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 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 6. GEOTHERMAL RESOURCES

SUBCHAPTER A. SHALLOW CLOSED-LOOP GEOTHERMAL SYSTEMS

16 TAC §§6.101 - 6.112

The Railroad Commission of Texas (Commission) proposes new Chapter 6, relating to Geothermal Resources. Specifically, the Commission proposes Subchapter A of Chapter 6, relating to Shallow Closed-Loop Geothermal Systems, which includes proposed new §§6.101 - 6.112, relating to Purpose and Scope; Definitions; Applicability and Compliance; Authorization by Rule; Authorization for a Shallow Closed-Loop Geothermal System; Construction Standards; Leak Detection and Pressure Loss; Pump Installer Requirements; Operational Standards; Well Reports; Plugging; and Enforcement and Penalties, respectively.

The new rules are proposed to implement the requirements of Senate Bill 786 (88th Legislature, Regular Session, 2023). Senate Bill 786 amended Texas Water Code §27.037 to transfer regulatory authority of closed-loop geothermal injection wells to the Commission from the Texas Commission on Environmental Quality (TCEQ). Thus, the bill provided the Commission with jurisdiction and permitting authority for these wells. The TCEQ retains jurisdiction over ground-source air conditioning return flow wells, which are shallow open-loop geothermal injection wells. All other types of geothermal injection wells are now under the jurisdiction of the Commission.

Transferring regulatory authority for shallow closed-loop geothermal injection wells to the Commission will lessen the administrative burden for those who seek to drill and operate shallow closed-loop geothermal injection wells because it consolidates authority in fewer agencies. The proposed new rules retain the general process required for drilling and operating these types of wells. Some updates to the former process are proposed to provide flexibility for changes in innovation and technology.

As stated in proposed §6.101, the new rules proposed in Subchapter A of Chapter 6 specifically address shallow closed-loop geothermal injection wells, which are defined in proposed §6.102 as injection wells that are part of shallow closed-loop geothermal systems. These types of wells are limited to a depth of formations that contain water with a total dissolved solids content of 1000 parts per million (ppm) or less. This parts per million standard is proposed to ensure consistency with definitions developed by the Texas Groundwater Protection Committee.

Section 6.102 also contains proposed definitions for other terms used throughout the subchapter such as fresh water, injection well, license number, pump installer, water well driller, and well report.

Proposed §6.103 clarifies that the subchapter only applies to shallow closed-loop geothermal systems for which construction is commenced after the effective date of proposed Subchapter A. The Commission anticipates that the effective date will be January 6, 2025, and the Commission proposes §6.103 with that date. If the timeline changes during the rulemaking process, the Commission will update the effective date upon adoption of the new subchapter.

Proposed §6.103 also clarifies that the subchapter does not apply to open-loop air-conditioning return flow wells or other geothermal injection wells. Open-loop air-conditioning return flow wells remain under the jurisdiction of the TCEQ. Other geothermal systems such as geothermal systems that generate energy for sale or transfer to an energy market are not addressed in proposed Subchapter A. A person shall not drill or operate another type of geothermal injection well unless that person holds a valid individual permit issued by the Commission.

Conversely, a person in compliance with Subchapter A may cause a shallow closed-loop geothermal system to be drilled and installed and may operate the system without obtaining an individual permit. In other words, a shallow closed-loop geothermal system is authorized by rule provided it is drilled, installed, and operated in accordance with proposed Subchapter A.

Proposed §6.104 states this general rule and provides for exceptions based on the Director's review. The Director will review an owner's request for authorization for a shallow closed-loop geothermal system submitted pursuant to proposed §6.105 and the well report required by proposed §6.110 to determine whether factors are present such that an individual permit or other further action is required. If after review of the request or well report, or at any other time, the Director finds that the shallow closed-loop geothermal injection well (1) encounters groundwater that is detrimental to human health and the environment or can cause pollution to land, surface water, or other groundwater, (2) may cause a violation of primary drinking water regulations under 40 CFR Part 142, or (3) may otherwise adversely affect human health or the environment, then the Director may require the owner to obtain an individual permit, require the owner to take action to prevent the violation, or may refer the violation for enforcement action. Proposed §6.104(c) directs the owner of the system to cease injection operations if the Director makes such a determination. Injection operations shall not continue until the owner complies with the Director's requirements.

Proposed §6.105 describes the procedure for obtaining Commission authorization for a shallow closed-loop geothermal sys-

tem. Prior to commencing operations for a shallow closed-loop geothermal system, the owner of the system must submit a request for authorization to drill the well. The owner must sign the authorization, certifying that the owner will use the services of a licensed water well driller and a licensed pump installer, and that the owner agrees to plug the well upon abandonment. The request for authorization shall include the TDLR license numbers for the TDLR-licensed water well driller and the TDLR-licensed pump installer. Proposed subsection (b) requires the well driller to complete the state well report form required by TDLR and submit it to the Director within 30 days from the date the well construction is completed. Additional requirements regarding the well report are included in proposed §6.110. The Commission's Special Injection Permits Unit will review the request for authorization required by proposed §6.105 and will notify the owner when the well report is received by the Commission.

Proposed §6.106 contains the construction standards with which the licensed water well driller must comply when drilling a shallow closed-loop geothermal injection well. Proposed subsection (a) contains the surface completion requirements, including the requirement to place a concrete slab or sealing block above the cement slurry around the well. Proposed subsection (a) also provides requirements for the concrete slab or sealing block. Proposed §6.106(b) contains the drilling and completion requirements for the licensed water well driller. Requirements for backfill material are included but the water well driller is also authorized to request the Director's approval for using an alternative material that is similarly impervious. Additional drilling and completion requirements are proposed in subsection (b)(3) - (10).

Casing requirements for shallow closed-loop geothermal injection wells are proposed in subsection (c) of §6.106. The licensed water well driller is responsible for complying with these requirements. Proposed subsection (d) of §6.106 outlines the fluids that may be used as antifreeze additives or denaturants for ethanol additives. Only propylene glycol and ethanol may be used as antifreeze additives for a shallow closed-loop geothermal injection well. Denatonium benzoate, ethyl acetate, isopropanol, pine oil, and tertiary butyl alcohol may be used as denaturants for ethanol additives. A water well driller may request approval from the Director for use of other antifreeze chemicals and denaturants. Director approval is required before the water well driller uses any other chemical or denaturant.

Proposed §6.107 requires that all shallow closed-loop geothermal systems have automatic shutdown devices.

Proposed §6.108 contains the requirements for licensed pump installers. The pump installer shall (1) verify all owner information prior to installing any components of a shallow closed-loop geothermal system; (2) verify that all the pumps, tubing, and connections from the well to the infrastructure and the geothermal heat exchange system are installed, tested, and backfilled in a manner that is consistent with this subchapter and any other applicable local, state, or federal guidelines, regulations, and ordinances; (3) install all subsurface infrastructure such as loops or tubing; and (4) comply with all other applicable state regulations, statutes, and local ordinances.

Standards for operating the shallow closed-loop geothermal system are proposed in §6.109. Requirements for safety, pressure testing, sampling, and siting and setback are proposed in subsections (a) - (d). Proposed subsection (e) prohibits commingling of aquifers or zones containing waters that are known to differ significantly in chemical quality. Proposed subsection (f) notes that site plans may be required by local jurisdictions.

Proposed §6.110 contains the requirement for a licensed water well driller to submit an electronic copy of the report required by §76.70 of this title (relating to Responsibilities of the Licensee -- State Well Reports) to the Director within 30 days of well completion for each well drilled. Section 6.110 also proposes minimum information that must be contained in the report. This information is consistent with the information currently required on the report under §76.70. Proposed §6.110(c) provides that filing an incomplete well report may prompt a notice of violation from the Commission. Failure to complete the well report within 30 days of the notice of violation may result in enforcement action. Proposed §6.110(d) contains the requirements for transferring ownership of a shallow closed-loop geothermal injection well and specifies that the transferee owner shall be responsible for plugging the well upon abandonment. Proposed subsection (e) allows the owner of the well to request that well reports be kept confidential. If the Commission receives a request under the Texas Public Information Act (PIA), Texas Government Code, Chapter 552, for materials that have been designated confidential, the Commission will notify the filer of the request in accordance with the provisions of the PIA so that the filer can take action with the Office of the Attorney General to oppose release of the materials.

The Commission proposes §6.111 to outline plugging requirements for shallow closed-loop geothermal injection wells upon permanent discontinued use or abandonment. Proposed subsections (a) and (b) contain the technical requirements for plugging, and proposed subsection (c) requires the person who plugs the well to submit a signed statement to the Commission not later than the 30th day after the well is plugged. The Commission will coordinate with TDLR, groundwater conservation districts, and Commission field offices to investigate complaints regarding abandoned and/or deteriorated shallow closed-loop geothermal injection wells.

Proposed §6.112 describes the process the Commission will follow to enforce violations of Subchapter A or the conditions of a permit issued under proposed §6.104(b). Section 6.112 also contains proposed penalties for violations.

Jared Ware, Analyst for the Oil and Gas Division, has determined there will be a small cost to the Commission as a result of the proposed new rules. The Commission's Special Injection Permits Unit will need to devote a portion of the responsibilities of two full-time employees to review authorizations for shallow closed-loop geothermal systems. So, a portion of those employees' salaries is attributed to enforcement of the proposed new rules. Mr. Ware has determined that for the first five years the new rules will be in effect, there will be no fiscal implications for local governments as a result of the new rules.

Mr. Ware has determined that the public benefit anticipated as a result of enforcing or administering the new rules is compliance with state statutory requirements and decreased regulatory burden due to consolidating regulatory functions with the Commission.

Mr. Ware has determined that for each year of the first five years that the proposed new rules will be in effect, there will be no additional economic costs for persons required to comply as a result of the proposed new rules. The new rules are proposed to implement the Commission's jurisdiction over shallow closed-loop geothermal injection systems, which were previously regulated by the TCEQ. Generally, the proposed new rules incorporate existing regulatory requirements and the process for persons required to comply is the same. Some persons required to comply may experience a decrease in costs due to the reduced admin-

istrative burden caused by consolidated jurisdiction in the Commission.

In accordance with Texas Government Code, §2006.002, the Commission has determined there will be no adverse economic effect on rural communities, small businesses or micro-businesses resulting from the proposed new rules. As discussed above, there will be no additional economic costs for persons required to comply as a result of adoption of the proposed new rules; therefore, the Commission has not prepared the economic impact statement or the regulatory flexibility analysis required under §2006.002.

The Commission has determined that the proposed rulemaking will not affect a local economy; therefore, pursuant to Texas Government Code, §2001.022, the Commission is not required to prepare a local employment impact statement for the proposed rules.

The Commission has determined that the proposed new rules do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225; therefore, a regulatory analysis conducted pursuant to that section is not required.

The Commission reviewed the proposed new rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §29.11(b)(4), nor would they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §29.11(a)(3). Therefore, the proposed new rules are not subject to the Texas Coastal Management Program.

During the first five years that the rule would be in effect, the proposed new rules would not: increase fees paid to the agency; create or eliminate any employee positions; increase or decrease the number of individuals subject to the rules' applicability; expand, limit, or repeal an existing regulation; or affect the state's economy. The proposed new rules would not create or eliminate a government program, but would relocate administration of the program to a different state agency, consistent with Senate Bill 786 (88th Legislature, 2023). The new rules are not the sole cause of a need for increased future legislative appropriations; however, due to delegation to the Commission of several new initiatives from the Legislature, including administration of this program, the Commission will need increased appropriations in the future.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The Commission will accept comments until 5:00 p.m., on Tuesday, November 12, 2024. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's web site more than two weeks prior to *Texas Register* publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mr. Ware at (512) 463-7336. The status of Commission rulemakings in progress is available at www.rrc.texas.gov/general-counsel/rules/proposed-rules. Once received, all comments are posted on the Commission's website at https://rrc.texas.gov/general-counsel/rules/proposed-rules/. If you submit a comment and do not see the comment posted at this link within three business days of submittal, please call the Office of General Counsel at (512) 463-7149. The Commission has safeguards to prevent emailed comments from getting lost; however, your operating system's or email server's settings may delay or prevent receipt.

The Commission proposes the new rules under Texas Water Code, §27.037, which gives the Commission jurisdiction over closed-loop geothermal injection wells and the authority to issue permits for closed-loop geothermal injection wells. Section 27.037 also requires the Commission to adopt rules necessary to administer the section and to regulate closed-loop geothermal injection wells.

Statutory authority: Texas Water Code, §27.037.

Cross-reference to statute: Texas Water Code, Chapter 27.

§6.101. Purpose and Scope.

This subchapter implements the state program for shallow closed-loop geothermal systems under the jurisdiction of the Commission consistent with state and federal law, including laws related to protection of underground sources of drinking water.

§6.102. Definitions.

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

(1) Commission--The Railroad Commission of Texas.

(2) Director--The director of the Oil and Gas Division or the director's delegate.

(3) Fresh water--Groundwater containing 1000 parts per million (ppm) or less total dissolved solids.

(4) Groundwater conservation district--Any district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution that has the authority to regulate the spacing of water wells, the production from water wells, or both as defined in Texas Water Code §36.001.

(5) Individual permit--A permit, other than an authorization by rule or general permit, for a specific activity at a specific location.

(6) Injection well--A well into which fluids are injected.

(7) License number--The number assigned to a water well driller or pump installer by the Texas Department of Licensing and Regulation (TDLR).

(8) Open-loop air conditioning return flow wells--Class V Underground Injection Control (UIC) wells used to return groundwater, which has been circulated through open-loop, heat pump/air condition (HAC) systems, to the subsurface. These wells are regulated by the Texas Commission on Environmental Quality under 30 Texas Administrative Code §331.11 and §331.12.

(9) Owner--The owner of a shallow closed-loop geothermal system subject to the requirements of this subchapter.

(10) Person--A natural person, corporation, organization, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(11) Pitless adapter--An adapter that provides a water-tight connection between the drop pipe from the submersible pump inside a well and the water line running to the service location. The device not

only prevents water from freezing but also permits easy maintenance of the system components without the need to dig around the well.

(12) Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(13) Pump installer--A person who installs or repairs well pumps and equipment. The term does not include a person who:

(A) installs or repairs well pumps and equipment on the person's own property for the person's own use; or

(B) assists in pump installation under the direct supervision of an installer and is not primarily responsible for the installation.

(14) Shallow closed-loop geothermal injection well--An injection well that is part of a shallow closed-loop geothermal system. These types of wells are limited to a depth of formations that contain water with a total dissolved solids content of 1000 parts per million (ppm) or less.

(15) Shallow closed-loop geothermal system--A closed-loop geothermal injection well, including all pumps and tubing and connections from the injection well to the infrastructure and the geothermal heat exchange system, that operates as a heat source or heat sink in concert with a heating, ventilation, and air conditioning system designed to heat or cool infrastructure. All energy used from this type of well is consumed by the onsite infrastructure and is not provided to an energy market.

(16) TDLR--The Texas Department of Licensing and Regulation.

(17) Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136.

(18) Tracking number--The designated number assigned by TDLR for a specific well report.

(19) Water well driller--A person or company possessing a water well driller's license issued by TDLR.

(20) Well report--The State of Texas Well Report administered by TDLR.

§6.103. Applicability and Compliance.

(a) This subchapter applies to shallow closed-loop geothermal systems in this state for which construction is commenced on or after January 6, 2025.

(b) This subchapter does not apply to:

(1) open-loop air-conditioning return flow wells used to return water that has been used for heating or cooling in a heat pump to the aquifer that supplied the water; or

(2) other geothermal injection wells.

(c) Compliance with this subchapter does not relieve the driller or installer from compliance with the requirements of TDLR regulations adopted under Texas Occupations Code, Chapters 1901 and 1902.

§6.104. Authorization by Rule.

(a) An owner in compliance with this subchapter is authorized by rule to cause to be drilled and installed and to operate a shallow closed-loop geothermal system and is not required to obtain an individual permit except as provided by subsection (b) of this section.

(b) The Director will review the request for authorization required by §6.105 of this title (relating to Authorization for a Shallow Closed-Loop Geothermal System) and the well report required by §6.110 of this title (relating to Well Reports).

(1) The Director will review the request for authorization and the well report to determine whether the shallow closed-loop geothermal injection well:

(A) encounters groundwater that is detrimental to human health and the environment or can cause pollution to land, surface water, or other groundwater;

(B) may cause a violation of primary drinking water regulations under 40 CFR Part 142; or

(C) may otherwise adversely affect human health or the environment.

(2) If upon review of the request for authorization or the well report, or at any other time, the Director determines that a condition listed in paragraph (1) of this subsection exists, the Director may take any of the following actions:

(A) require the owner to obtain an individual permit;

(B) require the owner to take such actions (including, where required, closure of the injection well) as may be necessary to prevent the violation; or

(C) refer the violation for enforcement action.

(c) If the Director makes a determination under subsection (b) of this section, the owner shall cease injection operations until the owner complies with the Director's requirements. The owner may request a hearing to contest the Director's determination.

§6.105. Authorization for a Shallow Closed-Loop Geothermal System.

(a) Request for authorization.

(1) Prior to commencing operations for a shallow closed-loop geothermal system, the owner of the system shall submit to the Director a request for authorization to drill the injection well. The request shall be signed by the owner, include the TDLR license numbers required by paragraphs (2) and (3) of this subsection, and include the following statement: "I declare under penalties prescribed in Section 91.143, Texas Natural Resources Code, that I will use the services of a licensed water well driller as required under 16 Texas Administrative Code §6.105(a)(2), a licensed pump installer as required under 16 Texas Administrative Code §6.105(a)(3), and I agree to plug the well upon abandonment."

(2) All shallow closed-loop geothermal injection wells shall be drilled and completed by a water well driller who holds a current and valid water well driller's license issued by TDLR. Prior to commencing operations for a shallow closed-loop geothermal injection well, an owner shall provide to the Director the name and TDLR license number of the TDLR water well driller.

(3) All pumps and other equipment associated with shallow closed-loop geothermal systems shall be installed by a pump installer who holds a current and valid pump installer's license issued by TDLR. Prior to commencing installation of the pumps and other equipment, an owner shall provide to the Director the name and TDLR license number of the pump installer.

(b) Inventory. Drillers of shallow closed-loop geothermal injection wells authorized by rule shall inventory wells after construction by completing the TDLR state well report form and submitting the form to the Director within 30 days from the date the well construction is completed. Any additives, constituents, or fluids (other than potable

water) that are used in the closed loop system shall be reported in the Water Quality Section on the state well report form.

(c) Approval. A request for authorization for a shallow closed-loop geothermal system will be reviewed by the Commission's Special Injection Permits (SIP) Unit. The SIP Unit will notify the owner when the TDLR state well report form is approved by the Commission. The owner may operate the system as soon as the owner receives the SIP Unit's approval.

§6.106 Construction Standards.

(a) Surface completion. Water well drillers drilling a shallow closed-loop geothermal injection well shall place a concrete slab or sealing block above the cement slurry around the well.

(1) The slab or block shall extend at least two feet from the well in all directions and have a thickness of at least four inches. The slab or block shall be separated from the well casing by a plastic or mastic coating or sleeve to prevent bonding of the slab to the casing.

(2) The surface of the slab shall be sloped so that liquid drains away from the well.

(3) A pitless adapter may be used if:

(A) the adapter is welded to the casing or fitted with another equally effective seal; and

(B) the annular space between the borehole and the casing is filled with cement to a depth not less than 20 feet below the adapter connection.

(b) Drilling and completion requirements.

(1) The water well driller shall backfill the annular space of a shallow closed-loop geothermal injection well to the total depth with impervious bentonite, or a similar alternative impervious material that has been approved by the Director.

(2) The water well driller shall fill the top 30 feet with impervious bentonite, or a similar alternative impervious material that has been approved by the Director. Where no groundwater or only one zone of groundwater is encountered during drilling, sand, gravel, or drill cuttings may be used to backfill up to 30 feet from the surface.

(3) At all times during the progress of work, the driller shall provide protection to prevent tampering with the well or introduction of foreign materials into the well.

(4) Borehole diameter shall, at a minimum, allow for the insertion of a pipe sized to ensure all concrete is properly located, distributed, and cured based on the overall design and operation of the shallow closed-loop geothermal injection well. Loop tubing shall be installed for the purpose of filling the annulus between the tubing and the borehole with sand and grout material.

(5) No section of the annulus between the tubing and borehole wall shall remain open after completion of the well.

(6) For tubing material and connection requirements, the applicable American Society for Testing and Materials (ASTM) standards for the polyethylene (PE) tubing material shall be used. Tubing shall not be forced into the borehole or past an obstruction in such a manner that the structural integrity of the tubing may be compromised. This includes but is not limited to instances of cave-in, bedrock dislodgement, partial blockage, or overburden.

(7) All heat exchange loop pipe connections to be placed in the borehole shall be connected by heat-fusion, electrofusion, or a similar joints process. In addition to heat fusion or electrofusion joints, non-metallic mechanical stab-type insert fittings shall meet applicable ASTM standards.

(8) Wells that use a plastic loop require the placement of a high solids bentonite slurry grout with at least 20 percent solids by weight for any depth interval of the boring that is in a confining or semi-confining layer containing significant silt and/or clay.

(9) If copper tubing is used for heat exchange applications, all below grade copper connections shall be joined by brazing using a filler material with a high melting temperature such as a material with 15% silver content or equivalent.

(10) A water well driller shall obtain prior approval from the Director before installing any tubing material other than copper in a well.

(c) Casing requirements. The water well driller shall ensure the following casing requirements are met for each shallow closed-loop geothermal injection well.

(1) Steel well casing wall thickness shall be dependent on casing length and shall be determined using American Petroleum Institute (API) or American Water Works Association (AWWA) standards but in no circumstance shall have less than a .233-inch wall thickness.

(2) Plastic well casing or screen shall not be driven. Plastic well casing shall meet the requirements specified in the ASTM Standard F480, Standard Specification for Thermoplastic Well Casing Pipe and Couplings Made in Standard Dimension Ratios (SDR) as amended and supplemented. Plastic casing shall also meet the American National Standards Institute (ANSI) standards for "Plastic Piping System Components and Related Materials."

(3) If the use of a steel or polyvinyl chloride (PVC) sleeve is necessary to prevent possible damage to the casing, the steel sleeve shall be a minimum of 3/16 inches in thickness and the PVC sleeve shall be a minimum of ASTM D1785 Schedule 80 sun-resistant and 24 inches in length. Any sleeve shall extend 12 inches into the cement slurry.

(4) Shallow closed-loop geothermal injection wells are not required to be cased into bedrock.

(5) Temporary casing shall be installed to prevent overburden cave-in prior to the installation of tubing material and grouting of shallow closed-loop geothermal injection wells unless other means to temporarily stabilize the open boring are used. If temporary casing is not installed, the completion of well construction should proceed as soon as possible upon completion of the borehole.

(d) Fluid.

(1) Propylene glycol (Chemical Abstract Service (CAS) No. 57-55-6) and ethanol (CAS No. 64-17-5) are the only antifreeze additives a water well driller may use for shallow closed-loop geothermal injection wells.

