less. Subsection (e) is amended to increase the minimum bidding capacity for the differing levels of bidder qualification: $2 million for qualification under a Confidential Questionnaire; $1 million for qualification under a Bidder's Questionnaire without compiled financial information; $1.5 million for qualification under a Bidder's Questionnaire with compiled financial information and at least one year of experience; $2 million for qualification under a Bidder's Questionnaire with compiled financial information and two years of experience, with additional capacity granted for additional years of experience ($6 million maximum); and $2 million for qualification under a Bidder's Questionnaire with reviewed financial information and at least three years of experience. The definition of "affiliated" is moved from §9.12 to new §9.27, Affiliated Entities. Subsection (g) is revised to clarify the process for determining whether bidders are independent from one another.

Amendments to §9.15, Acceptance, Rejection, and Reading of Bids, remove the requirement for bids opened at the state level to be read publicly, in accordance with Transportation Code §223.004, and permit highway and building contracts estimated under $1 million to be locally let by a district engineer or Division Director of the Support Services Division, respectively. The word "telegraph" is removed from subsections (c) and (d) because telegraphs are no longer used as a means for making requests to the department. This change is intended to be clean-up only and not a substantive change; telegraph requests still will not be accepted to request a change of a bid price after the bid has been manually submitted to the department. Finally, the section heading is simplified for clarity.

Amendments to §9.16, Tabulation of Bids, allow the executive director to make the determination of bid error for projects with an engineer's estimate less than $1 million.

Amendments to §9.17, Award of Contract, allow the executive director to award or reject contracts for projects with an engineer's estimate less than $1 million and allow the executive director to rescind the award of such a contract prior to execution upon a determination that it is in the best interest of the state. Allowing rescission of locally let contracts under the same authority as award or rejection, rather than requiring commission involvement, improves efficiency and will streamline the process

Amendments to §9.18, Contract Execution, Forfeiture of Bid Guaranty, and Bond Requirements, remove the requirement for the low bidder to submit a list of all quoting subcontractors and suppliers at contract execution because the department has that information from another source. The amendments also add building contracts to the types of contracts that require a bidder to provide a certificate of insurance before the date that the contractor begins work. This change reflects current department policy.

Amendments to §9.23, Evaluation and Monitoring of Contract Performance, clarify the process used for the evaluation and monitoring of highway improvement contracts. Changes to subsection (b) clarify that the Director of the Support Services Division is responsible for the evaluations related to building contracts. The changes to the section provide that district engineers for highway improvement contracts, other than building contracts, will submit final evaluation scores to the division responsible for monitoring the contract, and the division will periodically review the final evaluation scores. This change formalizes current department policy and clarifies and simplifies the rules. Changes to subsection (d) remove the reference to the Chief Administrative Officer because under subsection (c) the Director of the Support Services Division is responsible for monitoring compliance with building contracts. Because the Support Services Division is the monitor of building contracts, it will already have the evaluations, recovery plans, and associated documentation.

Amendments to the section also clarify that for a building contract, the Director of the Support Services Division may modify a proposed corrective action plan and adopt a final plan.

Amendments to §9.24, Performance Review Committee and Actions, allow the committee to recommend remedial action be applied to an entity identified as an affiliate under §9.27. This revision is intended to prevent circumvention of a remedial action by shifting bidding to an affiliated entity that is in existence before or created after the action.

Amendments to §9.25, Appeal of Remedial Action, clarify acceptable methods for delivery of an appeal to the executive director and remove the automatic stay of an imposed remedial action on a timely appeal. This revision is intended to comport with existing language in §9.24 that allows the Deputy Executive Director to take immediate action. Changes to subsection (d) clarify when notice of the executive director's final order on a remedial action is to be given.

New §9.27, Affiliated Entities, is comprised of existing language moved from §9.12 relating to the description of what make two entities affiliated.

FISCAL NOTE

Stephen Stewart, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of the department's or commission's enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Duane Milligan, Director, Construction Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Duane Milligan has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be clarity on the department's incorporation of the provisions of S.B. 1021 into its contract letting and awarding procedures.

COSTS ON REGULATED PERSONS

Duane Milligan has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Duane Milligan has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

GOVERNMENT GROWTH IMPACT STATEMENT

Duane Milligan has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. He expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Duane Milligan has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the amendments to §§9.11, 9.12, 9.15 - 9.18, and §§9.23 - 9.25 and new §9.27 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Contracts for Highway Projects." The deadline for receipt of comments is 5:00 p.m. on March 4, 2024. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.005, which authorizes the commission to adopt rules concerning bids on a contract estimated by the department to involve an amount less than $1 million.

The authority for the proposed amendments is provided by S.B. No. 1021, 88th Regular Session, 2023. The primary author and the primary sponsor of that bill are Sen. Robert Nichols and Rep. Terry Canales, respectively.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Chapter 223, Subchapters A-C.

§9.11. Definitions.

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

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

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

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

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

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

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

(7) Bidder--A person that submits a bid for a proposed contract.

(8) Bidder's Questionnaire--A prequalification form, prescribed by the department, that reflects detailed equipment and experience data but waives audited financial data.

(9) Bidding capacity--The maximum dollar value, as determined by the department, of all of the highway improvement contracts, other than building contracts, that a person may have with the department at any given time.

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

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

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

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

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

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

(16) Confidential Questionnaire--A prequalification form, prescribed by the department, reflecting detailed financial and experience data.

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

(18) Disadvantaged business enterprise (DBE)--Has the meaning assigned by §9.202(4) of this chapter (relating to Definitions).

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

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

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

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

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

(24) Highway improvement contract--A contract entered into under Transportation Code, Chapter 223, Subchapter A, for the construction, reconstruction, or maintenance of a segment of the state highway system or for the construction or maintenance of a building or other facility appurtenant to a building. The term does not include a materials contract.

(25) Historically underutilized business (HUB)--Has the meaning assigned by §9.352 of this chapter (relating to Definitions).

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

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

(28) Maintenance contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the maintenance of a segment of the state highway system. A maintenance contract is considered to be a highway improvement contract.

(29) Materials contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the purchase of maintenance materials, traffic control devices, or safety devices, as described by Transportation Code, §223.001(b)(2) or (3).

(30) Materials supplier's questionnaire--A prequalification form, prescribed by the department, that gathers information, such as company contact, signature authority, and other requirements, to allow a person to bid on a materials contract.

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

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

(33) Person--An individual, partnership, limited liability company, corporation, or joint venture.