(2) Denatonium benzoate (CAS No. 3734-33-6), ethyl acetate (CAS No. 141-78-6), isopropanol (CAS No. 67-63-0), pine oil (CAS No. 8002-09-3), and tertiary butyl alcohol (CAS No. 75-65-0) may be used as denaturants for ethanol additives. A water well driller shall obtain prior approval from the Director before using any other antifreeze chemicals and denaturants.

(3) The owner and driller involved in the design and installation of the well system shall report the release of 10 pounds or more of ethanol to the ground surface or groundwater as a reportable quantity release under 40 CFR Part 302. If a shallow closed-loop geothermal injection well consists of 20 percent ethanol by volume, then a release of as little as 7.6 gallons of water/ethanol solution meets the reportable quantity release threshold of 10 pounds of ethanol.

§6.107. Leak Detection and Pressure Loss.

A shallow closed-loop geothermal system shall have automatic shutdown devices to minimize leaks of refrigerant, antifreeze, or oil in the event of a pressure or fluid loss.

§6.108. Pump Installer Requirements.

The pump installer shall:

(1) verify all owner information prior to installing any components of a shallow closed-loop geothermal system;

(2) verify that all the pumps, tubing, and connections from the well to the infrastructure and the geothermal heat exchange system are installed, tested, and backfilled in a manner that is consistent with this subchapter and any other applicable local, state, or federal guidelines, regulations, and ordinances;

(3) install all subsurface infrastructure such as loops or tubing; and

(4) comply with all other applicable state regulations, statutes, and local ordinances.

§6.109. Operational Standards.

(a) Safety. The following information shall be prominently displayed on the shallow closed-loop geothermal system:

(1) name and telephone number of the person to contact in the event of a system shutdown;

(2) name and telephone number of the person to contact for routine maintenance; and

(3) types of fluids used in the shallow closed-loop geothermal system.

(b) Pressure testing. Shallow closed-loop geothermal injection wells shall be pressure-tested with water at 100 psi (690 kPa) for 30 minutes prior to backfilling of connection (header) trenches. Any leaking loop shall be repaired or replaced prior to completing the well.

(c) Sampling. Any required sampling shall be done at the point of injection, or as specified in a permit issued by the Commission under §6.104(b) of this title (relating to Authorization by Rule).

(d) Siting and setback. All wells shall be located at least 10 feet from potable water sources and sewer lines, and at least 25 feet from potential sources of contamination that include but are not limited to septic tanks/fields, livestock pens, or material storage facilities.

(e) Commingling prohibited. All shallow closed-loop geothermal injection wells shall be completed so that aquifers or zones containing waters that are known to differ significantly in chemical quality are not allowed to commingle through the borehole-casing annulus or the gravel pack and cause degradation of any aquifer containing fresh water.

(f) Local regulation. The Commission does not require the submittal of site plans for wells authorized by rule under this subchapter. However, a site plan may be required by a local health agent, other local governmental entity, and/or a groundwater conservation district.

§6.110. Well Reports.

(a) The water well driller is required by §76.70 of this title (relating to Responsibilities of the Licensee -- State Well Reports) to submit a well report to TDLR electronically through the Texas Well Report Submission and Retrieval System (TWRSRS). The driller shall provide an electronic copy of the well report to the Director within 30 days of well completion for each well drilled.

(b) At a minimum, a completed copy of the well report must include the following information for each well drilled:

(1) the name and address of the well owner;

(2) the county in which the well was drilled;

(3) a list of any other wells drilled at the same time;

(4) the owner well number (if assigned);

(5) the well's Latitude/Longitude (WGS 84 datum in either Degrees/Minutes Seconds or Decimal Degrees);

(6) the elevation (surface level of drill site expressed in feet above sea level);

(7) the drilling start date and end date (expressed in month/date/year);

(8) the borehole diameter in inches;

(9) the bottom depth in feet;

(10) the drilling method;

(11) the driller's name; and

(12) the water well driller's TDLR license number.

(c) Incomplete well reports may be subject to a notice of violation from the Commission. Failure to complete a well report within 30 days of a notice of violation may result in enforcement action.

(d) If a well is transferred, both the transferor owner and the transferee owner shall notify the Commission of the transfer within 30 days of the date of the transfer. The transferee owner shall be responsible for plugging the well upon abandonment.

(e) Texas Occupations Code §1901.251 authorizes the owner or the person for whom the well was drilled to request that information in well reports be made confidential. If such person seeks to request confidentiality, the person shall file a written request with the Commission via certified mail. If the Commission receives a request under the Texas Public Information Act (PIA), Texas Government Code, Chapter 552, for materials that have been designated confidential, the Commission will notify the filer of the request in accordance with the provisions of the PIA so that the filer can take action with the Office of the Attorney General to oppose release of the materials.

§6.111. Plugging.

(a) Upon permanent discontinued use or abandonment of a shallow closed-loop geothermal injection well, the owner shall plug the well according to the following standards:

(1) All removable casing shall be removed and the entire well shall be pressure filled with cement from bottom to the land surface using a pipe correctly sized to ensure all cement is properly located, distributed, and cured; and

(2) The well may be filled with fine sand, clay, or heavy mud followed by a cement plug extending from land surface to a depth of not less than ten feet below the land surface.

(b) Any fluids injected into the closed loop system shall not endanger fresh water.

(c) Not later than the 30th day after the date the well is plugged, a driller or well owner who plugs an abandoned well shall submit to the Commission a signed statement that the well was plugged in accordance with this subchapter.

§6.112. Enforcement and Penalties.

(a) A well which violates any requirement of this subchapter or a condition of a permit issued under §6.104(b) of this title (relating to Authorization by Rule) is subject to appropriate enforcement action.

The Director may require owners or drillers to submit additional information deemed necessary to protect fresh water. If the required information is not submitted, the owner may be prohibited from using the well until the information is received by the Director.

(b) If a person violates any requirement of this subchapter or a condition of a permit issued under §6.104(b) of this title, the person may be assessed a civil penalty by the Commission. The penalty may not exceed $10,000 a day for each violation. Each day a violation continues may be considered a separate violation. In determining the amount of the penalty, the Commission will consider the person's history of previous violations, the seriousness of the violation, any hazard to the health or safety of the public, and the demonstrated good faith of the person.

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

Filed with the Office of the Secretary of State on September 24, 2024.

TRD-202404591
Haley Cochran
Assistant General Counsel, Office of General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.512

The Public Utility Commission of Texas (commission) proposes new 16 Texas Administrative Code (TAC) §25.512, relating to the Texas Energy Fund Grants for Facilities outside of the ERCOT Region. This new rule will implement Public Utility Regulatory Act (PURA) §§34.0103 and 34.0106 as enacted by Senate Bill (SB) 2627 during the Texas 88th Regular Legislative Session. The proposed rule will establish procedures for applying for a grant award and the requirements and terms for grants to finance modernization, weatherization, reliability and resiliency enhancements, and vegetation management for transmission and distribution infrastructure and electric generating facilities in this state outside the ERCOT region.

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 in legislative appropriations because Texas Constitution article III, § 49-q provides that "money in the Texas energy fund may be administered and used, without further appropriation;

(4) implementation of the proposed rule will not require a decrease in future legislative appropriations to the agency;

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

(6) the proposed rule will create a new regulation;

(7) the proposed rule will not expand, limit, or repeal an existing regulation;

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

(9) 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

David Gordon, Executive Counsel, Executive Director Division, 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. Gordon 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 more resilient transmission and distribution infrastructure and electric generating facilities in this state outside of the ERCOT region. There will be no probable economic costs to persons required to comply with the rule under Texas Government Code § 2001.024(a)(5) because the rule is designed to deliver grant money to qualifying transmission and distribution infrastructure and electric generating facilities.

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 November 7, 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 or by submitting a paper copy to Central Records, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326. Austin, Texas 78711-3326. Comments must be filed by November 7, 2024. Comments should be organized in a manner consistent with the organization of the proposed rules. 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 57004.

Each set of comments must 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 rule 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; §34.0103, which authorizes the commission to use money in the Texas Energy Fund to provide grants for modernization, weatherization, reliability and resiliency enhancements, and vegetation management for transmission and distribution infrastructure and electric generating facilities in this state outside of the ERCOT region; and §34.0110, which authorizes the commission to establish procedures for the application and award of a grant under PURA chapter 34, subchapter A.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001, 14.002, 34.0103, and 34.0110.

§25.512. Texas Energy Fund Grants for Facilities Outside of the ERCOT Region.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §34.0103 and §34.0106 and establish requirements and terms for grants to finance modernization, weatherization, reliability and resiliency enhancements, and vegetation management for transmission and distribution infrastructure and electric generating facilities in this state outside of the ERCOT region.

(b) Eligibility.

(1) Applicant eligibility. To be eligible for a grant under this section, an applicant must:

(A) be an electric utility, electric cooperative, municipally owned utility, or river authority that owns or manages transmission or distribution infrastructure or one or more electric generating facilities in this state outside of the ERCOT region, or own a qualifying facility as defined by the Public Utility Regulatory Policies Act of 1978 (PURPA) §201, codified at 16 U.S.C.A. §§796(17) and (18); and

(B) be compliant with the requirements in the Lone Star Infrastructure Protection Act (codified at Texas Business and Commerce Code §117.002).

(2) Project eligibility. A project consists of one or more measures that share a specific objective over a defined duration. A measure may be an action or series of actions, acquisition of equipment, or construction of infrastructure. Measures that are inter-dependent must be submitted within the same project.

(3) Objectives. To be eligible for a grant under this section, a project must meet one of the following objectives.

(A) Facility modernization. This objective relates to upgrading or replacing infrastructure or equipment and improvements to facility or system situational awareness. Advanced metering installation and analytics, substation automation, water conservation, cooling system upgrades, and installation of heat-resistant technologies meet the facility modernization objective.

(B) Facility weatherization. This objective relates to measures that protect, strengthen, or improve the energy efficiency, operational parameters, or safety of a structure against the natural elements. Elevation of critical equipment, drainage system improvements, structure reinforcement, insulation and heating of critical areas and equipment, installation of advanced irrigation systems, and installation of weather-resistant equipment and fire or flood barriers meet the facility weatherization objective.

(C) Reliability and resiliency. This objective relates to helping facilities prevent, withstand, mitigate, or more promptly recover from power outages and events involving extreme weather conditions, uncontrolled events, cyber and physical attacks, cascading failures, or unanticipated loss of system components that pose a material threat to the safe and reliable operation of an electric utility's transmission, distribution, and generation systems. Fortification against flooding, pole upgrading, powerline hardening, battery storage, onsite fuel storage capacity increases, generation uprates, cybersecurity enhancements, and fortification against physical threats meet the reliability and resiliency objective.

(D) Vegetation management. This objective relates to actions taken above and beyond those supported by an applicant's current rates to prevent or curtail vegetation from interfering with electric infrastructure. Data-driven trimming and removal scheduling, GIS-based vegetation mapping, drought-resistant vegetation installation, and measures taken to prevent the growth of trees, shrubs, and other vegetation meet the vegetation management objective.

(4) Funding exclusions. Proceeds of a grant received under this section must not be used for the following:

(A) compliance with weatherization standards adopted before December 1, 2023;

(B) debt payments;

(C) operation of a facility that will be used primarily to serve an industrial load or private use network (PUN), except as provided in paragraph (5) of this subsection;

(D) construction or operation of a natural gas transmission pipeline, or any project related to natural gas transmission or distribution infrastructure;

(E) construction of new electric generation resources; or

(F) operations expenses associated with any project funded by a grant under this section.

(5) Electric generating facilities that serve an industrial load or PUN are eligible for a grant under this section, subject to the following conditions:

(A) transmission and distribution infrastructure that serves an industrial load or PUN must be on the public use side of the meter and geographically located entirely within this state; and

(B) an electric generating facility that serves an industrial load or PUN must operate in such a manner that the portion of nameplate capacity that will serve the maximum non-coincident peak demand of the industrial load or PUN is less than 50 percent of the facility's total nameplate capacity.

(c) Application. An eligible applicant may submit one or more applications for a grant under this section. Each application may contain multiple projects. An applicant must not submit an application containing a project with an objective, as described in subsection (b)(3) of this section, within 24 months of the date the applicant previously submitted an application requesting a grant for a project with that objective. Each application must be submitted electronically in a form and manner prescribed by the commission and contain the information required by this subsection.

(1) Applicant. An application must be submitted at the highest entity level (e.g., most senior parent or owner). Applications for projects with multiple owners must be submitted by the highest level of the entity with managing authority (e.g., owner with controlling interest, managing partner, or cooperative).

(A) Applicant information. Each application must include applicant information, including:

(i) the applicant's legal name;

(ii) the applicant's form of organization; and

(iii) the applicant's primary contact name and title, mailing address, business telephone number, business e-mail address, and web address.

(B) Applicant experience. Each application must include information on the applicant's history and experience, including:

(i) the applicant's history of transmission, distribution, and electric generation operations in this state and this country;

(ii) information describing the applicant's quality of services and management;

(iii) information describing the applicant's efficiency of operations;

(iv) evidence that the applicant is in good standing with financial institutions and is meeting all compliance requirements; and

(v) evidence of past grant management and administration.

(2) Project. An application must be organized by project and objective. Each application must include the following information for each project:

(A) Project information, including:

(i) proposed project name;

(ii) project objective, as specified in subsection (b)(3) of this section;

(iii) grant amount requested for the project;

(iv) description of the proposed project;

(v) demonstration of the project's eligibility under subsection (c) of this section;

(vi) a description of the operational attributes of the transmission or distribution infrastructure or electric generating facility for which the applicant is requesting a grant;

(vii) the name, location, owner, and applicable share of ownership of the transmission or distribution infrastructure or electric generating facilities included in the project; and

(viii) the priority of the project relative to any other projects also proposed under this section by the same applicant.

(B) Expected benefits of the proposed project receiving a grant under this section, including:

(i) a description of the expected benefits, including the location and magnitude of the expected benefits;

(ii) a description of the project's ability to address regional and reliability needs;

(iii) evidence of past performance of similarly sized and scoped projects, as applicable; and

(iv) an explanation for why this project should be funded by a grant under this section, as opposed to other available funding sources.

(C) Project implementation details, including:

(i) a proposed project schedule with anticipated dates for major project milestones;

(ii) evidence of the technical feasibility of the project, including staffing plans, material contracts, and required permits, as applicable;

(iii) evidence of how any assets purchased with a grant under this section will be maintained through the depreciable life of the asset; and

(iv) performance metrics and targets for the project.

(D) Budget information and a description of estimated project costs, including, as applicable:

(i) capital expenses, such as equipment, hardware, software, development, construction, and capital commitments required for the project to reach completion;

(ii) operating expenses in conjunction with the project and that result from the project, such as maintenance;

(iii) estimated timing requirements of the funds; and

(iv) the portions of the proposed budget funded by:

(I) this grant program, limited to capital expenses;

(II) applicant cost-share; and

(III) other sources, including federal grants.

(3) An applicant must provide a notarized affidavit, signed by an executive officer of the applicant, affirming that the information provided in the application is true, accurate, and complete.

(4) Information submitted to the commission in an application for a grant under this section is confidential and not subject to disclosure under Government Code chapter 522.

(5) An applicant must separately file a statement indicating that an application for a grant award has been presented to the commission for review with the date of the application submission, the eligible objective and project, and the total grant amount requested per objective.

(d) Application review. The commission will approve in full, approve in part, or deny each project in an application based on the screening and evaluation criteria outlined in this subsection. Evaluations and other recommendations provided by the TEF administrator are advisory only. All final decisions on whether to approve or deny each project will be made by the commission.

(1) Applications will be reviewed in the order in which the commission receives them.

(2) Applications and proposed projects will be screened for eligibility under subsection (b) of this section.

(3) Each eligible project will be evaluated to determine whether it is reasonable. The following factors may also be considered in the evaluation:

(A) the applicant's past performance, personnel, and resources to implement the project;

(B) the project's expected benefits;

(C) the project's ability to address regional and reliability needs;

(D) the applicant's stated priority level for the project under subsection (c)(2)(A)(viii) of this section;

(E) the project's attributes;

(F) the project's cost; and

(G) any other factors the commission deems appropriate.

(4) The TEF administrator may request that an applicant provide any additional information necessary to screen and evaluate any project in an application.

(e) Grant award amount.

(1) The amount of a grant award is based on program funding availability and application evaluation by the TEF administrator. Applications may be funded entirely, or the commission may fund a portion of the proposed application.

(2) Grants will be awarded only to fund eligible capital expenditures or vegetation management expenses incurred to implement projects in approved applications. Any expenses funded by a grant under this section must not be included in any rate base.

(3) A single applicant will not be awarded more than $200 million in grants under this section.

(4) In order to receive a grant payment under this section, applicants must enter into a grant agreement in the form and manner specified by the commission. The TEF administrator may separate or combine projects across applications into any number of grant agreements. Failure to enter into a grant agreement or an uncured breach of the executed grant agreement will be grounds for the TEF administrator to determine that an applicant is ineligible to obtain any future grant payments under this section. The TEF administrator may tailor any applicable reporting requirements, period of performance, milestones, performance metrics and targets, deliverables, and payment schedules for individual projects, all of which will be included in the grant agreement.

(f) Grant payment process.

(1) Payment terms for each project will be determined by the TEF administrator and specified in the corresponding grant agreement. A grantee must comply with reporting requirements outlined in the grant agreement to be eligible for grant fund disbursement.

(2) A grantee may receive grant funds in advance of incurring expenses, as specified in the grant agreement.

(3) The commission will withhold payments for expenses that are found ineligible.

(g) Period of performance.

(1) Each project's period of performance will be stated in the respective grant agreement based on the project schedule provided in the grantee's application. The grant agreement will specify project milestones.

(2) Activities related to eligible expenses of the project must commence within 12 months of execution of the grant agreement. All projects must complete work by December 31, 2030, or an earlier date if specified in the grant agreement.

(h) No contested case or appeal. Review of an application for a grant under this section is not a contested case. A commission decision on a grant award is not subject to a motion for rehearing or appeal under the commission's procedural rules.

(i) Project monitoring. Reporting and monitoring requirements for each grantee will be specified in the grant agreement. Asset performance and maintenance will be monitored for a period specified in the grant agreement for any asset funded by a grant under this section. The TEF administrator must track each grantee's project progress and provide the commission with regular updates.

(j) Expiration. This section expires May 1, 2045.

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

Filed with the Office of the Secretary of State on September 26, 2024.

TRD-202404630
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 936-7244

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 41. AUDITING
SUBCHAPTER B. RECORDKEEPING & REPORTS

16 TAC §41.12

The Texas Alcoholic Beverage Commission (TABC) proposes to amend 16 TAC §41.12, relating to Compliance Reporting by License and Permit Holders. The proposed amendments increase the amount of time licensees and permittees are allotted to com-

plete and submit compliance reports and provide additional relief to businesses who fail to timely submit a report.

The current rule requires TABC-licensed businesses with a premises in Texas to complete a compliance self-assessment, known as a compliance report, each year. The report is due within 90 days from the date the agency notifies a licensee or permittee to complete the report. If a compliance report is not submitted within the 90-day period, TABC may issue a written warning for the failure and the business has 30 days to complete the report before TABC may initiate an administrative enforcement case. The proposed amendments to §41.12: (1) clarify that the rule applies to those permittees and licensees with a premises; (2) increase the time allotted to submit a compliance report from 90 days to 180 days; and (3) extend the time for initiating an administrative enforcement case by removing the 30-day grace period to complete an unsubmitted report and not initiating an administrative case until a subsequent report is due and not submitted for a second time.

TABC presented the proposed amendments at a stakeholder meeting on August 8, 2024, and received no comments.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Andrea Maceyra, Chief of Regulatory Affairs, has determined that during each year of the first five years the proposed amendments are in effect, there will be no fiscal impact on state or local governments because of enforcing or administering the amended rules. Mrs. Maceyra 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. Mrs. Maceyra also 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, Mrs. Maceyra expects that the amended rules will have the public benefit of giving TABC-licensed businesses additional time to submit compliance reports. Mrs. Maceyra does not expect the proposed amendments will impose economic costs on persons required to comply with the amended rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TABC 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), TABC is not required to prepare a regulatory flexibility analysis.

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

- 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 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. TABC 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. TABC will consider any written comments on the proposal that are received by TABC no later than 5:00 p.m., central time, November 10, 2024. Send your comments to rules@tabc.texas.gov or to the Office of the General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711-3127. TABC staff will hold a public hearing to receive oral comments on the proposed rule at 10:00 a.m. on October 24, 2024. Interested persons should visit the TABC's public website at www.tabc.texas.gov, or contact TABC Legal Assistant Kelly Johnson at (512) 206-3367, prior to the meeting date to receive further instructions.

STATUTORY AUTHORITY. TABC proposes the amendments pursuant to TABC's rulemaking authority under Texas Alcoholic Beverage Code §§5.31 and 5.361. Section 5.31 authorizes TABC to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Section 5.361(a-1) states that TABC "by rule shall develop a plan for inspecting permittees and licensees using a risk-based approach that prioritizes public safety," and further states that "the inspection plan may provide for a virtual inspection of the permittee or licensee that may include a review of the permittee's or licensee's records..."

CROSS-REFERENCE TO STATUTE. The proposed amendment implements Alcoholic Beverage Code §§5.31 and 5.361.

§41.12. Compliance Reporting by License and Permit Holders.

(a) (No change.)

(b) Each permittee and licensee <u>with a premises in Texas</u> must prepare and file an automated compliance report with the commission as instructed by the commission. The commission may require that the report be filed using a specified digital application.

(c) The commission will annually notify each permittee and licensee of the requirement to file its compliance report. The license or permit holder will have <u>180</u> [~~90~~] days from the date of the notification to file the report.

(d) The commission may issue a written warning to a permittee or licensee who fails to file the mandated compliance report within <u>180</u> [~~90~~] days of being notified by the commission. The commission may initiate an administrative case to cancel or suspend the license or permit of any permittee or licensee who does not file <u>a</u> [~~the~~] compliance report <u>for the subsequent reporting period</u> [~~within 30 days~~] following issuance of the written warning.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404656

Matthew Cherry
Senior Counsel
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 206-3491

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SUBCHAPTER G. OPERATING AGREEMENTS BETWEEN PERMIT AND LICENSE HOLDERS

16 TAC §41.65

The Texas Alcoholic Beverage Commission (TABC) proposes new Subchapter G, relating to Operating Agreements Between Permit and License Holders, and new rule 16 TAC §41.65, relating to Contract Distilling Arrangements and Distillery Alternating Proprietorships. The proposed rule is necessary to implement legislation. Senate Bill 60 (88th Regular Session) authorized holders of a distiller's and rectifier's permit and a nonresident seller's permit to enter into operating agreements for activities related to the production of distilled spirits. The bill required TABC to adopt implementing rules. The proposed rule implements SB 60 by providing a framework for permittees who engage in contract distilling arrangements and distillery alternating proprietorships as authorized in Alcoholic Beverage Code §§14.10 and 37.011.