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

~~[(35) Routine maintenance contract--A maintenance contract that is let through the routine maintenance contracting procedure to preserve and repair roadways and rights of way, with all its components to its designed or accepted configuration.]~~

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

§9.12 Qualification of Bidders.

(a) Eligibility. To be eligible to bid on a highway improvement contract, other than a building contract, or on a materials contract, po-

tential bidders must satisfy the applicable requirements listed in this section.

(1) If the department has accepted from a person a properly completed Confidential Questionnaire, as described in subsection (c) of this section, and audited financial information, as described in subsection (b)(1) of this section, the person is eligible to bid on any project for which the person meets any necessary special technical qualification requirements, has sufficient available bidding capacity, as determined under subsection (e) of this section, and has submitted a properly completed [a] Certification of Eligibility Status form if it is a federal-aid project.

(2) A person that has submitted only a Bidder's Questionnaire, as described in subsection (d) of this section, may bid only on a specified project for which the department has waived the requirements of paragraph (1) of this subsection. Such a project is referred to as a waived project and generally has one of the following characteristics:

(A) the engineer's estimate for the project is [~~$300,000~~] less than $1 million;

(B) the project is a [~~routine~~] maintenance project;

(C) the project is an emergency project;

(D) the project contains specialty items not normal to the department's roadway projects program; or

(E) the project is for the purchase of goods that may be purchased under a materials contract.

(3) A bidder that submits only a Materials Supplier's Questionnaire is eligible to bid only on a materials contract, including a materials contract awarded under §9.19 of this subchapter (relating to Emergency Contract Procedures).

(b) Financial Information. This section refers to three types of financial information.

(1) Audited financial information is information resulting from an examination of the accounting system, records, and financial statements by an independent certified public accountant in accordance with generally accepted auditing standards. Based on the examination, the auditor expresses an opinion concerning the fairness of the financial information in conformity with generally accepted accounting principles. A bidder that submits audited financial information, as required for a Confidential Questionnaire in accordance with subsection (c) of this section, is eligible to bid on all projects for which the bidder has available bidding capacity, as determined under subsection (e) of this section.

(2) Reviewed financial information may be used in a Bidder's Questionnaire under subsection (d) of this section. The scope of reviewed financial information is substantially less than audited financial information, and the information is the result primarily of inquiries of company personnel and analytical procedures applied to financial data by an independent certified public accountant. Only negative assurance is expressed by the independent accountant, which means that the independent accountant is not aware of any material modifications that should be made in order for the financial information to conform to generally accepted accounting principles. A bidder that submits reviewed financial information is subject to the limitations described in subsections (d) and (e) of this section for a waived project.

(3) Compiled financial information also may be used in a Bidder's Questionnaire under subsection (d) of this section. Compiled financial information only presents information that is the representation of management. No opinion or other assurance is expressed by the independent accountant. A bidder that submits compiled financial information is subject to the limitations described in subsections (d) and (e) of this section for a waived project.

(c) Confidential Questionnaire. A potential bidder must satisfy the requirements of this subsection to be eligible to bid on a highway improvement contract, except as provided by subsection (d) of this section.

(1) A potential bidder must:

(A) submit to the department's Construction Division in Austin 10 days prior to the last day of bid opening a Confidential Questionnaire that includes information, as required by the department, concerning the bidder's equipment and experience as well as financial condition;

(B) have a certified public accountant firm that is licensed to practice public accountancy prepare the audited and any other financial information required by the department;

(C) satisfactorily comply with any technical qualification requirements determined by the department to be necessary for a specific project; and

(D) properly complete the Certification of Eligibility Status form contained in the Confidential Questionnaire for the purpose of bidding on federal-aid projects.

(2) Information adverse to the potential bidder contained in the Certification of Eligibility Status form will be reviewed by the department and the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids.

(3) Satisfactory audited financial information will grant a 12-month period of qualification from the date of the financial statement.

(4) A three month grace period of qualification, for the purpose of preparing and submitting current audited information, will be granted prior to the expiration date of the financial statement.

(5) The department may require current audited information at any time if circumstances develop which are factors that could alter the potential bidder's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern.

(d) Bidder's Questionnaire; Materials Supplier's Questionnaire. To be eligible to bid on a contract under this subsection or on a contract to be awarded under §9.19 of this subchapter (relating to Emergency Contract Procedures), a bidder must:

(1) submit to the department's headquarters office in Austin 10 days prior to the date the bid opens, a Bidder's Questionnaire that includes information, as required by the department, concerning a bidder's equipment and experience or for a materials contract, a bidder may submit a Materials Supplier's Questionnaire instead of a Bidder's Questionnaire;

(2) submit unaudited and other data as required in the instructions to the questionnaire submitted under paragraph (1) of this subsection;

(3) satisfactorily comply with any technical qualification requirements determined by the department to be necessary on a specific project; and

(4) for a federal-aid project, properly complete the Certification of Eligibility Status form contained in the questionnaire submitted under paragraph (1) of this subsection. Information adverse to the potential bidder contained in the certification will be reviewed by the department and by the Federal Highway Administration, and may

result in the bidder being declared ineligible to submit bids on a federal-aid project.

(e) Bidding capacity; available bidding capacity. The department will make its examination and determination based on the information submitted under subsection (c) or (d) of this section, as appropriate, and advise the bidder of its bidding capacity.

(1) For a bidder submitting a Confidential Questionnaire and audited financial information, the amount of the bidding capacity will be determined by multiplying the net working capital by a factor determined by the department based on the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. If this calculation results in a positive amount that is not greater than $2 million [~~$1,000,000~~], the bidder will receive a bidding capacity of $2 million [~~$1,000,000~~] if the bidder has positive net working capital and the bidder provides documentation of at least two years' experience and four completed projects in the field in which the bidder wishes to bid. Bidding capacity determined under this paragraph applies for any project and is not limited to waived projects.

(2) For a bidder submitting a Bidder's Questionnaire with no prior experience in construction or maintenance, or a negative working capital position (i.e., financial statements indicate that current liabilities exceed current assets), will receive a bidding capacity of $1 million [~~$300,000~~] for waived projects only.

(3) For a bidder submitting a Bidder's Questionnaire and compiled financial information if the principals of the bidder have at least one year experience in construction or maintenance and have satisfactorily completed at least two projects in these fields, the bidding capacity is $1.5 million [~~$500,000~~] for waived projects only.

(4) For a bidder submitting a Bidder's Questionnaire and compiled financial information and the principals of which have at least two years' experience in construction or maintenance and have satisfactorily completed at least four projects in these fields, the bidding capacity is $2 million [~~$1,000,000~~] for waived projects only. Those bidders possessing more than two years' experience will be granted an additional $500,000 [~~$250,000~~] in bidding capacity for each additional year of experience in construction or maintenance, with a maximum bidding capacity of $6 million [~~$3,000,000~~] for waived projects only.