Proposed §41.65(a) provides a citation to the provisions in the Alcoholic Beverage Code that this rule implements. Proposed §41.65(b) defines the two types of operating agreements for the production of distilled spirits that are authorized by Alcoholic Beverage Code §§14.10 and 37.011, while proposed §41.65(c) provides a definition for the term "affiliate" as used in §§14.10(a)(6) and 37.011(a). Although the term "affiliate" appears elsewhere in the Alcoholic Beverage Code, the proposed definition applies solely to the use of the word in the context of contract distilling arrangements and distillery alternating proprietorships.

Proposed §41.65(d) sets forth and clarifies who must be a party to arrangements under Alcoholic Beverage Code §37.011(a), which governs arrangements between certain Nonresident Seller's Permit holders and Distiller's and Rectifier's Permit holders. To be a valid arrangement under this proposed provision, the nonresident seller must either own an out-of-state distillery or have an affiliate that itself owns an out-of-state distillery and has a Distiller's and Rectifier's Permit.

Proposed §41.65(e) implements Alcoholic Beverage Code §§14.10(d) and 37.011(c) by clarifying that the distiller who provides services on behalf of another distiller may neither consider the product to be owned by the distiller providing the services nor sell the product at their premises.

Proposed §41.65(f) clarifies that product manufactured by another distiller under a contract distilling arrangement may not be brought back to the product owner's premises and sold directly to consumers in conformity with the requirements under Alcoholic Beverage Code §14.05. For additional clarity, this provision's reference to manufacturing refers to the actual distillation and rectification of distilled spirits and does not include the ancillary processes necessary to create a marketable product such as bottling, packaging, and labeling distilled spirits.

Proposed §41.65(g) clarifies that when a distiller or nonresident seller who engages in the activities authorized in Alcoholic Beverage Code §§14.10(a) or 37.011(a), including manufacturing, bottling, or labeling product, on another distiller's ("host distiller") premises pursuant to a distillery alternating proprietorship, the product may not be sold to ultimate consumers on the host distiller's premises under §14.05.

Proposed §41.65(h) is the inverse of subsection (f) for purposes of selling distilled spirits to a consumer under Alcoholic Beverage Code §14.05. Under subsection (h), a distiller who manufactures (i.e. distills or rectifies) its own distilled spirits and has the product bottled, packaged, and/or labeled by someone else under a contract distilling arrangement may sell the product to consumers at the distiller's premises in accordance with §14.05.

Proposed §41.65(i) requires a written agreement to be submitted to TABC before permittees may engage in a contract distilling arrangement or alternating distillery proprietorship. Additionally, the subsection outlines certain provisions that must appear in the agreement so the agency may ensure that there is a strict separation between the businesses and operations of the involved permit holders as required by Alcoholic Beverage Code §§14.10(e) and 37.011(d).

Proposed §41.65(j) requires nonresident sellers who engage in authorized activities under the proposed rule through an affiliate to submit an affidavit that describes the affiliate's qualifications under §41.65(c) of the proposed rule. This will provide the agency the ability to ensure that the nonresident seller meets the qualifications in Alcoholic Beverage Code §37.011(a).

Lastly, proposed §41.65(k) authorizes transportation of distilled spirits between premises under a contract distilling arrangement or alternating distillery proprietorship before the product has been registered with TABC. Currently, 16 TAC §45.26 prohibits removing distilled spirits from a permitted premises unless the product has first been registered with TABC. This exception to the registration requirement is necessary in these arrangements to allow the product to be submitted to the Alcohol and Tobacco Tax and Trade Bureau for a Certificate of Label Approval, which is a prerequisite for registration with TABC under Alcoholic Beverage Code §101.671.

TABC presented the proposed rule at a stakeholder meeting on August 8, 2024, and considered comments received from stakeholders in drafting the proposed rule.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Andrea Maceyra, Chief of Regulatory Affairs, has determined that during each year of the first five years the proposed rule is in effect, there will be no fiscal impact on state or local governments because of enforcing or administering the proposed rule. Mrs. Maceyra made this determination because the proposed rule does not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed rule. Mrs. Maceyra also 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 rule is in effect, Mrs. Maceyra expects that the new rule will have the public benefit of clarifying how industry members may engage in the authorizations under Alcoholic Beverage Code §§14.10 and 37.011. Mrs. Maceyra does not expect that the proposed rule will impose economic costs on persons required to comply with the rule, other than the minimal cost of submitting agreements and affidavits to TABC under proposed §41.65(i)-(j). But the agreements and affidavits are necessary to ensure the administrative accountability of the par-

ties and a strict separation between the businesses and operations of those parties, as required by Alcoholic Beverage Code §§14.10(e) and 37.011(d).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TABC has determined that the proposed rule 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), TABC is not required to prepare a regulatory flexibility analysis.

GOVERNMENT GROWTH IMPACT STATEMENT. TABC has determined that for each year of the first five years that the proposed rule is in effect, it:

- 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 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. TABC 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. TABC will consider any written comments on the proposal that are received by TABC no later than 5:00 p.m., central time, November 10, 2024. Send your comments to rules@tabc.texas.gov or to the Office of the General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711-3127. TABC staff will hold a public hearing to receive oral comments on the proposed rule at 10:00 a.m. on October 24, 2024. Interested persons should visit the TABC's public website at www.tabc.texas.gov, or contact TABC Legal Assistant Kelly Johnson at (512) 206-3367, prior to the meeting date to receive further instructions.

STATUTORY AUTHORITY. TABC proposes this rule pursuant to TABC's rulemaking authority under Texas Alcoholic Beverage Code §§5.31, 14.10, and 37.011. Section 5.31 authorizes TABC to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Sections 14.10 and 37.011 both direct the agency to "adopt rules regulating the shared use of the permitted premises under this section to ensure administrative accountability of each permit holder and a strict separation between the businesses and operations of the permit holders."

CROSS-REFERENCE TO STATUTE. The proposed rule implements Alcoholic Beverage Code §§14.05, 14.10, 37.011, and 101.671.

§41.65. Contract Distilling Arrangements and Distillery Alternating Proprietorships.

(a) This section implements Alcoholic Beverage Code §§14.10 and 37.011.

(b) Alcoholic Beverage Code §§14.10 and 37.011 authorize contract distilling arrangements and distillery alternating proprietorships.

(1) "Contract distilling arrangement" means an arrangement in which two distilleries contract for one distillery to engage in the activities authorized in Alcoholic Beverage Code §§14.10(a) or 37.011(a) on behalf of the other distillery.

(2) "Distillery alternating proprietorship" means an arrangement in which two or more parties take turns using the physical premises of a distillery as permitted under the Alcoholic Beverage Code.

(c) As used in this section and Alcoholic Beverage Code §§14.10 and 37.011, "affiliate" means a person who controls, is controlled by, or is under common control with the holder of a Nonresident Seller's Permit, including a subsidiary, parent, or sibling entity of the nonresident seller.

(d) The parties to an agreement under Alcoholic Beverage Code §37.011 shall consist of the holder of a Distiller's and Rectifier's Permit and the holder of a Nonresident Seller's Permit. The nonresident seller must either:

(1) own a distillery outside Texas; or

(2) have an affiliate who owns a distillery outside Texas who also holds a Distiller's and Rectifier's Permit.

(e) Pursuant to Alcoholic Beverage Code §§14.10(d) and 37.011(c), a distiller ("Distiller A") who manufactures, bottles, packages, or labels distilled spirits on behalf of another distiller ("Distiller B") or nonresident seller under a contract distilling arrangement may not consider the distilled spirits as being owned by Distiller A or sell those products on Distiller A's premises.

(f) A distiller who has its product manufactured at a separate location under a contract distilling arrangement may not sell the product to ultimate consumers under Alcoholic Beverage Code §14.05.

(g) A distiller ("tenant distiller") or nonresident seller who engages in the activities authorized in Alcoholic Beverage Code §§14.10(a) or 37.011(a) on another distiller's ("host distiller") premises pursuant to a distillery alternating proprietorship may not sell the product to ultimate consumers on the host distiller's premises.

(h) A distiller who manufactures its own product, regardless of whether the product is bottled, packaged, or labeled at a separate location under a contract distilling arrangement, may sell the product for consumption on or off the premises at which the manufacturing occurs in accordance with Alcoholic Beverage Code §14.05.

(i) Prior to engaging in the privileges authorized in this section and Alcoholic Beverage Code §§14.10 and 37.011, an agreement signed by each party to a contract distilling arrangement or distillery alternating proprietorship must be submitted to TABC by the permit holder who owns the ultimate product. The agreement must contain provisions specifying the nature, duration, and extent of the activities authorized under the agreement and provisions delineating a separation between each permit holder's business and operations. The agency's acceptance of the agreement does not constitute approval of the entirety of the agreement's terms and is merely an acknowledgement that an agreement containing the required provisions has been submitted.

(j) A nonresident seller who enters into a contract distilling arrangement or alternating distillery proprietorship through an affiliate

must submit to TABC an affidavit describing the affiliate's qualifications under subsection (c) of this section.

(k) Notwithstanding §45.26, distilled spirits manufactured, bottled, packaged, or labeled pursuant to a contract distilling arrangement or distillery alternating proprietorship may be removed from, and transported between, distillery premises as necessary to accomplish the agreement's terms.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404657
Matthew Cherry
Senior Counsel
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 206-3491

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CHAPTER 45. MARKETING PRACTICES

The Texas Alcoholic Beverage Commission (TABC) proposes to amend 16 TAC §45.2, relating to Definitions. TABC also proposes new rules 16 TAC §45.28, relating to Standards of Fill for Distilled Spirits, and 16 TAC §45.29, relating to Standards of Fill for Wine.

The proposed amendment to §45.2 updates the definition of distilled spirits to match the definition found in Alcoholic Beverage Code §1.04(3). The proposed new §45.28 and §45.29 adopts the container sizes and standards of fill for distilled spirits and wine authorized in the Alcoholic Beverage Code and established by the Alcohol and Tobacco Tax and Trade Bureau (TTB). These changes will ensure that the definition of distilled spirits in the agency's rules align with the definition in the Alcoholic Beverage Code, and that all container sizes eligible for a Certificate of Label Approval issued by the TTB, that are not otherwise prohibited in the Alcoholic Beverage Code, may legally be sold in Texas.

TABC presented the proposed amendments at a stakeholder meeting on August 8, 2024, and received no comments.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Andrea Maceyra, Chief of Regulatory Affairs, has determined that during each year of the first five years the proposed amendment and new rules are in effect, there will be no fiscal impact on state or local governments because of enforcing or administering the amended rules. Mrs. Maceyra made this determination because the proposed amendment and new rules do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the amended rules. Mrs. Maceyra also 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 amendment and new rules are in effect, Mrs. Maceyra expects that enforcing or administering the amended rules will have the public benefit of ensuring current rules align with existing legislation, and by establishing standards of fill for containers of distilled spirits and wine that are consistent with existing federal rules. Mrs. Maceyra does not expect the proposed amendment and new rules will impose economic costs on persons required to comply with the amended rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TABC has determined that the proposed amendment and new rules 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), TABC is not required to prepare a regulatory flexibility analysis.

GOVERNMENT GROWTH IMPACT STATEMENT. TABC has determined that for each year of the first five years that the proposed amendment and new rules are in effect, they:

- 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 create a new regulation;

- will 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. TABC 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. TABC will consider any written comments on the proposal that are received by TABC no later than 5:00 p.m., central time, November 10, 2024. Send your comments to rules@tabc.texas.gov or to the Office of the General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711-3127. TABC staff will hold a public hearing to receive oral comments on the proposed rule at 10:00 a.m. on October 24, 2024. Interested persons should visit the TABC's public website at www.tabc.texas.gov or contact TABC Legal Assistant Kelly Johnson at (512) 206-3367, prior to the meeting date to receive further instructions.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §45.2

STATUTORY AUTHORITY. TABC proposes the amendments pursuant to TABC's rulemaking authority under Texas Alcoholic Beverage Code §§5.31 and 5.39. Section 5.31 authorizes TABC to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Section 5.39 directs TABC to "adopt rules to standardize the size of containers in which liquor may be sold in the state."

CROSS-REFERENCE TO STATUTE. The proposed amendments implement Alcoholic Beverage Code §§5.39 and 101.671.

§45.2. Definitions.

When used in this chapter, the terms listed below shall have the following meanings:

(1) - (10) (No change.)

(11) Distilled Spirits--Alcohol, spirits of wine, whiskey, rum, brandy, gin, or any liquor produced in whole or in part by the process of distillation, including all dilutions or mixtures of them, and includes spirit coolers that may have an alcoholic content as low as four percent alcohol by volume and that contain plain, sparkling, or carbonated water and may also contain one or more natural or artificial blending or flavoring ingredients. [~~Alcohol, ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, other distilled spirits, and any liquor produced in whole or in part by the process of distillation, including all mixtures and dilutions thereof.~~]

(12) - (17) (No change.)

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404658
Matthew Cherry
Senior Counsel
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 206-3491

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SUBCHAPTER B. ENFORCEMENT

16 TAC §45.28, §45.29

STATUTORY AUTHORITY. TABC proposes the new rules pursuant to TABC's rulemaking authority under Texas Alcoholic Beverage Code §§5.31 and 5.39. Section 5.31 authorizes TABC to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code. Section 5.39 directs TABC to "adopt rules to standardize the size of containers in which liquor may be sold in the state."

§45.28. Standards of Fill for Distilled Spirits.

(a) Authorized standards of fill. The standards of fill for distilled spirits, whether domestically manufactured, domestically bottled, or imported, are subject to the container sizes and standards of fill authorized by the Alcoholic Beverage Code and the United States Department of the Treasury in 27 CFR Part 5, Subpart K.

(b) No container size or standard of fill prohibited by the Alcoholic Beverage Code shall be construed to be permitted by this section.

§45.29. Standards of Fill for Wine.

(a) Authorized standards of fill. The standards of fill for wine, whether domestically manufactured, domestically bottled, or imported, are subject to the container sizes and standards of fill authorized by the Alcoholic Beverage Code and the United States Department of the Treasury in 27 CFR Part 4, Subpart H.

(b) Wines less than 7 percent alcohol by volume are subject to 27 CFR Parts 16 and 24.

(c) No container size or standard of fill prohibited by the Alcoholic Beverage Code shall be construed to be permitted by this section.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404659
Matthew Cherry
Senior Counsel
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 206-3491

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER F. ADVISORY COMMITTEE ON RESEARCH PROGRAMS

19 TAC §§1.121 - 1.127

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter F, §§1.121 - 1.127, Advisory Committee on Research Programs. Specifically, this repeal will eliminate the subchapter and the committee itself, which is no longer necessary because the research funding programs have not been funded by the Legislature in several biennia, making the advisory committee unnecessary.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of an advisory committee that no longer meets because the programs it is charged with administering are no longer funded. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHAcomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter F.

§1.121. Authority and Specific Purposes of the Advisory Committee on Research Programs.

§1.122. Definitions.

§1.123. Committee Membership and Officers.

§1.124. Duration.

§1.125. Meetings.

§1.126. Tasks Assigned the Committee.

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

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404665
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6182

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SUBCHAPTER N. GRADUATE EDUCATION ADVISORY COMMITTEE

19 TAC §§1.178 - 1.184

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter N, §§1.178 - 1.184, Graduate Education Advisory Committee. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than October 31, 2021, and which no longer meets.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of rules establishing and relating to an advisory committee that was set to be abolished no later than October 31, 2021, and which no longer meets. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHAcomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter N.

§1.178. Authority and Specific Purposes of the Graduate Education Advisory Committee.

§1.179. Definitions.

§1.180. Committee Membership and Officers.

§1.181. Duration.

§1.182. Meetings.

§1.183. Tasks Assigned the Committee.

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

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404666
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6182

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SUBCHAPTER Q. COMMUNITY AND TECHNICAL COLLEGE LEADERSHIP COUNCIL

19 TAC §§1.199 - 1.205

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter Q, §§1.199 - 1.205, Community and Technical College Leadership Council. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than October 31, 2021, and which no longer meets.

Lee Rector, Associate Commissioner for Workforce Education, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Lee Rector, Associate Commissioner for Workforce Education, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of rules establishing and relating to an advisory committee that was set to be abolished no later than October 31, 2021, and which no longer meets. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Lee Rector, Associate Commissioner for Workforce Education, P.O. Box 12788, Austin, Texas 78711-2788, or via email at rulescomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter Q.

§1.199. Authority and Specific Purposes of the Community and Technical College Leadership Council.

§1.200. Definitions.

§1.201. Council Membership and Officers.

§1.202. Duration.

§1.203. Meetings.

§1.204. Tasks Assigned to the Council.

§1.205. Report to the Board, Evaluation of Council Costs and Effectiveness.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404667
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6344

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SUBCHAPTER R. UNDERGRADUATE EDUCATION ADVISORY COMMITTEE

19 TAC §§1.206 - 1.212

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter R, §§1.206 - 1.212, Undergraduate Education Advisory Committee. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than October 31, 2021, and which no longer meets.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of rules establishing and relating to an advisory committee that was set to be abolished no later than October 31, 2021, and which no longer meets. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHAcomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter R.

§1.206. Authority and Specific Purposes of the Undergraduate Education Advisory Committee.
§1.207. Definitions.
§1.208. Committee Membership and Officers.
§1.209. Duration.
§1.210. Meetings.
§1.211. Tasks Assigned the Committee.
§1.212. Report to the Board; Evaluation of Committee Costs and Effectiveness.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404668
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6182

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SUBCHAPTER BB. TEXAS APPLICATION FOR STATE FINANCIAL AID ADVISORY COMMITTEE

19 TAC §§1.9100 - 1.9106

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter BB, §§1.9100 - 1.9106, Texas Application for State Financial Aid Advisory Committee. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than January 1, 2023, and which has fulfilled its stated mission of providing a report to the Board.

Dr. Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of an advisory committee which was set to be abolished no later than no later than January 1, 2023, and which has already fulfilled its stated mission of providing a report to the Board. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.07762, which provides the Coordinating Board with the authority to adopt and publish rules related to the Texas Application

for State Financial Aid in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter BB.

§1.9100. Authority and Specific Purpose of the Texas Application for State Financial Aid (TASFA) Advisory Committee.

§1.9101. Definitions.

§1.9102. Committee Membership and Officers.

§1.9103. Duration.

§1.9104. Meetings.

§1.9105. Tasks Assigned to the Committee.

§1.9106. Report to the Board.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6365

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SUBCHAPTER DD. TITLE IX TRAINING ADVISORY COMMITTEE

19 TAC §§1.9531 - 1.9536

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter DD, §§1.9531 - 1.9536, Title IX Training Advisory Committee. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than November 1, 2023, and which has fulfilled its stated mission of creating Title IX training slides.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of rules establishing and relating to an advisory committee that was set to be abolished no later than November 1, 2023, and which has fulfilled its stated mission of creating Title IX training slides. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Cathie Maeyaert, Director, Private Postsecondary Institutions, P.O. Box 12788, Austin, Texas 78711-2788, or via email at Cathie.Maeyaert@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter DD.

§1.9531. Authority and Purpose of the Title IX Training Advisory Committee.

§1.9532. Definitions.

§1.9533. Committee Membership and Officers.

§1.9534. Duration.

§1.9535. Meetings and Tasks of the Committee.

§1.9536. Report to the Board; Evaluation of Committee Costs and Effectiveness.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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SUBCHAPTER EE. STUDY AND REPORT ON CORE CURRICULUM ADVISORY COMMITTEE

19 TAC §§1.9541 - 1.9546

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter EE, §§1.9541 - 1.9546, Study and Report on Core Curriculum Advisory Committee. Specifically, this repeal will eliminate the subchapter and the committee itself, which was set to be abolished no later than September 1, 2021, and which has fulfilled its stated mission of providing a report on the transfer of core curriculum course credits.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the elimination of an advisory committee which was set to be abolished no later than September 1, 2021, and which has already fulfilled its stated mission of providing a report on the transfer of core curriculum course credits. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHAcomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter EE.

§1.9541. Authority and Purpose of Study and Report on Core Curriculum Advisory Committee.

§1.9542. Definitions.

§1.9543. Committee Membership and Officers.

§1.9544. Duration.

§1.9545. Meetings and Tasks of the Committee.

§1.9546. Report to the Board; Evaluation of Committee Costs and Effectiveness.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §4.5

The Texas Higher Education Coordinating Board (Coordinating Board) proposes repeal of Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter A, §4.5, relating to the Common Calendar. It has been determined that the Coordinating Board does not have statutory authority to require an institution to seek approval by the agency if its academic calendar begins or ends outside of a given date range. The Coordinating Board has also not been able to identify any reporting or data that would be impacted by the repeal since the student census date is set by statute and other reporting deadlines are outlined in alternate requirements.

Fiscal Notes, Regulatory Flexibility Analyses, and Local Employment Impact

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commission for Academic and Health Affairs, has also determined that for each year of the

first five years the section is in effect, the public benefit anticipated as a result of administering the section will be reduced administrative burden for institutions to set academic calendars that best suit the institution. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at ahacomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.051, which provides the Coordinating Board with authority to coordinate institutions of higher education in Texas.

The proposed repeal affects Texas Administrative Code, Chapter 4, Subchapter A, §4.5.

§4.5. Common Calendar.

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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Nichole Bunker-Henderson
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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS
SUBCHAPTER C. TOBACCO LAWSUIT SETTLEMENT FUNDS

19 TAC §6.74

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 6, Subchapter C, §6.74, concerning the Minority Health Research and Education Grant Program. Specifically, this repeal will improve organization and consistency for Coordinating Board grant program rules overall, and improve rules for the application, review, and awarding of funds for the Minority Health Research and Education Grant Program. The Board proposes for adoption at its October Board meeting new rules governing the program in Chapter 10, Subchapter J.

Elizabeth Mayer, Assistant Commissioner of Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner of Academic and Health Affairs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the improved organization and consistency for Coordinating Board grant program rules overall, and improved rules for the application, review, and awarding of funds of the Minority Health Research and Education Grant Program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHAcomments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Sections 63.201 - 63.203, which grants the Coordinating Board with authority to adopt rules to administer the grant program.

The proposed repeal affects Texas Education Code, Sections 63.102 - 63.203.

§6.74. Minority Health Research and Education Grant Program.

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

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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CHAPTER 10. GRANT PROGRAMS
SUBCHAPTER C. STATEWIDE PRECEPTORSHIP GRANT PROGRAM

19 TAC §§10.70 - 10.78

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new rules in Texas Administrative Code, Title 19, Part 1, Chapter 10, Subchapter C, §§10.70 - 10.78, concerning the Statewide Preceptorship Grant Program. Specifically, this new section will codify in rule Coordinating Board processes and procedures for administering the grant program. The Coordinating Board used negotiated rulemaking to develop these proposed rules. The Coordinating Board will make reports of negotiated rulemaking committees available upon request.

Rule 10.70, Purpose, establishes the purpose of the new rule is to administer the Statewide Preceptorship Program.

Rule 10.71, Authority, identifies Texas Education Code, §58.006, as the authorizing statute for the rules.

Rule 10.72, Definitions, provides definitions for words and terms used in the rules.

Rule 10.73, Eligibility, establishes eligibility criteria to apply for and receive funding under the Statewide Preceptorship Program.

Rule 10.74, Application Process, lays out the application requirements. This section limits each eligible entity to one application and limits participation to students interested in a primary care career.

Rule 10.75, Evaluation, establishes the minimum evaluation criteria an applicant must meet to be considered for the grant award. This includes limiting participation to students interested in a primary care career and supporting student participation in preceptorship programs in internal medicine, family medicine, and general pediatrics.

Rule 10.76, Grant Awards, explains the amount of funding available to the grant program is dependent on legislative appropriations for the biennium and describes agency processes for awarding funds.

Rule 10.77, Reporting, establishes reporting requirements for grantees. A grantee is required to submit narrative and expenditure reports within the deadlines and addressing the criteria set forth in the Request for Application.

Rule 10.78, Additional Requirements, provides additional requirements for the return of unexpected funds to the Coordinating Board.

Elizabeth Mayer, Assistant Commissioner of Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be to provide guidance on the process and criteria for applying for grants awarded through the program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Elizabeth Mayer, Assistant Commissioner of Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at AHA-Comments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under Texas Education Code, Section 58.006, which provides the Coordinating Board with the authority to administer the Statewide Preceptorship Program.

The proposed new sections affect Texas Education Code, Section 58.006.

§10.70. Purpose.

The purpose of this subchapter is to administer the Statewide Preceptorship Grant Program to provide funding support to preceptorship programs in general internal medicine, family medicine, and general pediatrics.

§10.71. Authority.

The authority for this subchapter is found in Texas Education Code, §58.006, which provides the Coordinating Board with authority to operate the statewide preceptorship program.

§10.72. Definitions.

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

(1) Board--The governing body of the agency known as the Texas Higher Education Coordinating Board.

(2) Commissioner--The Texas Commissioner of Higher Education.

(3) Coordinating Board--The agency known as the Texas Higher Education Coordinating Board, including agency staff.

(4) Medical School--An eligible medical institution as identified in Texas Education Code, chapter 61.501(1), and the school of osteopathic medicine at the University of the Incarnate Word, as authorized by Texas Education Code, §58.006(d).

(5) Preceptor--A skilled and experienced physician who serves as a mentor to medical students in accordance with the terms and conditions of the Request for Application (RFA).

(6) Request for Application (RFA)--The official document issued by the Coordinating Board to solicit applicants for an award of available grant funds.

§10.73. Eligibility.

To be eligible to apply for and receive funding under the Program an entity must:

(1) qualify for exemption from federal income tax under Section 501, Internal Revenue Code of 1986 (26 U.S.C. Section 501); or

(2) be operated by a state accredited medical school; and

(3) fulfill any other eligibility criteria set forth in the RFA.

§10.74. Application Process.

(a) Unless otherwise specified in the RFA, an eligible entity may not submit more than one application.

(b) Each Applicant shall limit participation to students with a documented interest in a primary care career.

(c) To qualify for funding consideration, an eligible applicant must submit an application to the Board. The application shall:

(1) be submitted electronically in a format specified in the RFA;

(2) adhere to the grant program requirements contained in the RFA and these rules; and

(3) be submitted with proper authorization on or before the day and time specified by the RFA.

§10.75. Evaluation.

(a) The Commissioner shall competitively select applicants for funding based on requirements and award criteria provided in the RFA and these rules.

(b) At a minimum, an applicant shall:

(1) limit participation to students with documented interest in a primary care career; and

(2) maximize use of award funds to support medical student participation in, and only for activities related to, preceptorship programs in general internal medicine, family medicine, and general pediatrics.

§10.76. Grant Awards.

(a) The amount of funding available to the program is dependent on the legislative appropriation for the program for each biennial state budget. The Coordinating Board will provide award levels and an estimated number of awards in the RFA.

(b) Program awards shall be subject to approval pursuant to §1.16, of this title (relating to Contract, Including Grants, for Materials and/or Services).

(c) The Commissioner of Higher Education may negotiate or adjust a grantee award to best fulfill the purpose of the RFA.

(d) The Coordinating Board shall not disburse any awarded funds until the Notice of Grant Award (NOGA) has been fully executed and, if applicable, the institution has filed and received acknowledgement of the Disclosure of Interested Parties, as described in the RFA or until the institution has filed and obtained Coordinating Board approval of its periodic expenditure reports for payment.

(e) The Coordinating Board shall set forth the determination of the allowability of administrative costs in the RFA unless otherwise agreed in writing by the Commissioner and Grantee.

(f) An institution shall use a grant award to support the preceptorship program as described in the RFA and these rules.

§10.77. Reporting.

(a) Grantee shall submit narrative reports within the deadlines and format set forth in the RFA and shall include the following:

(1) the number of program preceptor matches, the number of participating medical students, and the number of participating preceptors;

(2) student participation by medical school in each fiscal year of the Grant Period;

(3) student and preceptor participation by specific preceptor location;

(4) the intended specialty training of medical students participating in the preceptorship program;

(5) a description of efforts to secure local and other support for the program, including information on in-kind grants of supplies, time, and property allocated to the program;

(6) narrative status report on the development of the program;

(7) Project Work Plan. The Applicant shall submit, with the Application, an updated workplan which must be supplemented for each interim report and for the final report; and

(8) any other information required by the RFA.

(b) Grantee shall submit expenditure reports within the deadlines and format set forth in the RFA.

§10.78. Additional Requirements.

(a) Grantee shall return any unexpended funds to the Coordinating Board within ninety (90) days after the end of the Grant Period unless otherwise agreed in writing by the Commissioner and Grantee.

(b) Any funds that were expended in violation of this Grant shall be refunded to the Coordinating Board within thirty (30) days of Coordinating Board's notification of such prohibited expenditure or Grantee's loss of eligibility to receive grant funds under this Program.

(c) Grantee shall return any remaining funds promptly if an award is terminated.

(d) Any Coordinating Board overallocation of grant funds to Grantee shall be promptly returned to the Coordinating Board.

(e) Cancellation or Suspension of Grant Solicitations. The Commissioner has the right to reject all applications and cancel a grant solicitation at any point.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404676
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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CHAPTER 14. RESEARCH FUNDING PROGRAMS

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 14, Subchapter A, §14.1 and §14.2, General Provisions; Subchapter B, §§14.11 - 14.13, Norman Hackerman Advanced Research Program; Subchapter C, §§14.31 - 14.33, Advanced Technology Program; Subchapter D, §§14.51 - 14.53, Technology Development and Transfer Program; Subchapter E, §§14.72 - 14.79, Procedural Administration of the Research Funding Programs; and Subchapter F, §§14.91 - 14.95, Supplemental Grants Program for High School Teachers. Specifically, the repeal of Chapter 14 will eliminate unnecessary rules governing unfunded research funding programs.

The Coordinating Board proposes the repeal of Chapter 14 as part of an effort to update agency rules. It is necessary to eliminate the rules in Chapter 14, Subchapters A - F, because the Legislature has not funded the research funding programs that the rules govern for several biennia. Therefore, the programs are non-operational, and the rules that govern these programs should be repealed.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has determined that for the first five years the repeal is in effect there would be no fiscal implications for state or local governments as a result of repealing the rules.

There is no impact on small businesses, micro businesses, or rural communities. There is no anticipated impact on local employment.

Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years after the repeal of the rules the public benefit anticipated as a result of repealing the Chapter 14 rules is to repeal unnecessary rules that govern research funding programs that the Legislature has not funded for several biennia.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit existing rules;

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

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

Comments on the proposed repeal may be submitted to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas, 78711 or via email at AHAcomments@highered.texas.gov. Comments will be accepted for thirty days following publication of the proposal in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §14.1, §14.2

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter A, §14.1 and §14.2.

§14.1. Definitions.

§14.2. Authority and Scope.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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SUBCHAPTER B. NORMAN HACKERMAN ADVANCED RESEARCH PROGRAM

19 TAC §§14.11 - 14.13

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter B, §§14.11 - 14.13.

§14.11. Purpose.

§14.12. Eligibility.

§14.13. Evaluation Criteria.

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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Nichole Bunker-Henderson
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Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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SUBCHAPTER C. ADVANCED TECHNOLOGY PROGRAM

19 TAC §§14.31 - 14.33

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter C, §§14.31 - 14.33.

§14.31. Purpose.
§14.32. Eligibility.
§14.33. Evaluation Criteria.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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SUBCHAPTER D. TECHNOLOGY DEVELOPMENT AND TRANSFER PROGRAM

19 TAC §§14.51 - 14.53

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter D, §§14.51 - 14.53.

§14.51. Purpose.
§14.52. Eligibility.
§14.53. Evaluation Criteria.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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SUBCHAPTER E. PROCEDURAL ADMINISTRATION OF THE RESEARCH FUNDING PROGRAMS

19 TAC §§14.72 - 14.79

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter E, §§14.72 - 14.79.

§14.72. Pre-proposals and Proposal Solicitation.
§14.73. Proposal Evaluation.
§14.74. Confidentiality.
§14.75. Appeals Procedure for Declined Applicants.
§14.76. Fundings and Grants.
§14.77. Progress Reports.
§14.78. Merit Review.
§14.79. Suspension and Termination of Funding.

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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Nichole Bunker-Henderson
General Counsel
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SUBCHAPTER F. SUPPLEMENTAL GRANTS PROGRAM FOR HIGH SCHOOL TEACHERS

19 TAC §§14.91 - 14.95

The repeal is proposed under Texas Education Code, Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules in accordance with Texas Government Code, Chapter 2001.

The proposed repeal affects Texas Administrative Code, Part 1, Chapter 14, Subchapter F, §§14.91 - 14.95.

§14.91. Purpose.
§14.92. Eligibility.
§14.93. Application and Review Procedure.

§14.94. Grants and Grant Conditions.

§14.95. Reporting Requirements.

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

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6182

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CHAPTER 22. STUDENT FINANCIAL AID PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §22.7

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter A, §22.7, concerning Dissemination of Information and Rules. Specifically, this repeal will eliminate an unnecessary provision in the General Provisions relating to many of the Coordinating Board's financial aid programs. The Coordinating Board is authorized to adopt rules to effectuate the provisions of Texas Education Code, Chapter 61, including §61.051(a)(5) regarding the administration of financial aid programs.

Rule 22.7 is repealed. The rule asserts the Coordinating Board's responsibility for publishing and disseminating general information and program rules for the programs included in Texas Administrative Code, Chapter 22. Outreach to relevant stakeholders is crucial for the success of financial aid programs, but the Coordinating Board has determined that it can continue to accomplish this task without the rule, which is otherwise unnecessary for the administration of the programs in this chapter. Moreover, the rule could be construed as requiring the Coordinating Board to disseminate information regarding programs in the chapter that are not currently active, which could cause confusion for institutional partners and the public. Its elimination will not affect Coordinating Board operations.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the elimination of unnecessary rules. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeal is proposed under Texas Education Code, Section 61.051(a)(5), which provides the Coordinating Board with the authority to administer state financial aid programs.

The proposed repeal affects Texas Administrative Code, Title 19, Part 1, Chapter 22.

§22.7. Dissemination of Information and Rules.

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

Filed with the Office of the Secretary of State on September 27, 2024.

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6365

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SUBCHAPTER F. MATCHING SCHOLARSHIPS TO RETAIN STUDENTS IN TEXAS

19 TAC §§22.113 - 22.115

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter F, §§22.113 - 22.115, concerning Matching Scholarships to Retain Students in Texas. Specifically, this amendment makes nonsubstantive changes to rule language to conform with other program rules in the chapter.

The Coordinating Board is authorized to adopt rules as necessary by Texas Education Code, §61.087.

Rules 22.113, 22.114, and 22.115 are amended to make nonsubstantive changes to rule language. Citations to General Provisions in Chapter 22 are added to improve rule clarity and navigability, and use of the term "award" is replaced by "scholarship" to conform with rule language changes being made throughout the chapter. There are no practical changes to the administration of this subchapter.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the improved rule clarity through consistent language usage. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under Texas Education Code, Section 61.087, which provides the Coordinating Board with the authority to adopt rules regarding matching scholarships to retain students in Texas.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter F.

§22.113. Eligible Institutions.

Eligible institutions include institutions of higher education and private or independent institutions of higher education as defined in §22.1 of this chapter (relating to Definitions) [~~the Texas Education Code, Chapter 61.003~~].

§22.114. Eligible Students.

To be eligible to receive a scholarship under this subchapter [~~an award through this program~~], a student must:

(1) be a resident of Texas, as defined in §22.1 of this chapter (relating to Definitions);

(2) provide proof to the Texas institution that he or she has been offered a non-athletic scholarship or grant, including an offer of payment of tuition, fees, room and board, or a stipend, by an out-of-state institution; and

(3) have been accepted for admission to the out-of-state institution offering the assistance.

§22.115. Funds for Awards.

(a) Upon receipt of proof that a student is eligible, an eligible institution may use any funds appropriated to the institution or other funds that the institution may use for [~~the awarding of~~] scholarships or grants, to offer the student a scholarship [~~an award~~] that matches, in whole or in part, the offer from the out-of-state institution.

(b) In identifying which funds may be used for making matching scholarships through this subchapter, the institution must exclude funds for any program for which the student recipient would be disqualified by federal or state statute, donor specifications, or any funds that are otherwise restricted by law.

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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Nichole Bunker-Henderson
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Texas Higher Education Coordinating Board
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SUBCHAPTER G. TEXAS COLLEGE WORK-STUDY PROGRAM

19 TAC §§22.128 - 22.131, 22.133, 22.135

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter G, §§22.128 - 22.131, 22.133, and 22.135, concerning the Texas College Work-Study Program. Specifically, this amendment will align rule language and terminology, clarify potential ambiguities, and more clearly specify rule applicability to improve the clarity and navigability of the program rules. The Coordinating Board is authorized to adopt rules related to the Texas College Work-Study (TCWS) Program by Texas Education Code (TEC), §§56.073 and 56.077.

Included throughout the subchapter are a number of nonsubstantive updates to rule language. References to the Coordinating Board as an agency, for example, previously written as "Board" or "Board staff," are revised to "Coordinating Board" to ensure the distinction is clear between the agency and its governing board.

Rule 22.128, Definitions, is amended to eliminate unnecessary or redundant definitions. "Encumbered funds" is not used in this subchapter and is therefore unnecessary; additionally, "encumber" is already defined in the chapter's General Provisions. The terms "forecast" and "institution of higher education" have both been consolidated into the chapter's General Provisions.

Rule 22.129, Eligible Institutions, is amended to more closely align institutional eligibility with defined terms, specify the circumstances under which particular eligibility requirements apply, and simplify particular administrative requirements. The section is retitled to conform with rule naming conventions used throughout the chapter. Amendments to subsection (a) are nonsubstantive and meant only to align with defined terms in §22.1. The phrase "except theological or religious seminaries" in paragraph (a)(1) is removed because it has been incorporated into the definition of "private or independent institution of higher education" in §22.1; the underlying restriction is unchanged. Subsections (c) and (d) are amended, first, to clarify that the requirements apply to institutions' participation in the TCWS program as employers. Paragraph (d)(3) relates to other participating entities, not the institution, and therefore is relocated to §22.131(b). Subsection (e) was determined to be outdated and unnecessary to the administration of the program and is therefore eliminated.

Rule 22.130, Eligible Students, is amended by aligning eligibility criteria more closely with defined terms and adding citations to rules located in the chapter's General Provisions. The section is retitled to conform with rule naming conventions used throughout the chapter. Subsection (b) is clarified by adding "or" at the end of paragraph (1) to clarify that either condition would disqualify a student from eligibility for the program.

Rule 22.131, Eligible Off-Campus Employers, is amended to clarify aspects of non-institutional employer eligibility. Subsection (b) is the reconstituted §22.129(d)(3). Subsection (c) is reorganized to clarify the logic associated with paragraphs (4) and (5) -- non-institutional employers must meet one of the two conditions. Subsection (c) is eliminated due to being duplicative with §22.129(c)(4).

Rule 22.133, Allocation of Funds, is amended by removing unnecessary provisions relating to allocations for Fiscal Year 2023 and prior. All other changes are nonsubstantive; allocations for this program are unchanged.

Rule 23.135, Disbursement of Funds, is amended with nonsubstantive changes to rule language.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be improved rule clarity and navigability. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Education Code, Section 56.073, which provides the Coordinating Board with the authority to adopt rules related to the Texas College Work-Study Program.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 22.

§22.128. Definitions.

In addition to the words and terms defined in [~~Texas Administrative Code,~~] §22.1 of this chapter [~~title~~] (relating to Definitions), the following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

[~~(1) Encumbered funds--Program funds that have been offered to a specific student, which offer the student has accepted, and which may or may not have been disbursed to the student.~~]

[~~(2) Forecast--The FORECAST function in Microsoft Excel, or a comparable forecasting function.~~]

[~~(3) Institution of Higher Education or Institution--Any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in Texas Education Code, §61.003(8) or any private or independent institution of higher education as defined in Texas Education Code, §61.003(15).~~]

[~~(4) Program--The Texas College Work-Study Program.~~]

(1) [~~(5)~~] Mentor--An eligible student employed to:

(A) help students at participating eligible institutions or to help high school students in participating school districts;

(B) counsel high school students at high school-based recruiting centers designed to improve access to higher education; or

(C) support student interventions at participating eligible institutions that are focused on increasing completion of degrees or certificates, such as interventions occurring through advising or supplemental instruction.

(2) [~~(6)~~] Mentorship Program--A work-study student mentorship program under which students enrolled at participating institutions and who met the eligibility requirements for employment in the Texas College Work-Study Program may be employed by participating entities as mentors, tutors, or advisors.

(3) [~~(7)~~] Participating Entity--An eligible institution, a school district, or a nonprofit organization that has filed a memorandum of understanding with the Coordinating Board under this subchapter to participate in the Mentorship Program.

(4) Program--The Texas College Work-Study Program.

§22.129. Eligible Institutions.

(a) Eligibility.

(1) Any [~~public, private, or independent~~] institution of higher education or private or independent institution of higher education, as the terms are defined by §22.1 of this chapter (relating to Definitions) [~~Texas Education Code, §61.003, except a theological or religious seminary~~], is eligible to participate in the Program and/or the Mentorship Program.

(2) No institution may, on the grounds of race, color, national origin, gender, religion, age, or disability exclude an individual from participation in, or deny the benefits of the program described in this subchapter.

(3) Each participating institution must follow the Civil Rights Act of 1964, Title VI (Public Law 88-353) in avoiding discrimination in admissions or employment.

(4) Private or independent institutions of higher education offering only professional or graduate degrees are not eligible to participate in the Mentorship Program.

(b) Approval.

(1) Agreement. Each approved institution must enter into an agreement with the Coordinating Board, the terms of which shall be prescribed by the Commissioner.

(2) Approval Deadline. An institution must be approved by April 1 in order for qualified students enrolled in that institution to be eligible to be employed in a work-study position [~~receive grants~~] in the following fiscal year.

(c) To participate in the Program as an employer, an institution must:

(1) provide part-time employment to an eligible student in nonpartisan and nonsectarian activities;

(2) provide, insofar as is practicable, employment to an eligible student that is related to the student's academic interests;

(3) use Program positions only to supplement and not to supplant positions normally filled by persons not eligible to participate in the work-study program; and

(4) provide not less than 25 percent of an employed student's wages and 100 percent of other employee benefits for the employed student from sources other than federal college work-study program funds. Institutions eligible to receive Title III funds from the U. S. Department of Education are exempted from the Program requirement to provide 25 percent of an employed student's wages, if they provide the Board with a copy of a current Title III eligibility letter from the U. S. Department of Education.

(d) To participate in the Mentorship Program as an employer, an institution must:

(1) [~~an institution must~~] file with the Coordinating Board a memorandum of understanding detailing the roles and responsibilities of each participating entity; and

(2) [~~an institution must~~] provide not less than 10 percent of an employed mentor's wages and 100 percent of other employee benefits for the employed student from sources other than federal college work-study program funds. Institutions eligible to receive Title III funds from the U. S. Department of Education are exempted from the Mentorship Program requirement to provide 10 percent of an employed student's wages, if they provide the Board with a copy of a current Title III eligibility letter from the U. S. Department of Education.[~~; and~~]

[~~(3) a participating entity, other than an institution of higher education, benefiting from the services of the mentor must provide funding in an amount at least equal to the amount of the institution's contribution. The participating entity's contribution may be satisfied through in-kind contributions, if acceptable by the institution. Participating entities benefiting from the service of mentors enrolled at institutions eligible to receive Title III funds from the U. S. Department of Education are exempted from the Mentorship Program requirement to provide matching funds, if the institution has provided the Board with a copy of a current Title III eligibility letter from the U. S. Department of Education.~~]

[~~(e) Additional criteria for participation and program requirements for the Mentorship Program shall be determined and set forth in Commissioner's policies. The Commissioner's policies shall be reviewed periodically to determine the effectiveness and success of the Program.~~]

(e) [~~(f)~~] Publicizing Work-Study Employment Opportunities. Institutions participating in the Program must establish and maintain an online list of work-study employment opportunities available on campus, sorted by department as appropriate, and ensure that the list is easily accessible to the public and prominently displayed on the institution's website.

§22.130. Eligible Students [~~Student Employees~~].

(a) To be eligible for employment in the Program a person shall:

(1) be a [~~Texas~~] resident of Texas, as defined by §22.1 of this chapter (relating to Definitions) [~~Board rules~~];

(2) be enrolled [~~for~~] at least [~~the number of hours required of a~~] half-time [~~student~~], as determined by the student's institution, and be seeking a degree or certificate [~~certification~~] in an eligible institution;

(3) show [~~establish~~] financial need, as defined by §22.1 of this chapter [~~in accordance with Board procedures~~];

(4) meet applicable standards outlined in §22.3 of this chapter (relating to Student Compliance with Selective Service Registration [~~have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law~~]; and

(5) if participating in the Mentorship Program, receive appropriate training and supervision as determined by the [~~Commissioner or~~] Coordinating Board [~~staff~~].

(b) A person is not eligible to participate in the Program if the person:

(1) concurrently receives an athletic scholarship; or

(2) is enrolled in a seminary or other program leading to ordination or licensure to preach for a religious sect or to be a member of a religious order.

§22.131. Eligible Off-Campus Employers.

(a) For the Mentorship Program, an eligible institution must file, in conjunction with the participating school district(s) or nonprofit organization(s), a memorandum of understanding with the Coordinating Board.

(b) For the Mentorship Program, a participating entity, other than an institution of higher education, benefiting from the services of the mentor must provide funding in an amount at least equal to the amount of the institution's contribution, as described by §22.129(d)(2) of this subchapter (relating to Eligible Institutions). The participating entity's contribution may be satisfied through in-kind contributions, if acceptable by the institution.