(5) For a bidder submitting a Bidder's Questionnaire and reviewed financial information and the principals of which have at least three years of experience in construction or maintenance and have satisfactorily completed at least six projects in these fields, the amount of the bidding capacity will be determined by multiplying the net working capital by a factor determined by the department based upon the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. In the event that this calculation does not result in an amount greater than $2 million [~~$1,000,000~~], the bidder will receive a bidding capacity of $2 million [~~$1,000,000~~]. Bidding capacity determined under this paragraph is limited to waived projects only.

(6) A bidder's available bidding capacity is determined by the department by subtracting from the bidder's bidding capacity the amount of the estimated cost of the bidder's uncompleted work on department contracts. Bidding capacity does not apply to a materials contract or building contract and an uncompleted materials or building contract does not affect the bidding capacity or available bidding capacity of a bidder.

(f) Effect of contract performance. A person's bidding capacity or eligibility to bid on a highway improvement contract may be affected by a decision of the deputy executive director under §9.24 of this chapter (relating to Performance Review Committee and Actions).

(g) Affiliated bidders; independence exception [~~entities~~]. Bidders that the department determines in accordance with §9.27 of this subchapter (relating to Affiliated Entities) are affiliated are not eligible to submit bids for the same project. A bidder that is determined to be affiliated but that can establish independence from the other affiliated bidders may request, in accordance with this subsection, an exception to its ineligibility. Such a request may be made only once during any 12-month period.

~~[(1) For purposes of this subchapter:]~~

~~[(A) two or more bidders are affiliated if:]~~

~~*[(i)* the bidders share common officers, directors, or controlling stockholders;]~~

~~*[(ii)* a family member of an officer, director, or controlling stockholder of one bidder serves in a similar capacity in another of the bidder;]~~

~~*[(iii)* an individual who has an interest in, or controls a part of, one bidder either directly or indirectly also has an interest in, or controls a part of, another of the bidders;]~~

~~*[(iv)* the bidders are so closely connected or associated that one of the bidders, either directly or indirectly, controls or has the power to control another bidder;]~~

~~*[(v)* one bidder controls or has the power to control another of the bidders; or]~~

~~*[(vi)* the bidders are closely allied through an established course of dealings, including but not limited to the lending of financial assistance; and]~~

~~[(B) a family member of an individual is the individual's parent, parent's spouse, step-parent, step-parent's spouse, sibling, sibling's spouse, spouse, child, child's spouse, spouse's child, spouse's child's spouse, grandchild, grandparent, uncle, uncle's spouse, aunt, aunt's spouse, first cousin, or first cousin's spouse.]~~

(1) [~~(2)~~] To request the exception to the department's finding of affiliation, a bidder must submit to the executive director a written request explaining the basis for the exception accompanied by supporting evidence, including an affidavit affirming that the bidder is independent from and not coordinating with the affiliates or any other bidder. The written request must be received not later than the 30th day before the date of the bid opening for which the exception is requested.

(2) [~~(3)~~] The department will review the request and supporting evidence provided to determine whether the requester is independent from the other affiliated bidder [~~affiliation or independence of the potential bidders~~]. In determining independence, the [~~The~~] department will consider, in addition to other affiliation criteria:

(A) transactions between the potential bidders; and

(B) the extent to which the potential bidders share:

(i) equipment;

(ii) personnel;

(iii) office space; and

(iv) finances.

(3) [~~(4)~~] If the department finds that the bidders are independent, the director of the division reviewing the request will recommend to the executive director that the requesting bidder be granted an exception.

(4) [(5)] The executive director will review the request, supporting evidence, and department's recommendation and will make the final determination on the request. The executive director will send to the bidder the final written determination. An exception granted to the bidder remains in effect for future bid openings unless the exception is revoked under paragraph (5) [(6)] of this subsection.

(5) [(6)] The granting of an exception under this subsection does not remove the classification of the bidders as affiliated. The department reserves the right to conduct follow-up reviews and revoke the exception if the follow-up reviews indicate that the bidders are no longer independent. A bidder's failure to act independently of its affiliates or other bidder during the period it was granted an exception under this subsection may result in the imposition of sanctions.

(6) [(7)] If bidders classified as affiliates submit bids on the same project, the department reserves the right to reject all bids on that project and relet the contract.

(7) [(8)] Affiliated bidders that are granted an exception under this subsection and that have been sanctioned in accordance with Chapter 10 of this title must meet the exception criteria in that chapter to be eligible to bid.

(h) Building contracts. To be eligible to bid on a building contract, a potential bidder must [satisfactorily] comply only with any [financial, experience, technical, or other] requirements contained in the governing specifications applicable to the project.

§9.15. Acceptance[, Rejection, and Reading] of Bids.

(a) Public opening [reading]. Bids will be opened [and read] in accordance with Transportation Code, §223.004 and §223.005.

(1) Bids for contracts, other than building contracts, with an [engineer's] estimate of less than $1 million [$300,000] may be filed with the district engineer at the headquarters for the district[,] and opened and read at a public meeting conducted by the district engineer, or his or her designee, on behalf of the commission.

(2) Bids for a building contract with an estimate of less than $1 million may be filed with the Director of the Support Services Division at the headquarters of the division and opened and read at a public meeting conducted by the director of that division, or the director's designee, on behalf of the commission.

(b) Bids not considered.

(1) The department will not consider a bid if:

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

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

(C) the certification and affirmation are not signed;

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

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

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

(G) the proposal form was signed by a person who was not authorized to bind the bidder or bidders;

(H) the bid does not include a fully completed HUB plan in accordance with §9.356 of this chapter when required;

(I) a typed proposal form does not contain the information in the format shown on the "Example of Bid Prices Submitted by a Computer Printout" in the proposal form;

(J) the bidder was not authorized to be issued a bid form under §9.13(e) of this subchapter (relating to Notice of Letting and Issuance of Proposal Forms);

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

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

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

(N) the bidder does not meet the applicable technical qualification requirements;

(O) the bidder fails to submit a DBE commitment within the period described by §9.17(i) of this subchapter (relating to Award of Contract);

(P) the bidder fails to meet the requirements of §9.17(j) of this subchapter relating to participation in the Department of Homeland Security (DHS) E-Verify system; or

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

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

(3) If bids are submitted on the same project by affiliated bidders as determined under §9.27 [§9.12(g)] of this subchapter (relating to Affiliated Entities) and the executive director has not granted an affiliation exception under §9.12(g) of this subchapter (relating to Qualification of Bidders) [that subsection], the department will not accept [and will not read] any of the bids submitted by the affiliated bidders for that project.