(c) [~~(b)~~] An eligible institution may enter into agreements with off-campus employers to participate in the Program. To be eligible to participate, an off-campus employer must:

(1) provide part-time employment to an eligible student in nonpartisan and nonsectarian activities;

(2) provide, insofar as is practicable, employment to an eligible student that is related to the student's academic interests;

(3) use Program positions only to supplement and not to supplant positions normally filled by persons not eligible to participate in the work-study program; and

(4) either:

(A) [~~(4)~~] unless the institution enrolling the eligible student is eligible for a waiver of matching funds under §22.129(c)(4) of this subchapter [~~subsection (b) of this section~~], provide not less than 25 percent of an employed student's wages and 100 percent of other employee benefits for the employed student from sources other than federal college work-study program funds, if the employer is a nonprofit entity; or

(B) [~~(5)~~] provide not less than 50 percent of an employed student's wages and 100 percent of other employee benefits for the employed student, if the employer is a profit-making entity.

~~[(c) Institutions eligible to receive Title III funds from the U. S. Department of Education are exempted from the Program requirement to provide 25 percent of an employed student's wages, if they provide the Board with a copy of a current Title III eligibility letter from the U. S. Department of Education.]~~

§22.133. Allocation of Funds.

(a) [~~Allocations for Fiscal Year 2024 and later.~~] Allocations for the Program are to be determined on an annual basis as follows:

(1) All eligible institutions will be invited to participate in the Texas College Work-Study Program and/or the Work-Study Mentorship Program, prior to the start of the biennium; those choosing not to participate will be excluded from calculations for the relevant year.

(2) The annual allocation share for each institution choosing to participate will be its three-year average share of the total statewide number of students who met the following criteria:

(A) were [~~classified as Texas~~] residents of Texas, as defined in §22.1 of this chapter (relating to Definitions);

(B) were enrolled in a degree or certificate program at least half-time, with full-time students weighted as 1, three-quarter time students weighted as 0.75, and half-time students weighted as 0.50, as reported in the Financial Aid Database submission; and

(C) have a 9-month Expected Family Contribution, calculated using federal methodology, less than or equal to the Federal Pell Grant eligibility cap for the year reported in the Financial Aid Database submission.

(3) Institutions indicating participation in both the Texas College Work-Study and the Work-Study Mentorship Program will have their number of students who meet the criteria listed above increased by 60 percent [~~60%~~] prior to the calculation of the allocation shares.

(4) Institutions indicating participation in only one of the Texas College Work-Study and the Work-Study Mentorship Programs may only use allocated funding for the program in which they indicated intention to participate. Institutions indicating participation in both the Texas College Work-Study and the Work-Study Mentorship Program must disburse a minimum of 25 percent [~~25%~~] of their allocation to students participating in the Mentorship Program.

(5) Sources of data. The source of data used for the allocations are the three most recently certified Financial Aid Database reports submitted to the Coordinating Board by the institutions.

(6) Allocations for both years of the state appropriations' biennium will be completed at the same time. For the allocation process of the second year of the state appropriations' biennium, the sources of data outlined in paragraph (5) of this subsection will be utilized to forecast an additional year of data. This additional year of data, in combination with the two most recent years outlined in paragraph (5) of this subsection, will be utilized to calculate the three-year average share outlined in paragraph (2) of this subsection. Institutions will receive notification of their allocations for both years of the biennium at the same time.

~~[(b) Allocations for Fiscal Year 2023 and prior. Allocations for the Program are to be determined on an annual basis as follows:]~~

~~[(1) All eligible institutions will be invited to participate; those choosing not to participate will be left out of the calculations for the relevant year.]~~

~~[(2) The allocation base for each institution choosing to participate will be the number of students it reported in the most recent financial aid database report who met the following criteria:]~~

~~[(A) were classified as Texas residents;]~~

~~[(B) were enrolled at least half-time, with full-time students weighted as 1 and part-time students weighted as .5;]~~

~~[(C) completed either the FAFSA or TASFA; and]~~

~~[(D) have a 9-month Expected Family Contribution less than the simple average in-district 9-month cost of attendance for community college students enrolled for 30 semester credit hours while living off campus, as reported in the most recent year's College Student Budget Report.]~~

~~[(3) Each institution's share of the available funds will equal its share of the state-wide total of students who meet the criteria in paragraph (2) of this subsection.]~~

(b) [~~(c)~~] Verification of Data. Allocation calculations will be shared with all participating institutions for comment and verification prior to final posting and the institutions will be given 10 working days, beginning the day of the notice's distribution and excluding State holidays, to confirm that the allocation report accurately reflects the data they submitted or to advise the Coordinating Board [~~staff~~] of any inaccuracies.

(c) [~~(d)~~] Reductions in Funding.

(1) If annual funding for the program is reduced after the start of a fiscal year, the Coordinating Board may take steps to help distribute the impact of reduced funding across all participating institutions by an across-the-board percentage decrease in all institutions' allocations.

(2) If annual funding is reduced prior to the start of a fiscal year, the Coordinating Board may recalculate the allocations according to the allocation methodology outlined in this rule for the affected fiscal year based on available dollars.

§22.135. Disbursement of Funds.

(a) As requested by institutions throughout the academic year, the Coordinating Board shall forward to each participating institution a portion of its allocation of funds for timely disbursement to students.

(b) Institutions will have until the close of business on August 1, or the first working day thereafter if it falls on a weekend or holiday, to encumber program funds from their allocation for timely disbursement to students. After that date, institutions lose claim to any funds in the current fiscal year not yet drawn down from the Board for timely disbursement to students.

(c) Funds released in this manner in the first year of the biennium become available to the institution for use in the second year of the biennium. Funds released in this manner in the second year of the biennium become available to the Coordinating Board for utilization in financial aid processing.

(d) Should these unspent funds result in additional funding available for the next year's program, revised allocations, calculated according to the allocation methodology outlined in this subchapter, will be issued to participating institutions during the fall semester.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6365

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SUBCHAPTER I. TEXAS ARMED SERVICES SCHOLARSHIP PROGRAM

19 TAC §§22.163 - 22.170

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to and new rules in Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter I, §§22.163 - 22.170, concerning the Texas Armed Services Scholarship Program. Specifically, this amendment and new section will align terminology and rule language throughout the chapter and restructure existing provisions to improve rule clarity and readability.

Included throughout the subchapter are a number of nonsubstantive updates to rule language. References to the Coordinating Board as an agency, for example, previously written as "Board" or "Board staff," are revised to "Coordinating Board" to ensure the distinction is clear between the agency and its governing board. Similarly, the word "award" is changed to the more precise "scholarship" as a noun and "offer" as a verb, to avoid potential confusion.

Rule 22.163, Authority and Purpose, is amended to add the appropriate chapter to the authority citation to conform with standards throughout the rule chapter.

Rule 22.164, Definitions, is amended by removing unnecessary or duplicative definitions. The term "award" is being treated as mentioned above, and "institution of higher education" has been consolidated into rule §22.1. Because the definition of "institution of higher education" in rule §22.1 includes public institutions only, references to institution throughout this rule have been clarified to include "private or independent institution of higher education," which is also defined in rule §22.1.

Rule 22.165, Scholarship Amount, is amended by separating the concepts of scholarship amount and program limitations. Current subsections (c) and (d), which relate to the discontinuation of a student's eligibility for a scholarship, are being moved to the new rule §22.169. The section is retitled accordingly.

Rule 22.166, Appointment by Elected Officials, is amended by retitling the section to conform more closely with rule naming conventions used throughout the chapter and adding a header on subsection (c) to designate its purpose.

Rule 22.167, Eligible Students, is amended align more closely with the provisions of rule §22.166. Paragraph (4) is eliminated, as appointment by an elected official is a pre-condition for consideration for the scholarship. The section is retitled to conform to rule naming conventions used throughout the chapter.

Rule 22.168, Promissory Note, is amended to eliminate an unnecessary and potentially confusing phrase in paragraph (b)(2). Scholarship recipients are not required to enroll in an institution of higher education immediately after completing high school or their equivalency, so the phrase "after...equivalent" is potentially misleading. This does not represent a change in Coordinating Board policy.

Rule 22.169, Discontinuation of Eligibility, is created to specify provisions relating to discontinuation of a student's eligibility for a scholarship under the program. Subsections (a) and (b), respectively, are the reconstituted §22.165(c) and (d), with no changes.

Rule 22.170, Conversion of the Scholarship to a Loan, is amended to correct a rule citation and to eliminate paragraphs (c)(1) and (c)(2), which are not necessary and could be confusing.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit

anticipated as a result of administering the section will be improved rule clarity, consistency, and readability. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments and new section are proposed under Texas Education Code, Section 61.9774, which provides the Coordinating Board with the authority to adopt rules related to the Texas Armed Services Scholarship Program.

The proposed amendments and new section affect Texas Administrative Code, Title 19, Part 1, Chapter 22.

§22.163. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, chapter 61, subchapter FF [~~Subchapter FF~~], Texas Armed Services Scholarship Program. These rules establish procedures to administer the subchapter as prescribed in the Texas Education Code, §§61.9771 - 61.9776.

(b) Purpose. The purpose of the Texas Armed Services Scholarship Program is to encourage students to complete a baccalaureate degree and become members of the Texas Army National Guard, the Texas Air National Guard, the Texas State Guard, the United States Coast Guard, or the United States Merchant Marine, or to become commissioned officers in any branch of the armed services of the United States.

§22.164. Definitions.

In addition to the words and terms defined in [~~Texas Administrative Code,~~] §22.1 of this chapter (relating to Definitions), the following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

[~~(1) Award--The amount of a scholarship in an academic year, which may be comprised of multiple disbursements.~~]

[~~(2) Institution of Higher Education--As defined in Texas Education Code, §61.003(8), and which includes, for purposes of this subchapter, private or independent institutions of higher education as defined in Texas Education Code, §61.003(15).~~]

(1) [~~(3)~~] Contract to Serve [~~serve~~]--A legally-binding agreement between the recipient and the armed services of the United States, prescribing the terms of the military commitment that [~~to which~~] the recipient is obligated to serve.

(2) [~~(4)~~] Loan--A Texas Armed Services Scholarship that has become a loan as outlined in §22.170 of this subchapter (relating to Conversion of the Scholarship to a Loan).

(3) [~~(5)~~] Recipient--A person who has received a Texas Armed Services Scholarship.

(4) [~~(6)~~] Scholarship--A conditional scholarship through the Texas Armed Services Scholarship Program.

§22.165. Scholarship [~~Award~~] Amount [~~and Limitations~~].

(a) The amount of a scholarship in an academic year shall not exceed $15,000.

(b) A scholarship offered [~~awarded~~] to a student under this subchapter shall be reduced for an academic year by the amount by which the full amount of the scholarship plus the total amount to be paid to the student for being under contract with one of the branches of the armed services of the United States exceeds the student's [~~total~~] cost of attendance for that academic year at the institution of higher education or private or independent institution of higher education in which the student is enrolled.

[~~(c) A student may receive a scholarship for four years, if the student is enrolled in a degree program of four years or less, or for five years, if enrolled in a degree program of more than four years.~~]

[~~(d) A student may not receive a scholarship after having earned a baccalaureate degree or a cumulative total of 150 credit hours, including transferred hours, as verified by the student's institution of higher education.~~]

§22.166. [~~Requirements for~~] Appointment by Elected Officials.

(a) Each year the governor and the lieutenant governor may each appoint two students and two alternates, and each state senator and each state representative may appoint one student and one alternate to receive an initial scholarship.

(b) Appointments must be reported to the Coordinating Board by the deadline established by the Commissioner.

(c) Appointment Requirements. A selected student must meet two of the following four academic criteria at the time of application:

(1) Is on track to graduate high school or graduated with the Distinguished Achievement Program (DAP), the distinguished level of achievement under the Foundation High School program, or the International Baccalaureate Program (IB);

(2) Has a current high school GPA of 3.0 or higher or graduated with a high school GPA of 3.0 or higher;

(3) Achieved a college readiness score on the SAT or ACT;

(4) Is currently ranked in the top one-third of the prospective high school graduating class or graduated in the top one-third of the high school graduating class.

(d) If a student appointed to receive a scholarship fails to initially meet eligibility or fails to meet the requirements to initially receive the scholarship, the Coordinating Board must notify the alternate on file of his or her nomination.

(e) If a recipient's scholarship converts to a loan prior to graduation, beginning with the academic year following the determination, the appointing official may appoint another eligible student to receive any available funds designated for the recipient who no longer meets the requirements for the scholarship.

§22.167. Eligible Students [~~Award Eligibility~~].

To receive a scholarship, an appointed [~~a selected~~] student must:

(1) Be enrolled in an institution of higher education or a private or independent institution of higher education, as the terms are defined in §22.1 of this chapter (relating to Definitions), as certified by that institution;

(2) Enroll in and be a member in good standing of a Reserve Officers' Training Corps (ROTC) program or another undergraduate officer commissioning program while enrolled in the institution of higher education or private or independent institution of higher education, as certified by that institution;

(3) Enter into a written agreement with the Coordinating Board, set forth in §22.168 of this subchapter (relating to Promissory Note); and

[~~(4) Be appointed to receive a scholarship by the governor, lieutenant governor, a state senator, or a state representative; and~~]

(4) [~~(5)~~] Maintain the satisfactory academic progress requirements as indicated by the financial aid office at the recipient's institution of higher education or private or independent institution of higher education.

§22.168. Promissory Note.

(a) The Coordinating Board shall require a recipient to sign a promissory note acknowledging the conditional nature of the scholarship and promising to repay the amount of the scholarship plus applicable interest, late charges, and any collection costs, including attorneys' fees, if the recipient fails to meet certain conditions of the scholarship, set forth in §22.170 of this subchapter (Conversion of the Scholarship to a Loan).

(b) Recipients agree to:

(1) Complete one year of ROTC training for each year that the student receives a scholarship, or the equivalent of one year of ROTC training if the institution of higher education or private or independent institution of higher education awards ROTC credit for prior service in any branch of the U.S. Armed Services or the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine, or another undergraduate officer commissioning program;

(2) Graduate no later than six years after the date the student first enrolls in an institution of higher education or private or independent institution of higher education [~~after having received a high school diploma or a General Educational Diploma or its equivalent~~];

(3) After graduation, enter into and provide the Coordinating Board with verification of:

(A) A four-year commitment to be a member of the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine; or

(B) A contract to serve as a commissioned officer in any branch of the armed services of the United States;

(4) Meet the physical examination requirements and all other prescreening requirements of the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine, or the branch of the armed services with which the student enters into a contract.

§22.169. Discontinuation of Eligibility.

(a) A student may receive a scholarship for four years, if the student is enrolled in a degree program of four years or less, or for five years, if enrolled in a degree program of more than four years.

(b) A student may not receive a scholarship after having earned a baccalaureate degree or a cumulative total of 150 credit hours, including transferred hours, as verified by the student's institution of higher education or private or independent institution of higher education.

§22.170. Conversion of the Scholarship to a Loan.

(a) A scholarship will become a loan if the recipient:

(1) Fails to maintain satisfactory academic progress as described in §22.167 of this subchapter (relating to Eligible Students [~~Award Eligibility~~]);

(2) Withdraws from the scholarship program, as indicated through withdrawal or removal from the institution of higher education or private or independent institution of higher education or that institution's ROTC program or other undergraduate officer commissioning program, without subsequent enrollment in another institution of higher education or private or independent institution of higher education and that subsequent institution's ROTC program or other undergraduate officer commissioning program; or

(3) Fails to fulfill one of the following:

(A) a four-year commitment to be a member of the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine; or

(B) the minimum active service requirement included in a contract to serve as a commissioned officer in any branch of the armed services of the United States; honorable discharge is considered demonstration of fulfilling the minimum active service requirement.

(b) A scholarship converts to a loan if documentation of the contract or commitment outlined in subsection (a)(3) of this section is not submitted to the Coordinating Board within twelve months of graduation with a baccalaureate degree. Subsequent filing of this documentation will revert the loan back to a scholarship.

(c) If a recipient's scholarship converts to a loan, the recipient cannot regain eligibility for the Scholarship in any subsequent academic year.[~~:~~]

[~~(1) cannot regain award eligibility in a subsequent academic year; and~~]

[~~(2) loses eligibility to receive any future awards.~~]

(d) If a recipient requires a temporary leave of absence from the institution of higher education, private or independent institution of higher education, and/or the ROTC program or another undergraduate officer commissioning program for personal reasons or to provide service for the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine for fewer than twelve months, the Coordinating Board may agree to not convert the scholarship to a loan during that time.

(e) If a recipient is required to provide more than twelve months of service in the Texas Army National Guard, Texas Air National Guard, Texas State Guard, United States Coast Guard, or United States Merchant Marine as a result of a national emergency, the Coordinating Board shall grant that recipient additional time to meet the graduation and service requirements specified in the scholarship agreement.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6365

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SUBCHAPTER K. TEXAS TRANSFER GRANT PROGRAM

19 TAC §§22.201 - 22.210

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter K, §§22.201 - 22.210, concerning the Texas Transfer Grant Program. Specifically, this amendment will align rule language and terminology with rules throughout the chapter to improve rule clarity. The Coordinating Board is authorized to adopt rules related to the Texas Transfer Grant Program by the Administrative Procedures Act, Texas Government Code, §2001.003(6).

Rule 22.201, Definitions, is amended to eliminate the unused term, "encumbered funds," from the section. This term has a technical meaning but is not used in the rule.

Rule 22.202, Eligible Institutions, is amended to align the rule language with defined terms in §22.1 of this chapter and to eliminate paragraph (2)(B), which referred to approval procedures for the 2023 - 2024 academic year and is no longer needed.

Rule 22.203, Eligible Students, is amended to align eligibility criteria with defined terms and to clarify subsection (a)(3). The rules define the requirement to "have applied for any available financial aid assistance" in this and other programs as a requirement that the student to have completed the Free Application for Federal Student Aid (FAFSA) or, as needed, the Texas Application for State Financial Aid (TASFA). The amendments to the rule improve the clarity of the rule and align with current practice. The amendments to this section are conforming and should not be interpreted as changing the eligibility requirements for the program.

Rule 22.204, Satisfactory Academic Progress, is amended to specify that each institution shall calculate a student's grade point average for the purposes of meeting satisfactory academic progress in accordance with §22.10 in the chapter's General Provisions. This does not represent a change in policy.

Rule 22.205, Discontinuation of Eligibility or Non-Eligibility, is amended to correct a grammatical error and add a citation for a defined term.

Rule 22.206, Hardship Provisions, is amended to align the hardship provisions in this subchapter with equivalent sections elsewhere in the chapter. Because the Texas Transfer Grant is intended to be a two-year program for students who have already completed an associate degree, it would be nearly impossible for an eligible student to reach the 150 semester credit hour limit established in subsection (a)(4). This provision is eliminated to provide clarity around this requirement.

Rule 22.207, Priorities in Grants to Students, is amended by replacing "expected family contribution" with the new term "Student Aid Index" (no change in meaning) and updating a citation.

Rule 22.208, Grant Amounts, is amended by revising subsection (c) to align with similar provisions in other programs in this chapter.

Rule 22.209, Allocation of Funds, is amended by aligning existing rule text with defined terms. Allocations for this program are unaffected by these changes.

Rule 22.210, Disbursement of Funds, is amended by adding a citation to relevant rule within the chapter's General Provisions.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be improved rule clarity. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Government Code, Section 2001.003(6), which provides the Coordinating Board with the authority to adopt rules related to the Texas Transfer Grant Program.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 22.

§22.201. Definitions.

In addition to the words and terms defined in §22.1 of this chapter (relating to Definitions), the following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. In the event of conflict, the definitions in this subchapter shall control.

[(1) Encumbered Funds--Funds ready for disbursal to the institution, based on the institution having submitted to the Coordinating Board the required documentation to request funds.]

(1) [(2)] Grant--A Texas Transfer Grant provided through the Texas Transfer Grant Program.

(2) [(3)] Program--The Texas Transfer Grant Program.

§22.202. Eligible Institutions.

(a) Eligibility.

(1) A [Institutions eligible to make grants through the program are] medical or dental unit or [units, as the term is defined in Texas Education Code, §61.003(5), and] general academic teaching institution [institutions], other than a public state college [colleges], as the terms are [term is] defined in §22.1 of this chapter (relating to Definitions), is eligible to make a grant through this Program [Texas Education Code, §61.003(16)].

(2) No participating institution may, on the grounds of race, color, national origin, gender, religion, age, or disability exclude an individual from participation in, or deny the benefits of the program described in this subchapter.

(3) Each participating institution shall comply with [must follow] the Civil Rights Act of 1964, Title VI (Public Law 88-353) in avoiding discrimination in admissions or employment.

(b) Approval.

(1) Agreement. Each eligible institution shall [must] enter into an agreement with the Coordinating Board, the terms of which shall be prescribed by the Commissioner, prior to being approved to participate in the program.

(2) Approval Deadline.

[(A)] An institution must indicate an intent to participate in the program by June 1 and enter into an agreement with the Coordinating Board by August 31 for qualified students enrolled in that institution to be eligible to receive grants in the following biennium.

[(B) Notwithstanding subsection (A), for the 2023-2024 academic year, an institution may indicate intent to participate in the program by the administrative deadline established by the Commissioner.]

(c) Responsibilities. A participating institution is required to abide by the General Provisions outlined in subchapter A of this chapter.

§22.203. Eligible Students.

(a) To qualify for a grant through the Program, a student must:

(1) be a resident of Texas, as defined in §22.1 of this chapter (relating to Definitions) [have Texas resident status, as determined by chapter 21, subchapter B of this title (relating to Determination of Resident Status)];

(2) show financial need, as defined by §22.1 of this chapter [in the semester(s) in which a grant is offered];

(3) have applied for [any available] financial aid through the completion of the Federal Application for Federal Student Aid or, if the student is not eligible for federal financial aid, the Texas Application for State Financial Aid [assistance];

(4) be enrolled in a baccalaureate degree program at an eligible institution;

(5) be enrolled full-time [in the semester(s) in which a grant is offered] unless granted a hardship waiver of this requirement under §22.206 of this subchapter (relating to Hardship Provisions);

(6) make satisfactory academic progress toward the baccalaureate degree at the eligible institution, as defined in §22.204 of this subchapter (relating to Satisfactory Academic Progress) unless the student is granted a hardship extension in accordance with §22.206 of this subchapter [(relating to Hardship Provisions)];

(7) have been awarded an associate degree by a public junior college, [as defined in Texas Education Code, §61.003(2);] public technical institute, [as defined in Texas Education Code, §61.003(7);] or public state college as the terms are defined in §22.1 of this chapter [Texas Education Code, §61.003(16)], and credit hours earned toward completion of the associate degree must:

(A) include completion of the core curriculum or an abbreviated core curriculum related to a specific approved field of study curriculum transferable to one or more general academic teaching institutions;

(B) have been completed with at least a 2.5 grade point average; and

(C) have been completed prior to enrolling in a baccalaureate degree program at the institution offering a grant through this Program; [.]

(8) unless granted a hardship postponement in accordance with §22.206 of this subchapter [(relating to Hardship Provisions)], have enrolled in the baccalaureate degree program at the eligible institution on a full-time basis not later than the end of the 12th month after the calendar month in which the student ceased being enrolled in a public junior college, [as defined in Texas Education Code, §61.003(2);] public technical institute, [as defined in Texas Education Code, §61.003(7);] or public state college as the terms are defined in §22.1 of this chapter [Texas Education Code, §61.003(16)]; and

(9) meet applicable standards outlined in §22.3 of this chapter (relating to Student Compliance with Selective Service Registration).

(b) If a student's eligibility was based on the expectation that the student would meet the requirements in subsection (a)(7) of this section, and the student failed to do so, then the student is no longer eligible for a grant through this Program.

(1) If the institution offers the grant based on the expectation that the student would meet the requirements in subsection (a)(7) of this section and does not become aware that the student failed to meet these requirements until after the first disbursement of the grant has been made to the student, then the institution reserves the right to require the student to repay the amount that was previously received.

(2) In no case may a student receive a subsequent disbursement of a grant through the Program after the institution has become aware that the student failed to meet the requirements in subsection (a)(7) of this section.

§22.204. Satisfactory Academic Progress.

(a) To qualify for a grant, each recipient of the grant shall meet the satisfactory academic progress requirements as utilized by the financial aid office of the eligible institution to determine eligibility for federal financial aid programs.

(b) For the purposes of this section, the calculation of a student's GPA is to be completed in accordance with §22.10 of this chap-

ter (relating to Grade Point Average Calculations for Satisfactory Academic Progress).

§22.205. Discontinuation of Eligibility or Non-Eligibility.

(a) A student may not receive a grant after having already been [being] granted a baccalaureate degree by any institution.

(b) A student may not receive a grant while simultaneously receiving a Toward EXcellence, Access, and Success (TEXAS) Grant.

(c) Unless granted a hardship postponement in accordance with §22.206 of this subchapter (relating to Hardship Provisions), a student's eligibility for a grant ends:

(1) two years from the start of the semester in which the student enrolls in the baccalaureate degree program at the eligible institution on a full-time basis, if the student is enrolled in a degree program of four years or less, as defined in §22.1 of this chapter (relating to Definitions); or

(2) three years from the start of the semester in which the student enrolls in the baccalaureate degree program at the eligible institution on a full-time basis if the student is enrolled in a degree program of more than four years.

(d) A student's eligibility for a grant ends once he or she has attempted 135 semester credit hours or the equivalent unless the student is granted a hardship extension in accordance with §22.206 of this subchapter [(relating to Hardship Provisions)].

(e) Other than as described in §22.206 of this subchapter [(relating to Hardship Provisions)], if a student fails to meet any of the requirements for receiving a continuation grant as outlined in §22.203 of this subchapter (relating to Eligible Students) after completion of any semester, the student may not receive a grant until he or she completes a semester while not receiving a grant and meets all the requirements as outlined in §22.203 of this subchapter [(relating to Eligible Students)] as of the end of that semester.

§22.206. Hardship Provisions.

(a) In the event of a hardship, the Program Officer at an eligible institution may allow an otherwise eligible student to receive a grant under the following conditions:

(1) while enrolled in fewer semester credit hours than required in §22.203(5) of this subchapter (relating to Eligible Students);

(2) if the student fails to meet the satisfactory academic progress requirements of §22.203(6) of this subchapter (relating to Eligible Students);

(3) if the student requires an extension of the limits found in §22.205(c) of this subchapter (relating to Discontinuation of Eligibility or Non-Eligibility) to complete his or her degree; or

(4) if the student has attempted more hours than allowed under §22.205(d) of this subchapter (relating to Discontinuation of Eligibility or Non-Eligibility). [However, the total number of hours paid for, at least in part, with grant funds may not exceed 150 semester credit hours or the equivalent.]

(b) Hardships are not limited to, but include:

(1) documentation [a showing] of a severe illness or other debilitating condition that may affect the student's academic performance;

(2) documentation [an indication] that the student is responsible for the care of a sick, injured, or needy person and that the student's provision of care may affect his or her academic performance; [or]

(3) documentation of the birth of a child or placement of a child with the student for adoption or foster care, that may affect the student's academic performance; or

(4) [(3)] the requirement of fewer than twelve hours to complete one's degree plan.

(c) The Program Officer may allow a student to receive a grant after the time limits described in §22.203(8) of this subchapter [Section 22.203(8)] (relating to Eligible Students) if the student and/or the student's family has suffered a hardship that would [now] make the student rank as one of the institution's neediest.

(d) Documentation justifying the eligibility granted through the hardship provisions outlined in this rule must be kept in the student's file. Each institution must identify to the Coordinating Board those students granted eligibility through hardship provisions so that the Coordinating Board may appropriately monitor each student's period of eligibility.

(e) Each participating institution shall adopt a hardship policy under this section and have the policy available in writing in the financial aid office for public review upon request.

§22.207. Priorities in Grants to Students.

(a) If state appropriations for the program are insufficient to allow grants to all eligible students, each institution shall give priority to eligible students who have previously received a grant through the program.

(b) In determining first-time recipients of grants through the program, an institution shall give priority to those students who have a Student Aid Index [an expected family contribution] that does not exceed 60 percent of the average statewide amount of tuition and fees for general academic teaching institutions, other than public state colleges, as the terms are [term is] defined in §22.1 of this chapter (relating to Definitions) [Texas Education Code, §61.003(16)], for the relevant academic year. The Coordinating Board shall determine and announce this value for a given state fiscal year by January 31 of the prior fiscal year.

(c) In determining first-time recipients of grants through the program, an institution shall give highest priority to eligible students meeting criteria specified under subsection (b) of this section [§22.207(b) (relating to Priorities in Grants to Students)] who have also demonstrated the highest levels of academic achievement prior to transfer as determined by the participating institution.

§22.208. Grant Amounts.

(a) Funding. The Coordinating Board may not award through this program an amount that exceeds the amount of state appropriations and other funds that are available for this use.

(b) Grant Amounts.

(1) The Commissioner shall determine and announce the maximum grant amounts in a given state fiscal year by January 31 of the prior fiscal year. The calculation of the maximum amount will be consistent with the maximum grant forward for TEXAS Grant for the semester as set out in subchapter L of this chapter (relating to Toward EXcellence, Access, and Success (TEXAS) Grant Program).

(2) An institution may not reduce the [The] amount of a Grant offered [through an eligible public institution may not be reduced] by any gift aid for which the person receiving the grant is eligible, unless the total amount of a person's grant plus any aid other than loans received equals or exceeds the student's financial need.

(c) The Coordinating Board shall make grant calculations and disbursements in accordance with the General Provisions outlined in

subchapter A of this chapter. [~~The Commissioner shall make grant calculations in accordance with §22.11 of this chapter (relating to Provisions specific to the TEXAS Grant, TEOG, TEG, and Texas Work-Study Programs)~~].

§22.209. Allocation of Funds.

(a) The Commissioner shall determine allocations on an annual basis as follows:

(1) The allocation base for each eligible institution will be the number of students it reported in the most recent certified Financial Aid Database submission who met the following criteria:

(A) were enrolled as undergraduate students and had not yet received a baccalaureate [~~Bachelor's~~] degree;

(B) were classified as residents of Texas, as defined in §22.1 of this chapter (relating to Definitions) [~~having resident status, as determined by chapter 21, subchapter B of this title (relating to Determination of Resident Status)~~];

(C) were enrolled full-time in either the fall or spring semester; and

(D) have a Student Aid Index [~~nine-month Expected Family Contribution,~~] less than or equal to the amount established in §22.207(b) of this subchapter (relating to Priorities in Grants to Students) for the year reported in the Financial Aid Database submission.

(2) Each institution's percentage of the available funds will equal its percentage of the state-wide number of students who meet the criteria in paragraph (1) of this subsection.

(3) The Commissioner will complete allocations for both years of the biennium at the same time. The Coordinating Board will use the three most recent certified Financial Aid Database submissions to forecast the data utilized in the calculation of the allocation for the second year of the biennium. The Coordinating Board will provide each institution with notification of their allocations for both years of the biennium at the same time.

(b) Verification of Data. The Coordinating Board will share allocation calculations with each participating institution for comment and verification prior to final posting. Each institution will have ten business days, beginning the day of the notice's distribution, and excluding State holidays, to confirm that the allocation report accurately reflects the data the institution submitted or to advise the Coordinating Board of any inaccuracies.

(c) Reductions in Funding.

(1) If annual funding for the program is reduced after the start of a fiscal year, the Commissioner may use any method necessary to distribute the impact of reduced funding across all participating institutions by an across-the-board percentage decrease in each institution's allocation.

(2) If annual funding is reduced prior to the start of a fiscal year, the Commissioner may recalculate the allocations according to the allocation methodology outlined in this rule for the affected fiscal year based on available dollars.

§22.210. Disbursement of Funds.

Upon request by an institution throughout the academic year, the Coordinating Board shall forward to each participating institution a portion of its allocation of funds for timely disbursement to students in accordance with §22.2 of this chapter (relating to Timely Distribution of Funds). Each institution shall have until the close of business on August 1, or the first working day thereafter if it falls on a weekend or holiday, to encumber program funds from their allocation. After that date, an institution may lose any funds in the current fiscal year not yet drawn down from the Coordinating Board for timely disbursement to students. Funds released in this manner in the first year of the biennium become available to the institution for use in the second year of the biennium. Funds released in this manner in the second year of the biennium are deemed returned to the Coordinating Board.

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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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER T. TEXAS FIRST SCHOLARSHIP

19 TAC §§22.550, 22.552, 22.553, 22.555

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter T, §§22.550, 22.552, 22.553, and 22.555, concerning the Texas First Scholarship Program. Specifically, this amendment will align rule language and usage with other programs throughout the chapter. The Coordinating Board is authorized to adopt rules related to the Texas First Scholarship by Texas Education Code, §56.227.

The subchapter is retitled to conform to naming conventions used throughout the chapter.

Rule 22.550, Authority and Purpose, is amended to remove an unnecessary citation in the purpose statement. This usage misaligns with other program rules in the chapter.

Rule 22.552, Eligible Institutions, is amended to clarify that the provisions of §22.2 in the chapter's General Provisions, relating to Timely Distribution of Funds, do not apply to the program. Texas First operates by having the Coordinating Board reimburse participating institutions for eligible students' state credits, which the institutions are required to accept. Timely disbursement of funds is not applicable to this method. Citations in this section also are amended to be to the definitions in rule, rather than statute.

Rule 22.553, Eligible Students, is amended by making nonsubstantive changes to improve rule readability. Greater detail is provided regarding the requirement in paragraph (4), for example, and citations are added in a manner that conforms to other programs in the chapter.

Rule 22.555, Scholarship Amount, is amended by making nonsubstantive changes to rule language and by clarifying subsection (c)(2) to make it easier to understand. These rule changes do not affect the operation of the program.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing

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

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be improved rule clarity. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at SFAPPolicy@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under Texas Education Code, Section 56.227, which provides the Coordinating Board with the authority to adopt rules related to the Texas First Scholarship Program.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 22.

§22.550. Authority and Purpose.

(a) Authority. Unless otherwise noted in a section, the authority for this subchapter is provided in the Texas Education Code, chapter 56 subchapter K-1 [~~Chapter 56 Subchapter K-1~~], Texas First Scholarship Program. This subchapter establishes procedures to administer Texas Education Code, §§56.221 - 56.227.

(b) Purpose. The purpose of this program is to incentivize the enrollment of high performing students at Texas institutions of higher education [~~as defined in Texas Education Code, §61.003~~].

§22.552. Eligible Institutions.

(a) Participation.

(1) For any student graduating through the Texas First Early High School Completion Program on or after September 1, 2023, institutions of higher education, as defined in §22.1 of this chapter (relating to Definitions) [~~Texas Education Code, §61.003~~], are required to apply the state credit available to a student through the Program to the eligible student's cost of attendance, as outlined in §22.555 of this subchapter (relating to Scholarship Amount).

(2) For any student graduating through the Texas First Early High School Completion Program before September 1, 2023, institutions of higher education, as defined in §22.1 of this chapter [~~Texas Education Code, §61.003~~)], that are designated as either a public research university or public emerging research university under the coordinating board's accountability system are required to apply the state credit available to a student through the Program to the eligible student's costs of attendance, as outlined in §22.555 of this subchapter.

(b) Responsibilities. Participating [~~public~~] institutions are required to abide by the General Provisions outlined in subchapter A of this chapter (relating to General Provisions), except that the provisions in §22.2 of this chapter (relating to Timely Distribution of Funds) do not apply to this Program.

(c) Approval. Each eligible [~~public~~] institution must enter into an agreement with the Coordinating Board, the terms of which shall be prescribed by the Commissioner [~~or his/her designee~~], prior to receiving reimbursement through the program.

§22.553. Eligible Students.

To qualify for a scholarship, a person must:

(1) be enrolled at an eligible institution, as outlined in §22.552 of this subchapter (relating to Eligible Institutions);

(2) be a Resident of Texas, as defined in §22.1 of this chapter (relating to Definitions);

(3) have graduated early from high school under the Texas First Early High School Completion Program, as described by chapter 21, subchapter D of this title (relating to Texas First Early High School Completion Program) [~~Chapter 21, Subchapter D~~];

(4) meet the graduation requirement related to financial aid applications, as described by Texas Education Code, §28.0256 [~~comply with Education Code Section 28.0256~~]; and

(5) meet applicable standards outlined in [~~Subchapter A of this Chapter (relating to General Provisions), including~~] §22.3 of this chapter (relating to Student Compliance with Selective Service Registration).

§22.555. Scholarship Amount.

(a) The scholarship is issued by the Coordinating Board as a state credit for use by an eligible student at any eligible institution.

(1) For a student who graduated from high school two or more semesters or the equivalent earlier than the student's high school cohort, the state credit offered to the student will equal the maximum annual (two semester) TEXAS Grant amount [~~award~~] determined by the Coordinating Board. The calculation is based on TEXAS Grant value for the first academic year that begins following the student's graduation from high school.

(2) For a student who graduated from high school less than two semesters or the equivalent earlier than the student's high school cohort, the state credit offered to the student will equal half of the amount described by paragraph (1) of this subsection.

(b) The amount of state credit offered to a student under the program may not be considered in the calculation of any state or institutional need-based financial aid [~~awards~~] or the calculation of the student's overall financial need, unless the combination of the credit and other federal, state, and institutional financial aid, excluding work-

study and loan programs, for which the student would otherwise be eligible exceeds the estimated [~~total~~] cost of attendance at the eligible institution at which the student is enrolled.

(c) On enrollment of an eligible student at an eligible institution, the institution shall apply the state credit to the student's charges for tuition, mandatory fees, and other costs of attendance.

(1) The amount applied for the semester is equal to the lesser of:

(A) The amount of the state credit available to the student; or

(B) The student's cost [~~actual tuition, mandatory fees, and other costs~~] of attendance [~~at the institution~~].

(2) Remaining state credit may be applied to subsequent semesters within the eligibility period described by §22.554 of this subchapter (relating to Discontinuation of Eligibility or Non-Eligibility) [~~prior to the end of the first academic year that begins following the student's graduation from high school~~].

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404673
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 427-6365

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER A. BOARD OF TRUSTEES RELATIONSHIP

19 TAC §61.1

The State Board of Education (SBOE) proposes an amendment to §61.1, concerning continuing education for school board members. The proposed amendment would establish new eligibility requirements for trainers of school boards to include a background check, establish that only individuals (not organizations) are eligible to provide training to school board trustees, and prohibit trainers of school boards from engaging in political advocacy during training.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §11.159, Member Training and Orientation, requires the SBOE to provide a training course for school board trustees. Section 61.1 addresses this statutory requirement. School board trustee training under current SBOE rule includes a local school district orientation session; a basic orientation to the TEC; an annual team-building session with the local school board and the superintendent; specified hours of continuing education based on identified needs; training on evaluating student academic performance; training on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children; and training on school safety. In addition to establishing the conditions for the training courses required for school district trustees, §61.1 establishes the criteria for both registered providers of school board training and authorized providers of school board training.

The proposed amendment would update the application requirements to be a provider of school board member training. Specifically, subsection (c) would be amended to limit eligible providers to individuals, removing organizations from eligibility. Subsection (c)(1) would be amended to require the rejection of applications that do not demonstrate the requisite training, experience, educational background, or expertise. New subsection (c)(2) would be added to require applications to include a background check and would establish additional conditions under which an application would be rejected. New subsection (c)(3) would be added to describe conditions under which a provider's status would be revoked. New subsection (c)(5) would be added to describe conditions under which a non-registered provider may be involved in training school board trustees.

Proposed new subsection (d) would prohibit training providers from engaging in political advocacy while providing training. Subsections (d)(1) would define political advocacy for the purpose of this section. New subsection (d)(2) would require trainers to provide a written acknowledgement that he or she would not engage in political advocacy. New subsection (d)(3) would establish steps Texas Education Agency (TEA) would take if it determined that a provider engaged in political advocacy. New subsection (d)(4) would permit the SBOE to revoke a provider's eligibility if it determines that the provider engaged in political advocacy. New subsection (d)(5) would establish that the revocation of a provider's status would be for one year, unless determined otherwise by the SBOE. New subsection (d)(6) would establish that a provider is presumed to have engaged in political advocacy if the advocacy occurs during the training session.

In addition, the term "governance leadership" would be updated to "school board development" throughout, a statement would be added to subsection (b) stating that all school board trainings and continuing education under §61.1 shall comply with state law, and obsolete language related to implementation of the section would be removed.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 13, 2024 meeting.

FISCAL IMPACT: Steve Lecholop, deputy commissioner for governance, has determined that for the first five years the proposal is in effect, there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal would impose a cost on regulated persons. A prospective provider of school board trustee training would be required to submit a background check from one of at least five providers approved by TEA. If the background check indicates the

prospective provider has been convicted of a felony or crime of moral turpitude, the applicant would be rejected. At the time of filing as proposed, background checks can cost between $50 and $100 according to several national background check providers. A provider of school board trustee training would be required to submit a new application (and new background check) every three years. The rule is necessary to protect the health, safety, and welfare of the residents of this state.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation by requiring a prospective provider of school board trustee training to submit a background check from one of at least five providers approved by TEA. If the background check indicates the prospective provider has been convicted of a felony or crime of moral turpitude, the applicant would be rejected.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Lecholop has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be updating the application requirements to be a provider of school board member training to protect the health, safety, and welfare of the residents of this state. There is an anticipated economic cost to persons who are required to comply with the proposal. A prospective provider of school board trustee training would be required to submit a background check from one of at least five providers approved by TEA. If the background check indicates the prospective provider has been convicted of a felony or crime of moral turpitude, the applicant would be rejected. At the time of filing as proposed, background checks can cost between $50 and $100 according to several national background check providers.

DATA AND REPORTING IMPACT: The proposal would have no data or reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins October 11, 2024, and ends at 5:00 p.m. on November 12, 2024. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in November 2024 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 11, 2024.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code, §11.159, which requires the State Board of Education to provide a training course for school board trustees.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §11.159.

§61.1. Continuing Education for School Board Members.

(a) Under the Texas Education Code (TEC), §11.159, the State Board of Education (SBOE) shall adopt a framework for school board development [~~governance~~ ~~leadership~~] to be used in structuring continuing education for school board members. The framework shall be posted to the Texas Education Agency (TEA) website and shall be distributed annually by the president of each board of trustees to all current board members and the superintendent.

(b) The continuing education required under the TEC, §11.159, applies to each member of an independent school district board of trustees. All school board trainings and continuing education under this section shall comply with state law.

(1) Each school board member of an independent school district shall complete a local district orientation.

(A) The purpose of the local orientation is to familiarize new board members with local board policies and procedures and district goals and priorities.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) The orientation shall address local district practices in the following, in addition to topics chosen by the local district:

(i) curriculum and instruction;

(ii) business and finance operations;

(iii) district operations;

(iv) superintendent evaluation; and

(v) board member roles and responsibilities.

(E) Each board member should be made aware of the continuing education requirements of this section and those of the following:

(i) open meetings act in Texas Government Code, §551.005;

(ii) public information act in Texas Government Code, §552.012; and

(iii) cybersecurity in Texas Government Code, §2054.5191.

(F) The orientation shall be open to any board member who chooses to attend.

(2) Each school board member of an independent school district shall complete a basic orientation to the TEC and relevant legal obligations.

(A) The orientation shall have special, but not exclusive, emphasis on statutory provisions related to governing Texas school districts.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) Topics shall include, but not be limited to, the TEC, Chapter 26 (Parental Rights and Responsibilities), and the TEC, §28.004 (Local School Health Advisory Council and Health Education Instruction).

(E) The orientation shall be provided by a regional education service center (ESC).

(F) The orientation shall be open to any board member who chooses to attend.

(G) The continuing education may be fulfilled through online instruction, provided that the training incorporates interactive activities that assess learning and provide feedback to the learner and offers an opportunity for interaction with the instructor.

(H) The ESC shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (i) [~~(h)~~] of this section.

(3) After each session of the Texas Legislature, including each regular session and called session related to education, each school board member shall complete an update to the basic orientation to the TEC.

(A) The update session shall be of sufficient length to familiarize board members with major changes in statute and other relevant legal developments related to school governance.

(B) The update shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(C) A board member who has attended an ESC basic orientation session described in paragraph (2) of this subsection that incorporated the most recent legislative changes is not required to attend an update.

(D) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(E) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (i) [~~(h)~~] of this section.

(4) The entire board shall participate with their superintendent in a team-building session.

(A) The purpose of the team-building session is to enhance the effectiveness of the board-superintendent team and to assess the continuing education needs of the board-superintendent team.

(B) The session shall be held annually.

(C) The session shall be at least three hours in length.

(D) The session shall include a review of the roles, rights, and responsibilities of a local board, including its oversight relationship to administrators, as outlined in the framework for school board development [~~governance leadership~~] described in subsection (a) of this section.

(E) The assessment of needs shall be based on the framework for school board development [~~governance leadership~~] described in subsection (a) of this section and shall be used to plan continuing education activities for the year for the governance leadership team.

(F) The team-building session shall be provided by an ESC or a registered provider as described in subsection (c) of this section.

(G) The superintendent's participation in team-building sessions as part of the continuing education for board members shall represent one component of the superintendent's ongoing professional development.

(5) In addition to the continuing education requirements in paragraphs (1) through (4) of this subsection, each board member shall complete additional continuing education based on the framework for school board development [~~governance leadership~~] described in subsection (a) of this section.

(A) The purpose of continuing education is to address the continuing education needs referenced in paragraph (4) of this subsection.

(B) The continuing education shall be completed annually.

(C) In a board member's first year of service, he or she shall complete at least ten hours of continuing education in fulfillment of assessed needs.

(D) Following a board member's first year of service, he or she shall complete at least five hours of continuing education annually in fulfillment of assessed needs.

(E) A board president shall complete continuing education related to leadership duties of a board president as some portion of the annual requirement.

(F) At least 50% of the continuing education shall be designed and delivered by persons not employed or affiliated with the board member's local school district. No more than one hour of the required continuing education that is delivered by the local district may utilize self-instructional materials.

(G) The continuing education shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(H) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(I) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (i) [~~(h)~~] of this section.