(c) Revision of bid.

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

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

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

(d) Withdrawal of bid.

(1) A bidder may withdraw a manually submitted bid by submitting a request in writing to the letting official before the time and date of the bid opening. The request must be made by a person

authorized to bind the bidder. The department will not accept telephone [~~or telegraph~~] requests[~~,~~] but will accept a properly signed facsimile request. Except as provided in §9.16(c) of this subchapter (relating to Tabulation of Bids) and §9.17(d) of this subchapter, a bidder may not withdraw a bid subsequent to the time for the receipt of bids.

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

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

§9.16. Tabulation of Bids.

(a) Official bid amount. Except for lump sum building contract bid items, the official total bid amount for each bidder will be determined by multiplying the unit bid price written in for each item by the respective quantity and totaling those amounts.

(b) Department interpretations.

(1) Bids where unit bid prices have been left blank will be considered by the department to be incomplete and nonresponsive. If a bid has a regular and a corresponding alternate bid item or group of items, the bid will not be considered to be incomplete if either the regular bid item, or group of items, or the alternate bid item, or group of items, has a unit bid price entered. If both a regular bid item, or group of items, and a corresponding alternate bid item, or group of items, are left blank, the bid will be considered to be incomplete and nonresponsive. A bidder who elects to bid on a bid item group corresponding to a regular or alternate bid item, or group of items, must include unit bid prices for each bid item contained in the bid item group.

(2) Bid entries such as no dollars and no cents, zero dollars and zero cents, or numerical entries of $0.00 will be interpreted to be one-tenth of a cent ($.001) and will be entered in the bid tabulation as $.001, except as provided in paragraph (6) of this subsection. Any entry extended to more than three decimal places will be rounded to the nearest tenth of a cent and entered as such. For rounding purposes contained in this subsection, entries of five-hundredths of a cent or more will be rounded up to the next highest tenth of a cent, while entries of four-hundredths of a cent or less will be rounded down to the next lowest tenth of a cent.

(3) If the bidder submits both an electronic bid and a properly completed manual bid, the department will use the electronic bid to determine the total bid amount of the bid. If the bidder submits an electronic bid and a manual bid that is not complete, the department will use the electronic bid to determine the total bid amount of the bid.

(4) If the bidder submits two or more manual bids, all responsive manual bids will be tabulated, and the department will use the lowest bid tabulation to determine the total bid amount of the bid.

(5) If a unit bid price is illegible, the department will make a documented determination of the unit bid price for tabulation purposes.

(6) If a unit bid price has been entered for both the regular bid item, or group of items, and a corresponding alternate bid item, or group of items, the department will determine the option that results in the lowest total cost to the state and tabulate as such, except as provided in subparagraphs (A) and (B) of this paragraph. If both the regular and alternate bids result in the same cost to the state, the department will select the regular bid item or items.

(A) If both a regular bid item or a group of items, and a corresponding alternate bid item or group of items, have an entry such as no dollars and no cents, zero dollars and zero cents, or numerical entries of $0.00, the department will make two calculations using one-tenth of a cent ($.001) for each item as described in paragraph (2) of this subsection. The department will determine the option that results in the lowest total cost to the state and tabulate as such. If both the regular and alternate bids result in the same cost to the state, the department will select the regular bid item or items.

(B) If a unit bid price greater than zero has been entered for either a regular bid or corresponding alternate bid item, or a group of items, and an entry of no dollars and no cents, zero dollars and zero cents, or a numerical entry of $0.00 has been entered for the other corresponding item, or group of items, the department will use the unit bid price that is greater than zero for bid tabulation.

(c) Tie bids. In the event the official bid amount for two or more bidders is equal and those bids are the lowest submitted, each tie bidder will be given an opportunity to withdraw its bid. If two or more tie bidders decline to withdraw their bids, the low bidder will be determined by a coin toss. If all tie bidders request to withdraw their bids, no withdrawals will be allowed and the low bidder will be determined by a coin toss.

(d) Bid guaranty. Not later than 72 hours after bids are opened, the department will mail the check or money order bid guaranty of each bidder except the apparent low bidder to the address specified on the return bidder's check form included in the bid. Bid bonds will not be returned.

(e) Bid errors. The department will consider a bid error that meets the notification requirements contained in paragraph (1) of this subsection and satisfies the criteria contained in paragraph (2) of this subsection in the award of a contract.

(1) The apparent low bidder must submit written notification of an alleged bid error to the department within five business days after the date bids are opened for the project. The notification must identify the items of work involved and must include bid documentation, such as quotes received, calculations made, or other related documentation used in bid preparation that substantiates the alleged error. Once the notification is submitted to the department, it may not be revised or supplemented unless additional information is requested by the department.

(2) The department will consider the following criteria in determining whether a bid error exists:

(A) the alleged bid error relates to a material item of work contained in the bid;

(B) the alleged bid error is a significant portion of the total bid as compared to the intended bid contained in the documentation submitted by the contractor in accordance with paragraph (1) of this subsection, and other contractor bids;

(C) the alleged bid error occurred despite the contractor's exercise of ordinary care in preparing its bid; and

(D) delay in the completion of the project will not have a significant impact on the cost to and safety of the public.

(3) The department may consider an alleged bid error caused by an effort to unbalance the bid as failure to exercise ordinary care.

(4) When the engineer's estimate on a project is less than $1 million [$300,000], the executive director may determine whether a bid error exists[,] under the same conditions and criteria as provided in paragraphs (1) and (2) of this subsection.

§9.17. Award of Contract.

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

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

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

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

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

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

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

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

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

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

(B) the nonresident is a resident manufacturer; or

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

(d) For a maintenance contract for a building or a segment of the state highway system involving a bid amount of less than $300,000, if the lowest bidder withdraws its bid after bid opening, the executive director may recommend to the commission that the contract be awarded to the second lowest bidder.

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

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

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

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

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

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

(4) If the commission awards a contract to the second lowest bidder and the department successfully enters into a contract with the second lowest bidder, the department will return the lowest bidder's bid guaranty upon execution of that contract.

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

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

(g) Contracts with an engineer's estimate of less than $1 million [$300,000] may be awarded or rejected by the executive director under the same conditions and limitations as provided in subsections (a)-(c) of this section.