(6) Each school board member shall complete continuing education on evaluating student academic performance and setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness.

(A) The purpose of the training on evaluating student academic performance is to provide research-based information to board members that is designed to support the oversight role of the board of trustees outlined in the TEC, §11.1515.

(B) The purpose of the continuing education on setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness is to facilitate boards meeting the requirements of TEC, §11.185 and §11.186.

(C) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(D) The continuing education shall be completed every two years.

(E) The training shall be at least three hours in length.

(F) The continuing education required by this subsection shall include, at a minimum:

(i) instruction in school board behaviors correlated with improved student outcomes with emphasis on:

(I) setting specific, quantifiable student outcome goals; and

(II) adopting plans to improve early literacy and numeracy and college, career, and military readiness for applicable student groups evaluated in the Closing the Gaps domain of the state accountability system established under TEC, Chapter 39;

(ii) instruction in progress monitoring practices to improve student outcomes; and

(iii) instruction in state accountability with emphasis on the Texas Essential Knowledge and Skills, state assessment instruments administered under the TEC, Chapter 39, and the state accountability system established under the TEC, Chapter 39.

(G) The continuing education shall be provided by an authorized provider as defined by subsection (e) [~~(d)~~] of this section.

(H) If the training is attended by an entire school board and its superintendent, includes a review of local school district data on student achievement, and otherwise meets the requirements of subsection (b)(4) of this section, the training may serve to meet a school board member's obligation to complete training under subsection (b)(4) and (6) of this section, as long as the training complies with the Texas Open Meetings Act.

(7) Each board member shall complete continuing education on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children in accordance with TEC, §11.159(c)(2).

(A) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(B) The training shall be completed every two years.

(C) The training shall be at least one hour in length.

(D) The training must familiarize board members with the requirements of TEC, §38.004 and §38.0041, and §103.1401 [~~§61.1051~~] of this title (relating to Reporting Child Abuse or Neglect, Including Trafficking of a Child).

(E) The training required by this subsection shall include, at a minimum:

(i) instruction in best practices of identifying potential victims of child abuse, human trafficking, and other maltreatment of children;

(ii) instruction in legal requirements to report potential victims of child abuse, human trafficking, and other maltreatment of children; and

(iii) instruction in resources and organizations that help support victims and prevent child abuse, human trafficking, and other maltreatment of children.

(F) The training sessions shall be provided by a registered provider as defined by subsection (c) of this section.

(G) This training may be completed online, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(H) The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (i) [~~(h)~~] of this section.

(c) For the purposes of this section, a registered provider has demonstrated proficiency in the content required for a specific training. An individual applicant [~~A private or professional organization, school district, government agency, college/university, or private consultant~~] shall register with the TEA to provide the board member continuing education required in subsection (b)(3), (5), and (7) of this section. Groups and organizations are no longer eligible for registration.

(1) The applicant's registration application [~~process~~] shall include documentation of the applicant's [~~provider's~~] training, experience, educational background, and/or expertise in the activities and areas covered in the framework for school board development. A registration application that does not demonstrate the training, experience, educational background, and/or expertise shall be rejected [~~governance leadership~~].

(2) TEA will provide each applicant with a list of at least five (5) TEA approved background check providers. The applicant's registration application shall include a background check report from one of the approved providers. A registration application that does not include a background check report shall be rejected; or a registration application that includes a background check report documenting an applicant's felony or crime of moral turpitude conviction shall be rejected.

(3) TEA shall revoke a registered provider's status upon notification and confirmation that a registered provider has been convicted of a felony or a crime of moral turpitude. A registered provider will be given an opportunity to promptly contest a claim in writing; within 30 days, that the registered provider was convicted. TEA will respond within 30 days of its decision. An informal hearing will be conducted by TEA upon request from the registered provider. Registration shall be withheld until confirmation of registration is received from TEA.

(4) [~~(2)~~] An updated registration shall be required of a provider of continuing education every three years.

(5) A registered provider may present with other panel members, speakers, or presenters for credit, however those panel

members, speakers, or presenters will comply with the remainder of this section, but are not required to comply with paragraphs (1)-(4) of this subsection. Any violation of this section by the other panel members, speakers, or presenters is the responsibility of the registered provider.

(6) [~~(3)~~] A school district that provides continuing education exclusively for its own board members is not required to register.

(7) [~~(4)~~] An ESC is not required to register under this subsection.

(d) A provider of training under this section may not engage in political advocacy while providing the training under this section.

(1) For the purposes of this rule, political advocacy means:

(A) Supporting or opposing political candidate(s), particular party or group of candidates who hold a particular political viewpoint or position, specifically or by unmistakable implication, with the intent to influence the outcome of an election or appointment and/or

(B) Supporting or opposing a political or policy position with the intent of influencing the outcome of a legislative, rulemaking or other policy process.

(C) Political advocacy shall not include discussions on fostering legislative relationships, legislative or rulemaking processes or legislative or policy updates.

(2) If a provider is required to register under subsection (c) of this section, the provider shall provide a written acknowledgement, provided by the agency, indicating that the provider shall not engage in political advocacy while providing training. A registration application that does not include an acknowledgement shall be rejected.

(3) If the agency determines a provider engaged in political advocacy while providing training, the agency shall:

(A) issue a warning to the provider;

(B) request that the provider submit a written explanation from the provider explaining the events and what action, if any, has or will be taken to prevent a future violation; and

(C) notify members of the State Board of Education of the warning issued to the provider and include any written explanation from the provider.

(4) The board may remove the registration or the authorization to provide training under this section for an individual, school district, or regional service center if the board determines that the provider engaged in political advocacy while providing training under this section.

(5) Removal of registration or authorization under paragraph (4) of this subsection shall be for a term of one year unless modified by the board.

(6) A provider is presumed to have provided political advocacy while providing training under this section if the political advocacy occurs during that training session.

(e) [~~(d)~~] An authorized provider meets all the requirements of a registered provider and has demonstrated proficiency in the content required in subsection (b)(4) and (6) of this section. Proficiency may be demonstrated by completing a TEA-approved train-the-trainer course that includes evaluation on the topics and following a review of the provider's qualifications and course design, or through other means as determined by the commissioner.

(1) A [~~private or professional organization,~~] school district or individual [~~, government agency, college/university, or private consultant~~] may be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(2) An ESC shall be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(3) The authorization process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for school board development [~~governance leadership~~].

(4) An updated authorization shall be required of a provider of training every three years.

(f) [~~(e)~~] No continuing education shall take place during a school board meeting unless that meeting is called expressly for the delivery of board member continuing education. However, continuing education may take place prior to or after a legally called board meeting in accordance with the provisions of the Texas Government Code, §551.001(4).

(g) [~~(f)~~] An ESC board member continuing education program shall be open to any interested person, including a current or prospective board member. A district is not responsible for any costs associated with individuals who are not current board members.

(h) [~~(g)~~] A registration fee shall be determined by ESCs to cover the costs of providing continuing education programs offered by ESCs.

(i) [~~(h)~~] For each training described in this section, the provider of continuing education shall provide verification of completion of board member continuing education to the individual participant and to the participant's school district. The verification must include the provider's authorization or registration number.

(j) [~~(i)~~] To the extent possible, the entire board shall participate in continuing education programs together.

(k) [~~(j)~~] At the last regular meeting of the board of trustees before an election of trustees, the current president of each local board of trustees shall announce the name of each board member who has completed the required continuing education, who has exceeded the required hours of continuing education, and who is deficient in meeting the required continuing education as of the anniversary of the date of each board member's election or appointment to the board or two-year anniversary of his or her previous training, as applicable. The announcement shall state that completing the required continuing education is a basic obligation and expectation of any sitting board member under SBOE rule. The minutes of the last regular board meeting before an election of trustees must reflect whether each trustee has met or is deficient in meeting the training required for the trustee as of the first anniversary of the date of the trustee's election or appointment or two-year anniversary of his or her previous training, as applicable. The president shall cause the minutes of the local board to reflect the announcement and, if the minutes reflect that a trustee is deficient in training as of the anniversary of his or her joining the board, the district shall post the minutes on the district's Internet website within 10 business days of the meeting and maintain the posting until the trustee meets the requirements.

(l) [~~(k)~~] Annually, the SBOE shall commend those local board-superintendent teams that complete at least eight hours of the continuing education specified in subsection (b)(4) and (5) of this section as an entire board-superintendent team.

(m) [~~(l)~~] Annually, the SBOE shall commend local board-superintendent teams that effectively implement the commissioner's

trustee improvement and evaluation tool developed under the TEC, §11.182, or any other tool approved by the commissioner.

~~[(m) This section will be implemented May 1, 2020. This section as it read prior to adoption by the SBOE at its January 2020 meeting controls continuing education for school board members until May 1, 2020.]~~

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

Filed with the Office of the Secretary of State on September 30, 2024.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 475-1497

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CHAPTER 67. STATE REVIEW AND APPROVAL OF INSTRUCTIONAL MATERIALS SUBCHAPTER B. STATE REVIEW AND APPROVAL

19 TAC §67.25

The State Board of Education (SBOE) proposes an amendment to §67.25, concerning state review and approval of instructional materials. The proposed amendment would establish a minimum threshold for standards alignment for instructional materials for enrichment subjects and courses and for supplemental instructional materials by defining the criteria to be used in the review and approval of instructional materials by the SBOE and the Texas Education Agency (TEA).

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), Chapter 31, addresses instructional materials in public education and permits the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials. House Bill (HB) 1605, 88th Texas Legislature, Regular Session, 2023, significantly revised TEC, Chapter 31, including several provisions under SBOE authority. The proposed amendment would establish a minimum threshold for standards alignment for instructional materials for enrichment subjects and courses by defining the criteria to be used in the review and approval of instructional materials.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 13, 2024 meeting.

FISCAL IMPACT: Todd Davis, associate commissioner for instructional strategy, has determined that for the first five years the proposal is in effect, there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation by establishing a minimum threshold for standards alignment for instructional materials for enrichment subjects and courses by defining the criteria to be used in the review and approval of instructional materials by the SBOE and TEA in order to implement HB 1605, 88th Texas Legislature, Regular Session, 2023.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Davis has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that adopted instructional materials continue to appropriately meet statutory and SBOE requirements prior to use by Texas teachers and students. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data or reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins October 11, 2024, and ends at 5:00 p.m. on November 12, 2024. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in November 2024 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 11, 2024.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §28.002(a), which identifies the subjects of the required curriculum; TEC, §31.003(a), as amended by House Bill (HB) 1605, 88th Texas Legislature, Regular Session, 2023, which permits the State Board of Education (SBOE) to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials;

TEC, §31.022, as amended by HB 1605, 88th Texas Legislature, Regular Session, 2023, which requires the SBOE to review instructional materials that have been provided to the board by the Texas Education Agency (TEA) under TEC, §31.023; and TEC, §31.023, as amended by HB 1605, 88th Texas Legislature, Regular Session, 2023, which requires the commissioner of education to establish, in consultation with and with the approval of the SBOE, a process for the annual review of instructional materials by TEA. In conducting a review under this section, TEA must use a rubric developed by TEA in consultation with and approved by the SBOE.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §28.002(a), and §§31.003(a), 31.022, and 31.023, as amended by House Bill 1605, 88th Texas Legislature, Regular Session, 2023.

§67.25. Consideration and Approval of Instructional Materials by the State Board of Education.

The State Board of Education (SBOE) shall review the results of the instructional materials reviews completed by a review panel and submitted by the commissioner of education in accordance with Texas Education Code (TEC), §31.022 and §31.023. Instructional materials may be placed on the list of approved instructional materials only if they meet the following criteria:

(1) for full-subject and partial-subject tier one instructional materials for foundation subjects as defined by TEC, §28.002(a)(1), the product components cover 100% of the Texas Essential Knowledge and Skills (TEKS) and applicable English Language Proficiency Standards (ELPS) for the specific grade level and subject area when the proclamation or request for instructional materials was issued. In determining the percentage of the TEKS and ELPS covered by instructional materials, each student expectation shall count as an independent element of the standards;

(2) for full-subject and partial-subject tier one instructional materials for enrichment subjects as defined by TEC, §28.002(a)(2), the product components cover 100% of the applicable TEKS for the specific grade level and subject area when the proclamation or request for instructional materials was issued. In determining the percentage of the TEKS covered by instructional materials, each applicable student expectation shall count as an independent element of the standards;

(3) for supplemental instructional materials as defined by TEC, §31.002(3), the publisher will indicate which TEKS are applicable, and the product and its components cover 100% of the applicable student expectations in the TEKS for the specific subject or course for which the materials are designed;

(4) [~~(2)~~] materials have been reviewed through the process required by TEC, §31.023;

(5) [~~(3)~~] materials are free from factual error, defined as a verified error of fact or any error that would interfere with student learning, including significant grammatical or punctuation errors;

(6) [~~(4)~~] materials meet the Web Content Accessibility Guidelines (WCAG) and meet the technical specifications of the Federal Rehabilitation Act, Section 508, as specified when a request for instructional materials or proclamation was issued;

(7) [~~(5)~~] materials conform to or exceed in every instance the latest edition of the Manufacturing Standards and Specifications for Textbooks (MSST), developed by the State Instructional Materials Review Association, when the proclamation or request for instructional materials was issued;

(8) [~~(6)~~] materials are compliant with the suitability standards adopted by the SBOE and are compliant with all applicable state laws; and

(9) [~~(7)~~] materials provide access to a parent portal as required by TEC, §31.154.

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

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Cristina De La Fuente-Valadez
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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING STATE PLAN FOR EDUCATING EMERGENT BILINGUAL STUDENTS

19 TAC §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226 - 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, 89.1265

The Texas Education Agency (TEA) proposes amendments to §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226 - 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265, concerning the state plan for educating emergent bilingual students. The proposed amendments would clarify terminology based on stakeholder feedback and codify current program practices and requirements. Additionally, the proposed amendment to §89.1226 would align with recommendations from the U.S. Department of Education (USDE) Office of English Language Acquisition regarding testing accommodations.

BACKGROUND INFORMATION AND JUSTIFICATION: Changes are proposed throughout 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter BB, Commissioner's Rules Concerning State Plan for Educating Emergent Bilingual Students, to clarify terms, including defining bilingual education to include both bilingual and English as a second language (ESL) programs; establishing an acronym for the term "emergent bilingual"; replacing the word "must" with the word "shall"; and referring to "home language" instead of "primary language" for alignment.

Section 89.1201 establishes the policy of the state for a student who has a home language other than English and who is identified as an emergent bilingual (EB) student. The proposed amendment to subsection (b) would clarify the goal of bilingual models to include dual language immersion (DLI) and transitional bilingual education. The proposed amendment to subsection (c) would clarify the goal of ESL program models to include content-based and pull-out.

Section 89.1203 establishes definitions. The proposed amendment would clarify terminology in paragraph (1) to include alternatives methods; align terminology in paragraph (3) regarding a "certified bilingual program teacher"; clarify in paragraph (5) that the goal of the content-based language instruction is used to develop the home or partner language and English of an EB student; establish in paragraph (6) that the two state-approved DLI program models are one-way DLI and two-way DLI; establish in paragraph (7) that dual-language instruction includes both DLI and transitional bilingual education programs; clarify in paragraph (9) that an ESL program includes both content-based and pull-out program models; clarify in paragraph (10) the definition of English language proficiency standards (ELPS); add new paragraph (12) to define "enrollment"; clarify exit criteria for an EB student in re-numbered paragraph (13); add new paragraph (14) to define "home language"; and delete the definition of "primary language" to align terminology from "primary" to "home" language.

Section 89.1205 establishes required bilingual and ESL programs. The proposed amendment to subsection (f) would combine existing information about what school districts are authorized to establish in addition to the required bilingual program.

Section 89.1207 establishes criteria for bilingual program exceptions and ESL program waivers. The proposed amendment would integrate bilingual program exceptions and ESL waivers, eliminating the need for separate subsections on exceptions and waivers. Proposed new subsection (d)(3) would include the term "affective" to align with §89.1210(b)(1)-(3). Proposed new subsection (d) would restructure existing text to further clarify application requirements and make conforming edits. Proposed new subsection (d)(3)(A) and (B) would specify the application requirements for EB students in a bilingual program or an ESL program. Proposed new subsection (f) would establish criteria for the approval of bilingual exceptions and ESL waivers. Proposed new subsection (f)(2) would clarify that the three approval requirements for a bilingual exception would also apply for approval of an ESL waiver.

Section 89.1210 establishes program content and design. The proposed amendment would align terminology.

Section 89.1215 establishes criteria for the home language survey. The proposed amendment would restructure the rule to further clarify the requirements.

Section 89.1220 establishes criteria for the language proficiency assessment committee (LPAC). Based on stakeholder feedback from educators, subsection (c) would be amended to clarify that all required members of an LPAC be present to make individualized student decisions. The proposed amendment to subsection (g)(2)(B) would allow the LPAC to recommend program participation based on available program models within the district for transferring EB students. Proposed new subsection (g)(2)(C) would clarify that parents have the right to begin to receive program services after previously indicating denial of services. The proposed amendment to subsection (g)(3)(A) and (B) would clarify LPAC criteria for ESL and bilingual programs rather than addressing language first and academic progress second. Additional proposed changes throughout the section would clarify terminology.

Section 89.1226 establishes criteria for testing and classification of EB students. A proposed amendment in subsection (h) would align with stakeholder feedback that an LPAC does not "determine," but instead "recommends," placement. The proposed amendment to subsection (i) would incorporate rule text to clarify that EB students with parental denials are eligible to receive linguistic or non-linguistic based designated supports or accommodations on the State of Texas Assessments of Academic Readiness (STAARÂ®) when recommended by the LPAC or any other committee. The proposed amendment would also clarify that the designated supports or accommodations cannot prevent an EB student from meeting reclassification criteria to align with the USDE consolidated Title III audit. The proposed amendment to subsection (i)(2) would clarify the assessment criteria for reclassification.

Section 89.1227 establishes minimum requirements for the DLI program model. The proposed amendment to subsection (a) would clarify requirements.

Section 89.1228 establishes criteria for two-way DLI program model implementation. The proposed amendment to subsection (b) would clarify the three eligibility categories of students participating in a two-way DLI program model, including EB students, reclassified EB students, and non-EB students. Re-numbered subsection (c)(5) would be updated to align with the dual-language instruction framework.

Section 89.1229 establishes general requirements for recognition of DLI program models. The proposed amendment would clarify terminology throughout the section.

Section 89.1230 establishes criteria for eligible students with disabilities. The proposed amendment would align terminology throughout the section.

Section 89.1233 establishes criteria for the participation of non-EB students. Based on stakeholder feedback, subsection (c) would be amended to clarify program participation percentages.

Section 89.1235 establishes criteria for facilities. The proposed amendment would restructure the rule to provide clarity.

Section 89.1240 establishes criteria for parental authority and responsibility. The proposed amendment would restructure the rule to provide clarity.

Section 89.1245 establishes staffing and staff development. The proposed amendment would clarify terminology throughout the section.

Section 89.1250 establishes criteria for required summer school programs. A proposed amendment to subsection (c) would align with TEC, §29.060, clarifying the required schedule for districts operating on a semester schedule as well as schedules other than semester.

Section 89.1265 establishes criteria for program evaluation. The proposed amendment would clarify and align terminology throughout the section.

FISCAL IMPACT: Justin Porter, associate commissioner and chief program officer for special populations, has determined that for the first five-year period the proposal is in effect, there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand existing regulations by updating terminology and adding into rule current program practices to provide clarity and alignment.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Porter has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be providing school districts with clarifications on terminology based on stakeholder feedback and codify current program practices and requirements. The proposed amendment to §89.1226 would align with recommendations from the USDE Office of English Language Acquisition regarding testing accommodations for students. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins October 11, 2024, and ends November 12, 2024. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 11, 2024. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §29.051, which establishes the state policy regarding bilingual and special language programs; TEC, §29.052, which establishes the definitions of an emergent bilingual student and parent; TEC, §29.053, which establishes the criteria for the establishment of bilingual education and special language programs; TEC, §29.054, which establishes the criteria for exceptions; TEC, §29.055, which establishes the criteria for program content and the method of instruction; TEC, §29.056, which establishes the criteria for enrollment of students in the program; TEC, §29.0561, which establishes the criteria for the evaluation of transferred students and reenrollment procedures; TEC, §29.057, which establishes the criteria for facilities and classes of bilingual education and special language programs; TEC, §29.058, which establishes the criteria for enrollment of students who do not have limited English proficiency; TEC, §29.059, which establishes the criteria for cooperation among districts to provide bilingual education and special language programs; TEC, §29.060, which establishes the criteria for preschool, summer school, and extended time programs; TEC, §29.061, which establishes the criteria for bilingual education and special language program teachers; TEC, §29.062, which establishes the criteria for monitoring compliance to evaluate the effectiveness of programs related to bilingual education and special language programs; TEC, §29.063, which establishes the criteria for language proficiency assessment committees; TEC, §29.064, which establishes the criteria for appeals; and TEC, §29.066, which establishes the criteria for a district's Public Education Information Management System (PEIMS) reporting requirements.

CROSS REFERENCE TO STATUTE. The amendments implements Texas Education Code (TEC), §§29.051, 29.052, 29.053, 29.054, 29.055, 29.056, 29.0561, 29.057, 29.058, 29.059, 29.060, 29.061, 29.062, 29.063, 29.064, and 29.066.

§89.1201. Policy.

(a) It is the policy of the state that every student in the state who has a home [~~primary~~] language other than English and who is identified as an emergent bilingual (EB) student shall be provided a full opportunity to participate in [~~a~~] bilingual education, to include bilingual and [~~or~~] English as a second language (ESL) programs [~~program~~], as required in Texas Education Code (TEC), Chapter 29, Subchapter B. To ensure equal educational opportunity, as required in TEC, §1.002(a), each school district shall:

(1) identify EB [~~emergent bilingual~~] students based on criteria established by the state;

(2) provide bilingual education, including bilingual and ESL programs, as integral parts of the general program as described in TEC, §4.002;

(3) seek appropriately certified teaching personnel to ensure that EB [~~emergent bilingual~~] students are afforded full opportunity to master the essential knowledge and skills required by the state; and

(4) assess for academic achievement and linguistic progress in accordance with TEC, Chapter 29, Subchapter B, to ensure accountability for EB [~~emergent bilingual~~] students and the schools that serve them.

(b) The goal of bilingual program models, including dual-language immersion and transitional bilingual education, [~~education programs~~] shall be to enable EB [~~emergent bilingual~~] students to develop home or partner [~~primary~~] language literacy and academic skills through the integrated use of content-based language [~~and~~] instructional methods to become proficient in listening, speaking, reading, and writing in the English language. Such programs shall include the mastery of grade level reading and language arts knowledge and skills in the home or partner language and in English, along with[~~,~~] mathematics, science, and social studies knowledge and skills

as integral parts of the academic goals for all students to enable EB [~~emergent bilingual~~] students to participate equitably in school.