(h) The commission may rescind the award of any contract prior to contract execution upon a determination that it is in the best interest of the state. The executive director may rescind the award of a contract awarded under subsection (g) of this section prior to contract execution upon a determination that it is in the best interest of the state. If a contract is rescinded under this subsection [In such an instance], the bid guaranty will be returned to the bidder but no[. No] compensation will be paid to the bidder as a result of the rescission [this cancellation].

(i) For a contract with a DBE goal, all bidders must submit the DBE information required by §9.227 of this chapter (related to Information from Bidders) within five calendar days after the date that the bids are opened.

(j) Prior to contract award, all low bidders must be participating or provide documentation of participation in the Department of Homeland Security's (DHS) E-Verify system within five calendar days after the date that the bids are opened.

§9.18. Contract Execution, Forfeiture of Bid Guaranty, and Bond Requirements.

(a) Contract execution.

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

(A) a performance bond and a payment bond, if required and as required by Government Code, Chapter 2253, with powers of attorneys attached, each in the full amount of the contract price except as provided by subsection (c) of this section, executed by a surety company or surety companies authorized to execute surety bonds under and in accordance with state law. Department interpreta-

tions made in accordance with §9.16(b)(2) of this subchapter (relating to Tabulation of Bids) will be used to determine the contract amount for providing a performance bond and payment bond, if required, and as required by the Government Code, Chapter 2253;

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

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

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

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

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

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

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

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

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

(d) Performance or payment bonds for materials contracts. A performance or payment bond is not required for a materials contract.

§9.23. Evaluation and Monitoring of Contract Performance.

(a) The department will develop standards used to evaluate a contractor's performance under a highway improvement contract, including standards for conformance with the project plans and specifications and recordkeeping requirements; compliance with the contract and industry standards for safety; responsiveness in dealing with the department and the public; meeting progress benchmarks and project milestones; addressing project schedule issues, given adjustments, change orders, and unforeseen conditions or circumstances; and completing project on time. The department will develop an evaluation form to be used by department employees in evaluating contract performance.

(b) The district engineer of the district in which a project under a highway improvement contract, other than a building contract, is located, or the Director of the Support Services Division for building contracts shall evaluate the contractor's performance under the contract. An interim evaluation shall be performed as necessary and on each anniversary date of the contract if the project extends for longer than one year. The district engineer for a highway improvement contract, other than a building contract, or the Director of the Support Services Division [Chief Administrative Officer] for a building contract shall approve any final evaluations on the completion of the project. Only final evaluations will be used to determine whether the contractor's contract performance meets the department's requirements.

(c) If the contractor's performance on a project is below the department's acceptable standards for contract performance, the district engineer or the Director of the Support Services Division, as applicable, may work with the contractor to establish a recovery plan for the project. The established project recovery plan will be used to correct significant deficiencies in contractor performance. The district engineer or the Director of the Support Services Division, as applicable, will monitor and document the contractor's compliance with the established project recovery plan.

(d) For [District engineers for] a highway improvement contract, other than a building contract, the district engineer [or the Chief Administrative Officer for a building contract] will submit the final evaluation scores [each evaluation] performed under this section [and each established project recovery plan and resulting documentation] to the division of the department that is responsible for monitoring the contract.

(e) The division that monitors the final evaluation scores [receives evaluations] of a contractor [under subsection (d) of this section] periodically will review the final evaluation scores [evaluations] of that contractor that were completed during the review period, or if fewer than 10 final evaluations were completed during the review period, up to 10 of the most recent final evaluations completed within the previous three-year period. If the average of the final evaluation scores [evaluations] reviewed [in this period] is below the department's acceptable standards for contract performance, the division will send a notice to the contractor and request that the contractor submit to the division for approval a proposed corrective action plan that will be used to correct significant deficiencies in the performance in all of contractor's projects. The division, in consultation with the department's Chief Engineer for a highway improvement contract, other than a building contract, or the Director of the Support Services Division [Chief Administrative Officer] for a building contract, may modify the proposed corrective action plan and adopt a final plan. The division promptly will send the adopted corrective action plan to the contractor.

(f) For the 120-day period beginning on the day that the adopted corrective action plan is sent under subsection (e) of this section, the division will monitor the contractor's active projects to determine whether the contractor is meeting the requirements of the adopted corrective action plan or if there are no active projects, the division will monitor the contractor's next available projects. Before making a determination under this subsection, the division must consider and document any events outside a contractor's control that contributed to the contractor's failure to meet the performance standards or failure to comply with the corrective action plan. If at the end of the 120-day period contract performance remains below the department's standards for contract performance, the division will notify the contractor and forward to the Performance Review Com-

mittee all of the information that it has, which includes at minimum all final evaluations, any adopted corrective action plans, and any information about events outside a contractor's control contributing to the contractor's performance.

§9.24. Performance Review Committee and Actions.

(a) If information is required to be forwarded to a Performance Review Committee under §9.23 of this subchapter (relating to Evaluation and Monitoring of Contract Performance) or if a contractor, including a contractor on a materials contract, has defaulted, the deputy executive director will appoint the members and chairman of the Performance Review Committee. The members and chairman serve at the discretion of the deputy executive director. The Performance Review Committee will review the information submitted to the committee under §9.23(f) of this subchapter, any documentation developed by the department during the evaluation process under §9.23 of this subchapter, and any documentation submitted by the contractor. For a materials contract, the Performance Review Committee will review any documentation developed by the department related to the contract and any documentation submitted by the contractor. The committee will determine whether grounds exist for action under this section. After reviewing the submitted information, the Performance Review Committee may recommend one or more of the following:

(1) take no action;

(2) reduce the contractor's bidding capacity;

(3) prohibit the contractor from bidding on one or more projects;

(4) immediately suspend the contractor from bidding for a specified period of time; or

(5) prohibit the contractor from being awarded a contract on which they are the apparent low bidder.

(b) The Performance Review Committee may recommend that one or more actions listed in subsection (a) of this section be taken immediately to ensure project quality, safety, or timeliness if:

(1) the contractor failed to execute a highway improvement contract or a materials contract after a bid is awarded, unless the contractor honored the bid guaranty submitted under §9.14(d) of this chapter (relating to Submittal of Bid);

(2) the commission, during the preceding 36-month period, rejected two or more bids by the contractor because of contractor error;

(3) the department declared the contractor in default on a highway improvement contract or a materials contract; or

(4) a district notifies the committee through the referring division that a contractor has failed to comply with a project recovery plan established under §9.23(c).

(c) If the Performance Review Committee determines that one or more actions listed in subsection (a) of this section is appropriate, the committee may recommend that the action or actions also be taken against an entity that the committee determines, in accordance with §9.27 of this subchapter (relating to Affiliated Entities), is affiliated with the contractor.

(d) [~~(c)~~] If the Performance Review Committee [~~committee~~] determines that action under subsection (a), [~~or~~] (b), or (c) of this section is appropriate, the committee, except as provided by subsection (g) [~~(e)~~] of this section, will confer with the Chief Engineer, or the Chief Administrative Officer for a building contract, on the appropriate action to be taken and applied to the contractor. The committee will send its recommendation to the Deputy Executive Director within 10 business days after the date that it determines the action to be applied.

(e) [~~(d)~~] The Deputy Executive Director will consider the Performance Review Committee's recommendation and make a determination of any action to be taken. Within 10 business days after the date of the Deputy Executive Director's determination, the department will send notice to the contractor and to appropriate department employees affected by the determination. The notice will:

(1) state the nature and extent of the remedial action;

(2) summarize the facts and circumstances underlying the action;

(3) explain how the remedial action was determined;

(4) if applicable, inform the entity of the imposition of a suspension; and

(5) state that the provider may appeal the reduction in accordance with §9.25 of this subchapter [~~(relating to Appeal of Remedial Action)~~].

(f) [~~(e)~~] A decision of the Deputy Executive Director under subsection (e) [~~(d)~~] of this section may be appealed in accordance with §9.25 of this title (relating to Appeal of Remedial Action).

(g) [~~(f)~~] If the Performance Review Committee, in the performance of its duties under this section finds information that indicates that grounds for the imposition of sanctions under Chapter 10 of this title (relating to Ethical Conduct by Entities Doing Business with the Department) may exist, the committee immediately shall provide that information to the department's Compliance Division.

§9.25. Appeal of Remedial Action.

(a) A remedial action taken under §9.24 of this subchapter (relating to the Performance Review Committee and Actions) may be appealed by delivering to the executive director a written notice of appeal within 15 working days after the effective date of the action as specified in its notice.The written notice must be sent by:

(1) United States Mail, overnight delivery, or hand delivery addressed to: Executive Director, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; or

(2) email to contestedcase@txdot.gov.

(b) If a notice of appeal is timely delivered under subsection (a) of this section,[:]

[~~(1) the remedial action is automatically stayed beginning on the date that the department receives the notice of appeal until the time that a final order is entered by the executive director under subsection (d) of this section; and~~]

[~~(2)~~] the contractor will be given the opportunity for an informal hearing before the executive director.

(c) If the contractor chooses to have an informal hearing, the executive director will set a time for the hearing at the executive director's earliest convenience and will set the time allowed for oral presentations and written documents presented by the contractor.

(d) If an appeal to the executive director is not timely requested under this section, the executive director will issue a final order on the remedial action when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on the executive director's decision of the appeal. The executive director will mail to [~~notify~~] the contractor a copy of [~~in writing of~~] the executive director's final order [~~appeal decision~~] within five working days after the date that the final order is signed [~~decision is made~~].

(e) A final order issued by the executive director under subsection (d) of this section is not subject to judicial review, except as required by law.

§9.27. Affiliated Entities.

(a) Two or more entities are affiliated if:

(1) the entities share common officers, directors, or controlling stockholders;

(2) a family member of an officer, director, or controlling stockholder of one entity serves in a similar capacity in another of the entities;

(3) an individual who has an interest in, or controls a part of, one entity either directly or indirectly also has an interest in, or controls a part of, another of the entities;

(4) the entities are so closely connected or associated that one of the entities, either directly or indirectly, controls or has the power to control another entity;

(5) one entity controls or has the power to control another of the entities; or

(6) the entities are closely allied through an established course of dealings, including but not limited to the lending of financial assistance.

(b) In this section, an individual's family member is the individual's spouse, child, child's spouse, parent, parent's spouse, step-parent, step-parent's spouse, sibling, sibling's spouse, uncle, uncle's spouse, aunt, aunt's spouse, first cousin, first cousin's spouse, the individual's grandchild, the individual's grandparent, the individual's spouse's child, or the individual's spouse's child's spouse.

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 January 17, 2024.

TRD-202400155
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 3, 2024
For further information, please call: (512) 463-3164

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CHAPTER 31. PUBLIC TRANSPORTATION
SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11, §31.13

The Texas Department of Transportation (department) proposes the amendments to §31.11 and §31.13, concerning State Programs.

Due to 2020 Census changes and increased public transportation appropriations from the 88th Legislature, amendments to Chapter 31 governing the allocation of state public transportation grant program funding to transit districts serving rural, small urban, and large urban areas of the state are needed. The 2020 Census resulted in population changes and area designations changes throughout the state.

Proposed amendments to §31.11(a) clarify that an allocation of funds for public transportation is made on an annual basis, beginning at the first fiscal year of each biennium. This change aligns with current division practice of awarding state funds on an annual basis.

Proposed amendments to §31.11(b) clarify that the state funds formula allocation will be made at the beginning of each fiscal year in an amount equal to or less than the amount appropriated from all sources to the commission by the legislature for that biennium for public transportation. The aligns with current division practice of awarding state funds on an annual basis and allows the division flexibility to allocate certain amounts at the beginning of each fiscal year. All appropriated funding shall be allocated over the course of each biennium.

Proposed amendments to §31.11(b)(1) update appropriated funding amounts to include addition funding of $3,770,000 to mitigate Census 2020 impacts. The total appropriation amount is increased to $73,752,134 from $69,982,134. Funding allocations to large urban transit districts is amended from $7,000,000 to $10,365,694, while funding to small urban transit districts is amended to $15,927,748 from $20,118,748. Additionally, the allocation to rural transit districts is amended to $45,917,020 from $42,863,386. These changes are necessary due to the 2020 Census, which updated population figures and area designations throughout the state. The department has worked to ensure equitable funding to all district types post 2020 census, thus the updated allocation figures maintain equal per capita funding reductions across rural, small urban and large urban transit districts.

Proposed amendments to §31.11(b)(1)(A)(i) clarify the total appropriation is increased to $73,752,134 from $69,982,134. This amendment is necessary because of an increased appropriation in the amount of $3,770,000 from the 88th Legislature.

Proposed amendments to §31.11(b)(1)(A)(v) clarify that the commission may, in any year, waive or approve an alternative calculation for allocations under this paragraph to an urban transit district or group of urban transit districts based on unique conditions that negatively affect the performance of the district or group, including natural disaster, pandemic, or another event that specifically affects the service level of the district or group. This amendment clarifies unique conditions that may require an alternate calculation and specifies the department representative who can approve an alternate calculation.

Amendments to §31.11(b)(1)(B)(iii) clarify that the commission may, in any year, wave or approve an alternative calculation for allocations under this paragraph to a rural transit district or group of rural transit districts based on unique conditions that negatively affect the performance of the district or group, including natural disaster, pandemic, or another event that specifically affects the service level of the district or group. This amendment clarifies unique conditions that may require an alternate calculation and specifies the department representative who can approve an alternate calculation.

Amendments to §31.11(b)(2) delete obsolete language for a previous one-time allocation made in fiscal year 2018 to eligible urban and rural transit districts.

Amendments to §31.11(b)(3) renumber the paragraph to §31.11(b)(2). Amendments clarify that allocated funds may be used to address transit district service and capital development needs, changes in district boundaries, unforeseen funding anomalies, emergency services response and recovery needs,

changes in economic conditions or availability of assets significantly impacting current year operations expenses, or other needs as determined by the commission. These changes allow more flexibility in the use of formula funds and more clearly define the types of situations that may require targeted funds, such as emergency services response and recovery needs or changes in transit district boundaries. Proposed changes align with situation specific funding challenges that the division has witnessed over the past funding cycles.

Amendments to renumbered §31.11(d) delete the reference to money and replace it with funds. Amendments also clarify that unobligated funds not applied for before the November commission meeting in the second year of a state fiscal biennium may be administered by the commission under the discretionary program. This amendment allows maximum flexibility in use of the funds.

Amendments to §31.11(e) delete the reference to money and replace it with funds. Amendments also clarify that returned funds will be administered by the commission under the discretionary program if they are eligible for reallocation. This change clarifies that not all returned funds are eligible for reallocation.

Amendments to §31.11(f) clarify that the entire application must be certified, not just the statement regarding regional transportation planning implemented in accordance with 49 U.S.C. §5301.

Amendments to §31.13(b) clarify that if funds in excess of the amounts listed in §31.11(b)(1) are appropriated for purposes of public transportation, the commission can allocate those funds on a pro rata basis, competitively, a combination of both pro rata basis and competitively, or as a one-time award. This amendment allows more flexibility in the way funds may be awarded to entities when appropriated amounts are greater than those listed in 31.11(b).

FISCAL NOTE

Stephen Stewart, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of the department's or commission's enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Eric Gleason, Director, Public Transportation Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Eric Gleason has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be mitigation of census 2020 impacts and increased funding stability to state supported rural and urban transportation districts.

COSTS ON REGULATED PERSONS

Eric Gleason has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Eric Gleason has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will noT effect on government growth. He expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Eric Gleason has determined that a written takings impact assessment is not required under Government Code, §2007.043.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on February 15, 2024, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not

assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact the General Counsel Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8630 at least five working days before the date of the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the amendments to §31.11, §31.13, may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line ""*Public Transportation State Funding Formula Rules.*" The deadline for receipt of comments is 5:00 p.m. on March 4, 2024. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §456.022, which authorizes the commission to adopt rules necessary to allocate funding among eligible public transportation providers.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Texas Transportation Code Chapter 456, Subchapters A, B, and C

§31.11. Formula Program.

(a) Purpose. Transportation Code, Chapter 456 requires the commission to allocate, at the beginning of each state fiscal year [~~biennium~~], certain amounts appropriated for public transportation. This section sets out the policies, procedures, and requirements for that allocation.

(b) Formula allocation. At the beginning of each state fiscal year [~~biennium~~], an amount that does not exceed [~~equal to~~] the amount appropriated from all sources to the commission by the legislature for that biennium for public transportation, other than federal funds and amounts specifically appropriated for coordination, technical support, or other costs of administration, will be allocated to urban and rural transit districts.

(1) If the appropriated amount to which this subsection applies is at least $73,752,134 [~~$69,982,134~~], the commission will allocate $10,365,694 [~~$7,000,000~~] to large urban transit districts, $15,927,748 [~~$20,118,748~~] to small urban transit districts, and $45,917,020 [~~$42,863,386~~] to rural transit districts. If the appropriated amount is less than $73,752,134 [~~$69,982,134~~], the amounts allocated by this paragraph will be reduced proportionately.

(A) Urban funds available under this section will be allocated to urban transit districts as provided by this subparagraph.

(i) If at least $73,752,134 [~~$69,982,134~~] is appropriated as described in paragraph (1) of this subsection, an urban transit district receiving funds under Transportation Code, Section 456.006(b), will be allocated for each year of the biennium an amount equal to the amount received by that district in Fiscal Year 1997. These districts include the cities of Arlington (amount $341,663), Grand Prairie (amount $170,584), Mesquite (amount $142,455), and North Richland Hills (amount $116,134). These allocations will be assigned from the small urban transit district funds. If less than $73,752,134 [~~$69,982,134~~] is appropriated, the amounts allocated by this clause will be reduced proportionately. If more than $73,752,134 [~~$69,982,134~~] is appropriated, an urban transit district to which this clause applies is not eligible for additional funds under paragraph (2) or (3) of this subsection.

(ii) One-half of the funds allocated to small urban transit districts will be based on population by using the latest census data available from the U.S. Census Bureau for each small urbanized area relative to the sum of all small urbanized areas. One-half of the funds allocated to small urban transit districts will be performance-based allocations.

(iii) One-half of the funds allocated to large urban transit districts will be based on population by using the latest census data available from the U.S. Census Bureau for each large urbanized area relative to the sum of all large urbanized areas served by urban transit districts. A large urban transit district with an urbanized area population of 300,000 or more will have the population adjusted to reflect a population level of 299,999. One-half of the funds allocated to large urban transit districts will be performance-based allocations.

(iv) An urban transit district is eligible for a performance-based allocation under clause (ii) or (iii) of this subparagraph, as appropriate, if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the performance-based funding based on the following weighted criteria: 30 percent for local funds per operating expense, 20 percent for ridership per capita, 30 percent for ridership per revenue mile, and 20 percent for revenue miles per operating expense. These criteria may be calculated using the urban transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(v) The commission, in any year, may waive or approve an alternate calculation of an allocation under this paragraph to an urban transit district or a group of urban transit districts to mitigate unique conditions that negatively affect the performance of the district or group, including natural disaster, pandemic, or another event that specifically affects the service level of the district or group. [~~If an urban transit district experiences a negative impact in its performance factor calculations due to the acquisition or loss of service area, a natural disaster, including wind, fire, or flood, or an unforeseen anomaly, the department may mitigate that negative impact with an alternate calculation addressing the specific situation.~~] The alternate calculation may be used in subsequent years at the discretion of the department.

(B) Rural funds allocated under this paragraph will be allocated only to rural transit districts in rural areas based upon need and performance as described in clauses (i) and (ii) of this subparagraph.

(i) Sixty-five percent of the funding under this subparagraph will be allocated to rural transit districts as a need based allocation giving consideration to population weighted at 75 percent and on land area weighted at 25 percent for each rural area relative to the sum of all rural areas.

(ii) Thirty-five percent of the funding under this subparagraph will be allocated to rural transit districts as a performance based allocation. A rural transit district is eligible for funding under this clause if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding by giving equal consideration to local funds per operating

expense, ridership per revenue mile, and revenue miles per operating expense. These criteria may be calculated using the rural transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(iii) The commission, in any year, may waive or approve an alternate calculation under this paragraph to a rural transit district or a group of rural transit districts to mitigate unique conditions that negatively affect the performance of the district or group, including natural disaster, pandemic, or another event that specifically affects the service level of the district or group. [~~If a rural transit district experiences a negative impact in its performance factor calculations due to the acquisition or loss of service area, a natural disaster, as wind, fire, or flood, or an unforeseen anomaly, the department may mitigate that impact with an alternate calculation addressing the specific situation.~~] The alternate calculation may be used in subsequent years at the discretion of the department.

(C) Funds allocated under this section and any local funds may be used for any transit-related activity except that an urban transit district not included in a transit authority but located in an urbanized area that includes one or more transit authorities may use funds allocated under this section only to provide up to:

(i) 65 percent of the local share requirement for federally financed projects for capital improvements;

(ii) 50 percent of the local share requirement for projects for operating expenses and administrative costs;

(iii) 50 percent of the total cost of a public transportation capital improvement, if the urban transit district certifies that federal money is unavailable for the proposed project and the commission finds that the proposed project is vitally important to the development of public transportation in the state; and

(iv) 65 percent of the local share requirement for federally financed planning activities.

(D) Subject to available appropriation, no award to an urban or rural transit district under this paragraph will be less than 90 percent of the award to that transit district for the previous fiscal year. All allocations under subsection (b)(1)(A) and (B) of this section are subject to revision to comply with this standard.

[~~(2) A one-time allocation of state funds appropriated for Fiscal Year 2018 will be made to eligible urban and rural transit districts, consistent with the direction from Transportation Code, Section 456.021(a), as amended by H.B. 1140, 85th Legislature, Regular Session, 2017, to address the impacts of revisions to the state funding formula. This paragraph expires August 31, 2018.~~]

(2) [~~(3)~~] The commission will award on a pro rata basis, competitively, or using a combination of both, any appropriated amount that remains after other allocations made under this subsection. Funds awarded under this paragraph may be used to address transit district service and capital development needs, changes in transit district boundaries, unforeseen funding anomalies, emergency services response and recovery needs, changes in economic conditions or availability of assets significantly impacting current year operational expenses, or other needs determined by the commission. [~~In awarding funds under this paragraph, consideration may be given to coordination and technical support activities, compensation for unforeseen funding anomalies, assistance with eliminating waste and ensuring efficiency, maximum coverage in the provision of public transportation services, funds needed to initiate public transportation service in new designated urbanized areas, adjustment for reductions in purchasing power, reductions in air pollution, or any other appropriate factor.~~] Awards under this paragraph are not subject to subsection (b)(1)(D) of this section in succeeding fiscal years.

(c) Change in service area. If part of an urban or rural transit district's service area is changed due to declaration by the U.S. Census Bureau, or if the service area is otherwise altered, the department and the urban or rural transit district shall negotiate an appropriate adjustment in the funding awarded to that urban or rural transit district for that funding year or any subsequent year, as appropriate. This negotiated adjustment is not subject to subsection (b)(1)(D) of this section.

(d) Unobligated funds. Any funds [~~money~~] under this section that an urban or rural transit district has not applied for before the November commission meeting in the second year of a state fiscal biennium may [~~will~~] be administered by the commission under the discretionary program described in §31.13 of this subchapter (relating to Discretionary Program).

(e) Returned funds. Any funds [~~money~~] under this section that an urban or rural transit district agrees to return to the department, if eligible for reallocation, will be administered by the commission under the discretionary program described in §31.13 of this subchapter.

(f) Application. To receive funds allocated under this section, a transit district must first submit a completed and certified application, in the form prescribed by the department. The application must include [~~certification~~] a statement that the proposed public transportation project is consistent with continuing, cooperating, and comprehensive regional transportation planning implemented in accordance with 49 U.S.C. §5301. Federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met.

(g) Project evaluation. In evaluating a project under this section, the department will consider the need for fast, safe, efficient, and economical public transportation and the approval of the FTA, or its successor.

§31.13. Discretionary Program.

(a) Purpose. Transportation Code, Chapter 456 allows the commission to allocate any funds not obligated in accordance with the terms of §31.11 of this subchapter (relating to Formula Program) on a discretionary basis. This section sets out the policies, procedures, and requirements for that discretionary allocation.

(b) Discretionary allocation. In allocating funds in excess of the amounts listed in 31.11(b)(1) of under this subchapter, the commission will calculate the allocation on a pro rata basis, competitive basis, or combination of pro rata and competitive basis, or as a one-time award [~~The commission will allocate funds under this section~~] to a local public entity, other than an authority, or to a private nonprofit organization that has the power to operate or maintain a public transportation system. Funds may be used for:

(1) the same purposes as described in §31.11(b) of this subchapter; and

(2) 80 percent of the cost of capital expenditures associated with ridesharing activities.

(c) Application. To receive funds under this section, an entity must first submit a completed and certified application, in the form prescribed by the department. The application must include:

(1) a description of the project, including estimates of the population that would benefit from the project and the anticipated date of project completion;

(2) a statement of the estimated cost of the project, including estimates of the federally financed portions of the project costs; and

(3) certifications that:

(A) local funds are available for local share requirements if required and that the proposed project is consistent with comprehensive regional transportation plans (federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met);

(B) federal funds are not available under §31.11 of this subchapter;

(C) equipment furnished by the applicant in connection with ridesharing activities will be used primarily for commuting purposes;

(D) ridesharing activities will be operated on a nonprofit basis without state subsidies and with accountability in operating the van pool equipment; and

(E) any funding available through the United States Department of Transportation to participate in the capitalized portion of state and locally supported ridesharing activities will be applied for and utilized to supplement the availability of local resources for the recapitalization of van pool equipment.

(d) Project evaluation. In evaluating a project under this section, the department will consider the need for fast, safe, efficient, and economical public transportation and the approval of the FTA, 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 January 17, 2024.

TRD-202400154
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
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