(c) The goal of ESL program models, including content-based and pull-out, [~~programs~~] shall be to enable EB [~~emergent bilingual~~] students to become proficient in listening, speaking, reading, and writing in the English language through the integrated use of content-based language instructional methods. The ESL program shall include the mastery of grade level English reading and language arts, mathematics, science, and social studies knowledge and skills in English as integral parts of the academic goals for all students to enable EB [~~emergent bilingual~~] students to participate equitably in school.

(d) Bilingual [~~education~~] and ESL programs shall be integral parts of the total school program. Such programs shall use instructional approaches designed to meet the specific language needs of EB [~~emergent bilingual~~] students. The [~~basic~~] curriculum content of the programs shall be based on the Texas Essential Knowledge and Skills and the English Language Proficiency Standards [~~language proficiency standards~~] required by the state.

§89.1203. Definitions.

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

(1) Alternative methods [~~language program~~]--A temporary instructional plan that meets the affective, linguistic, and cognitive needs of emergent bilingual (EB) students and equips the teacher under a bilingual [~~education~~] exception or an English as a second language (ESL) waiver described in §89.1207 of this title (relating to Bilingual Program [~~Education~~] Exceptions and English as a Second Language Program Waivers) to align closely to the required bilingual or ESL program through the comprehensive professional development plan.

(2) Bilingual education allotment (BEA)--An adjusted basic funding allotment provided for each school district based on student average daily attendance in a bilingual [~~education~~] or an ESL program in accordance with Texas Education Code (TEC), §48.105.

(3) Certified bilingual program [~~education~~] teacher--A teacher holding bilingual certification and appropriately certified [~~in bilingual education as well as~~] for the grade level and content area. The term "certified bilingual program teacher" is synonymous with the term "professional bilingual educator" used in TEC, §29.063.

(4) Certified English as a second language teacher--A teacher appropriately certified in ESL as well as for the grade level and content area. The term "certified English as a second language teacher" as used in this subchapter is synonymous with the term "professional transitional language educator" used in TEC, §29.063.

(5) Content-based language instruction (CBLI)--An integrated approach to language instruction in which language is developed within the context of content delivery that is linguistically sustaining and is used across all programs for EB [~~emergent bilingual~~] students to develop the home or partner language and English.

(6) Dual language immersion (DLI) program--A state-approved bilingual program [~~model~~] in accordance with TEC, §29.066, that uses English and a partner language. The two state-approved DLI program models are one-way DLI and two-way DLI.

(7) Dual-language instruction--An educational approach that focuses on the use of English and the student's home or partner [~~primary~~] language for instructional purposes as described in TEC, §29.055, to include both DLI and transitional bilingual education (TBE) programs.

(8) Emergent bilingual (EB)--A student identified by the Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC) who is in the process of acquiring English and has another language as the student's [~~primary or~~] home language. This term is interchangeable with English learner as used in federal regulations and replaces the term "limited English proficient student" formerly used in TEC, Chapter 29, Subchapter B.

(9) English as a second language (ESL) program--A special language program in accordance with TEC, Chapter 29, Subchapter B, to include both content-based and pull-out program models. Another related term for an ESL program is "English as an additional language program."

(10) English language proficiency standards (ELPS)--The ELPS outline English language proficiency level descriptors and student expectations for EB students. School districts shall implement these standards as an integral part of each subject in the required curriculum. The ELPS are to be published along with the Texas Essential Knowledge and Skills for each subject in the required curriculum, as described in §74.4(a)(1) of this title (relating to English Language Proficiency Standards).

[~~(10) English language proficiency standards (ELPS)--Standards to be published along with the Texas Essential Knowledge and Skills for each subject in the required curriculum outlined in Chapter 74 of this title (relating to Curriculum Requirements), including foundation and enrichment areas, ELPS, and college and career readiness standards.~~]

(11) English proficient student--A former EB [~~emergent bilingual~~] student who has met reclassification as English proficient by the LPAC.

(12) Enrollment--Receiving instruction by attendance in a public school. This term does not apply to students who are registered but not yet receiving instruction.

(13) [~~(12)~~] Exit--The point at which an EB [~~when a~~] student is reclassified as English proficient and [~~no longer classified as an emergent bilingual student (i.e., the student is reclassified) and the student~~] ends bilingual or ESL program participation with LPAC recommendation and parental approval [~~and based on the recommendation of the LPAC~~]. The term "exit" as used in this subchapter is synonymous with the description in TEC, Chapter 29, Subchapter B, of a student having been "transferred out" [~~"transferring out"~~] of bilingual or special language programming. For the purpose of meeting the goals of a DLI program, the LPAC recommends that the EB student is reclassified as English proficient but continues [~~may recommend continued program~~] participation in the program to further develop biliteracy for the duration of the program for prekindergarten through Grade 12 [~~beyond reclassification~~].

(14) Home language--A language other than English that is indicated on the home language survey under §89.1215 of this title (relating to Home Language Survey) as being used at home, used by the child at home, or used by the child in a previous home setting.

(15) [~~(13)~~] Language allocation plan--A strategically developed and clearly communicated plan for a DLI program [~~model~~] that defines the percentage of language of instruction for each content area and grade level.

(16) [~~(14)~~] Language Proficiency Assessment Committee (LPAC) [~~proficiency assessment committee~~]--A designated group of committee members as described in §89.1220 of this title (relating to Language Proficiency Assessment Committee (LPAC)) and TEC, §26.063, that ensures the appropriate identification, placement, assessment, services, reclassification, and monitoring of EB [~~emergent bilin-~~

~~gual~~] students. The LPAC also meets in conjunction with all other committees related to programs and services for which an EB [~~emergent bilingual~~] student qualifies.

(17) [~~(15)~~] Non-emergent bilingual student--A student who has never [~~not~~] been classified as an EB [~~emergent bilingual~~] student by an [~~the~~] LPAC.

(18) [~~(16)~~] Paired teaching--A teaching partnership permissible in a DLI program model when half the content area instruction is in the partner language and half is in English (50/50 language allocation). One teacher provides content area instruction in the partner language while the second teacher provides content area instruction delivered in English. The teacher instructing in the partner language shall [~~must~~] hold bilingual [~~education~~] certification while the teacher instructing in English may hold either bilingual [~~education~~] or ESL certification.

(19) [~~(17)~~] Parent--The parent or legal guardian of the student in accordance with TEC, §29.052(2).

(20) [~~(18)~~] Partner language--The designated language of instruction other than English within a DLI program. The partner language within a DLI program may or may not be the home [~~primary~~] language of a DLI program student.

(21) [~~(19)~~] Prekindergarten--Students enrolled in a 3- or 4-year-old prekindergarten program as well as 3- or 4-year-old students enrolled in an early education setting.

[~~(20) Primary language--The language an emergent bilingual student is exposed to prior to entering school and uses mainly to communicate at home and school, also known as mother tongue, first language, native language, home language, or heritage language.~~]

(22) [~~(21)~~] Reclassification--The process by which the LPAC determines that an EB [~~emergent bilingual~~] student has met the appropriate criteria to be classified as English proficient, and the student enters year 1 of monitoring as indicated in the Texas Student Data System Public Education Information Management System.

(23) [~~(22)~~] School district--The term school district includes [~~A local education agency,~~] an open-enrollment charter school [~~,~~] or a district of innovation.

§89.1205. Required Bilingual [~~Education~~] and English as a Second Language (ESL) Programs.

(a) Each school district that has an enrollment of 20 or more students identified as emergent bilingual (EB) students in any language classification in the same grade level district-wide shall offer a bilingual [~~education~~] program as described in subsection (b) of this section for the EB [~~emergent bilingual~~] students in prekindergarten through the elementary grades with that language classification. "Elementary grades" shall include [~~at least~~] prekindergarten through Grade 5; Grade 6 [~~sixth grade~~] shall be included when clustered with elementary grades.

(b) A school district required to provide a bilingual [~~education~~] program as described in subsection (a) of this section shall offer dual-language instruction (English and home or partner [~~primary~~] language) in prekindergarten through the elementary grades, using one of the four bilingual program models described in §89.1210 of this title (relating to Program Content and Design).

(c) All EB [~~emergent bilingual~~] students for whom a school district is not required to offer a bilingual [~~education~~] program shall be provided an English as a second language (ESL) program [~~as described in subsection (d) of this section~~], regardless of the students' grade levels and home [~~primary~~] language, and regardless of the number of such students, except in cases where a district exercises the option described in subsection (f) [~~(g)~~] of this section.

(d) A school district required to provide an ESL program as described in subsection (c) of this section shall provide an ESL program using one of the two models described in §89.1210 of this title.

(e) School districts may join with other school districts to provide bilingual [~~education~~] or ESL programs.

(f) In addition to the required bilingual [~~and/or ESL~~] programs, school districts are also authorized to establish a bilingual [~~education~~] program:

(1) [~~even~~] if they have an enrollment of fewer than 20 students as described in [~~identified as emergent bilingual students in any language classification in the same grade level district-wide and are not required to do so under~~] subsection (a) of this section ; and [~~,~~]

(2) at grade levels in which the bilingual program is not required under subsection (a) of this section.

(g) Under the [~~this~~] authorization described in subsection (f) of this section, school districts shall adhere to all program requirements as described in §§89.1210 of this title, 89.1227 of this title (relating to Minimum Requirements for Dual Language Immersion Program Models [~~Model~~]), 89.1228 of this title (relating to Two-Way Dual Language Immersion Program Model Implementation), and 89.1229 of this title (relating to General Standards for Recognition of Dual Language Immersion Program Models).

[~~(g) In addition to the required bilingual and/or ESL programs, school districts are authorized to establish a bilingual education program at grade levels in which the bilingual education program is not required under subsection (a) of this section. Under this authorization, school districts shall adhere to all program requirements as described in §§89.1210, 89.1227, 89.1228, and 89.1229 of this title.~~]

§89.1207. Bilingual Program [~~Education~~] Exceptions and English as a Second Language (ESL) Program Waivers.

(a) Purpose. [~~Bilingual education program.~~]

[~~(1)~~] [~~Exceptions.~~] A school district that is unable to provide a bilingual and/or an English as a second language (ESL) [~~education~~] program as required by §89.1205(a) and (c) of this title (relating to Required Bilingual [~~Education~~] and English as a Second Language (ESL) Programs) because of an insufficient number of appropriately certified teachers shall request from the commissioner of education an exception to the bilingual [~~education~~] program and/or a waiver for the ESL program and the approval of [~~a~~] temporary alternative methods [~~language program~~] as defined in §89.1203(1) of this title (relating to Definitions) that align [~~aligns~~] as closely as possible to the required bilingual or ESL program.

(b) Funding. Emergent bilingual (EB) students with parental approval for program participation under a bilingual [~~education~~] exception or an ESL waiver will be included in the bilingual education allotment (BEA) designated for temporary alternative methods [~~an alternative language program~~].

(c) Duration. The approval of a bilingual exception or an ESL waiver [~~an exception to the bilingual education program~~] shall be valid only during the school year for which it was granted , which includes summer school.

(d) Application requirements. The bilingual exception and/or ESL waiver application shall [~~A request for a bilingual education program exception must~~] be submitted by November 1 and shall include:

(1) [~~(A)~~] a statement of the reasons the school district is unable to provide a sufficient number of appropriately certified teach-

ers to offer the bilingual and/or ESL [~~education~~] program with supporting documentation as described in Texas Education Code (TEC), §29.054(b)(1), (2), and (3);

(2) [~~(B)~~] a description of the temporary alternative [~~language program and~~] methods to meet the affective, linguistic, and cognitive needs of EB [~~the emergent bilingual~~] students, including the manner through which the students will be given opportunity to master the essential knowledge and skills required by Chapter 74 of this title (relating to Curriculum Requirements) to include foundation and enrichment areas, English language proficiency standards (ELPS), and college and career readiness standards (CCRS);

(3) [~~(C)~~] an assurance that appropriately certified teachers available in the school district will be assigned to [~~grade levels beginning at prekindergarten followed successively by subsequent grade levels to~~] ensure [~~effective early literacy development and~~] that the affective, linguistic, and cognitive [~~academic~~] needs of EB [~~emergent bilingual~~] students with beginning and intermediate levels of English proficiency are served on a priority basis by doing the following: [~~;~~]

(A) in a bilingual program, assigning appropriately certified teachers beginning in prekindergarten followed successively by subsequent grade levels to ensure effective early literacy development; or

(B) in an ESL program, assigning appropriately certified teachers to serve students with the highest linguistic needs at any grade level;

(4) [~~(D)~~] an assurance that the school district will implement a comprehensive professional development plan that:

(A) [~~(i)~~] is ongoing and targets the development of the knowledge, skills, and competencies needed to serve the needs of EB [~~emergent bilingual~~] students;

(B) [~~(ii)~~] includes the teachers who are not certified or not appropriately certified who are assigned to implement the temporary alternative methods [~~language program~~] that align [~~aligns~~] closely to the required bilingual or ESL program; and

(C) [~~(iii)~~] may include additional teachers who work with EB [~~emergent bilingual~~] students;

(5) [~~(E)~~] an assurance that at least 10% of the total BEA [~~bilingual education allotment~~] shall be used to fund the comprehensive professional development plan required under paragraph (4) of this subsection [~~subparagraph (D) of this paragraph~~] when applying for a bilingual [~~education~~] exception and/or an ESL[~~, an English as a second language (ESL)~~] waiver[~~, or both~~];

(6) [~~(F)~~] an assurance that the school district will develop an action plan [~~take actions~~] to ensure that the programs [~~program~~] required under §89.1205(a) and (c) of this title will be provided the subsequent year, including its plans for recruiting an adequate number of appropriately certified teachers to eliminate the need for subsequent exception waivers [~~exceptions~~] and measurable targets for the subsequent year as required by TEC, §29.054(b)(4); and

(7) [~~(G)~~] an assurance that the school district shall satisfy the additional reporting requirements described in §89.1265(c) of this title (relating to Program Evaluation).

(e) [~~(2)~~] School district responsibilities [~~Documentation~~]. A school district submitting a bilingual education exception and/or an ESL waiver shall maintain written records of all documents supporting the submission and assurances listed in subsection (d) of this section [~~paragraph (1) of this subsection~~], including:

(1) [~~(A)~~] a description of the temporary [~~proposed~~] alternative methods [~~language program~~] designed to meet the affective, linguistic, and cognitive needs of the EB [~~emergent bilingual~~] students;

(2) [~~(B)~~] the number of teachers for whom a bilingual [~~education~~] exception or an ESL waiver is needed by grade level and per campus;

(3) [~~(C)~~] a copy of the school district's comprehensive professional development plan; [~~and~~]

(4) [~~(D)~~] a copy of the BEA [~~bilingual allotment~~] budget documenting that a minimum of 10% of the funds were used to fund the comprehensive professional development plan ; and[~~.~~]

(5) a description of the actions taken to recruit an adequate number of appropriately certified teachers.

(f) [~~(3)~~] Approval of bilingual exceptions and ESL waivers. A bilingual exception and/or an ESL waiver [~~Bilingual education program exceptions~~] will be granted by the commissioner if any one of the following criteria is met for each program [~~the requesting school district~~]:

(1) For a bilingual exception, the school district:

(A) meets or exceeds the state average for EB [~~emergent bilingual~~] student performance on the required state assessments;

(B) meets the requirements and measurable targets of the action plan described in subsection (d)(6) of this section [~~paragraph (1)(F) of this subsection~~] submitted the previous year and approved by the Texas Education Agency (TEA); or

(C) reduces by 25% the number of teachers under the [~~exception for~~] bilingual exception [~~programs~~] when compared to the number of teachers under the bilingual exception [~~exceptions granted~~] the previous year.

(2) For an ESL waiver, the school district:

(A) meets or exceeds the state average for EB student performance on the required state assessments;

(B) meets the requirements and measurable targets of the action plan described in subsection (d)(6) of this section submitted the previous year and approved by TEA; or

(C) reduces by 25% the number of teachers under the ESL waiver when compared to the number of teachers under the ESL waiver the previous year.

(g) [~~(4)~~] Denial of bilingual exceptions and ESL waivers. A school district denied a bilingual [~~education program~~] exception and/or an ESL waiver shall [~~must~~] submit to the commissioner a detailed action plan for complying with required regulations for the following school year.

(h) [~~(5)~~] Appeals. A school district denied a bilingual [~~education program~~] exception and/or an ESL waiver may appeal to the commissioner or the commissioner's designee. The decision of the commissioner or commissioner's designee is final and may not be appealed further.

(i) [~~(6)~~] Special accreditation investigation. The commissioner may authorize a special accreditation investigation under TEC, §39.003 [~~§39.057~~], if a school district is denied a bilingual [~~education program~~] exception and/or an ESL waiver for more than three consecutive years.

(j) [~~(7)~~] Sanctions. Based on the results of a special accreditation investigation, the commissioner may take appropriate action under TEC, §39A.002 [~~§39.102~~].

[~~(b) ESL program.~~]

[~~(1) Waivers. A school district that is unable to provide an ESL program as required by §89.1205(c) of this title because of an insufficient number of appropriately certified teachers shall request from the commissioner a waiver of the certification requirements for each teacher who will provide instruction in ESL for emergent bilingual students and the approval of a temporary alternative language program as defined in §89.1203(1) of this title that aligns closely to the required ESL program. Emergent bilingual students with parental approval for program participation under an ESL waiver will be included in the bilingual education allotment designated for an alternative language program. The approval of a waiver of certification requirements shall be valid only during the school year for which it was granted. A request for an ESL program waiver must be submitted by November 1 and shall include:~~]

[~~(A) a statement of the reasons the school district is unable to provide a sufficient number of appropriately certified teachers to offer the ESL program as described in TEC, §29.054(b)(1), (2), and (3);~~]

[~~(B) a description of the alternative language program, including the manner in which the teachers in the ESL program will meet the affective, linguistic, and cognitive needs of the emergent bilingual students, including the manner through which the students will be given opportunity to master the essential knowledge and skills required by Chapter 74 of this title to include foundation and enrichment areas, ELPS, and CCRS;~~]

[~~(C) an assurance that appropriately certified teachers available in the school district will be assigned to grade levels beginning at prekindergarten followed successively by subsequent grade levels in the elementary school campus and, if needed, secondary campuses, to ensure that the linguistic and academic needs of the emergent bilingual students with beginning and intermediate levels of English proficiency are served on a priority basis;~~]

[~~(D) an assurance that the school district shall implement a comprehensive professional development plan that:~~]

~~(i)~~ ~~is ongoing and targets the development of the knowledge, skills, and competencies needed to serve the needs of emergent bilingual students;~~]

~~(ii)~~ ~~includes the teachers who are not certified or not appropriately certified who are assigned to implement the proposed alternative language program; and~~]

~~(iii)~~ ~~may include additional teachers who work with emergent bilingual students;~~]

[~~(E) an assurance that at least 10% of the total bilingual education allotment shall be used to fund the comprehensive professional development plan required under subparagraph (D) of this paragraph when applying for a bilingual education exception, an ESL waiver, or both;~~]

[~~(F) an assurance that the school district will take actions to ensure that the program required under §89.1205(c) of this title will be provided the subsequent year, including its plans for recruiting an adequate number of appropriately certified teachers to eliminate the need for subsequent waivers as required by TEC, §29.054(b)(4); and~~]

[~~(G) an assurance that the school district shall satisfy the additional reporting requirements described in §89.1265(c) of this title.~~]

[~~(2) Documentation. A school district submitting an ESL waiver shall maintain written records of all documents supporting the submission and assurances listed in paragraph (1) of this subsection, including:~~]

[~~(A) a description of the proposed alternative language program designed to meet the affective, linguistic, and cognitive needs of the emergent bilingual students;~~]

[~~(B) the name and teaching assignment, per campus, of each teacher who is assigned to implement the ESL program and is under a waiver and the estimated date for the completion of the ESL supplemental certification, which must be completed by the end of the school year for which the waiver was requested;~~]

[~~(C) a copy of the school district's comprehensive professional development plan;~~]

[~~(D) a copy of the bilingual allotment budget documenting that a minimum of 10% of the funds were used to fund the comprehensive professional development plan; and~~]

[~~(E) a description of the actions taken to recruit an adequate number of appropriately certified teachers.~~]

[~~(3) Approval of waivers. ESL waivers will be granted by the commissioner if the requesting school district:~~]

[~~(A) meets or exceeds the state average for emergent bilingual student performance on the required state assessments; or~~]

[~~(B) meets the requirements and measurable targets of the action plan described in paragraph (1)(G) of this subsection submitted the previous year and approved by TEA.~~]

[~~(4) Denial of waivers. A school district denied an ESL program waiver must submit to the commissioner a detailed action plan for complying with required regulations for the following school year.~~]

[~~(5) Appeals. A school district denied an ESL waiver may appeal to the commissioner or the commissioner's designee. The decision of the commissioner or commissioner's designee is final and may not be appealed further.~~]

[~~(6) Special accreditation investigation. The commissioner may authorize a special accreditation investigation under TEC, §39.057, if a school district is denied an ESL waiver for more than three consecutive years.~~]

[~~(7) Sanctions. Based on the results of a special accreditation investigation, the commissioner may take appropriate action under TEC, §39.102.~~]

§89.1210. Program Content and Design.

(a) Each school district required to offer [~~a~~] bilingual education through bilingual or English as a second language (ESL) program models shall provide each emergent bilingual (EB) student the opportunity to be enrolled in the required program at their [~~his or her~~] grade level. Each student's level of proficiency shall be designated by the Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC) in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee (LPAC)). The school district shall accommodate the instruction, pacing, and materials to ensure that EB [~~emergent bilingual~~] students have a full opportunity to master the essential knowledge and skills of the required curriculum, which includes the Texas Essential Knowledge and Skills (TEKS) and English language proficiency standards (ELPS).

Students participating in [~~the~~] bilingual [~~education~~] program models may demonstrate their mastery of the essential knowledge and skills in either the home or partner [~~their primary~~] language or in English for each content area.

(1) Bilingual [~~A bilingual education~~] program models [~~of instruction~~] established by a school district shall be [~~a~~] full-time programs [~~program~~] of dual-language instruction (English and home or partner [~~primary~~] language) that provides [~~provides~~] for learning academic and literacy skills in the student's home or program partner [~~primary~~] language [~~of the students enrolled in the program~~] and for carefully structured and sequenced mastery of English language skills under Texas Education Code (TEC), §29.055(a), throughout the elementary grades and beyond if the district so chooses as defined in §89.1205(a) of this title (relating to Required Bilingual and English as a Second Language (ESL) Programs).

(2) [~~An~~] ESL program models [~~of instruction~~] established by a school district shall be programs [~~a program~~] of intensive instruction in English in which ESL teachers recognize and address language differences in accordance with TEC, §29.055(a), in prekindergarten through Grade 12.

(b) Bilingual [~~The bilingual education program~~] and ESL program models shall be integral parts of the general educational program required under Chapter 74 of this title (relating to Curriculum Requirements) to include foundation and enrichment areas, ELPS, and college and career readiness standards. In bilingual program models [~~education programs~~], school districts shall purchase instructional materials in all [~~both~~] program languages with the district's instructional materials allotment or otherwise acquire instructional materials for use in bilingual program [~~education~~] classes in accordance with TEC, §31.029(a). Instructional materials for bilingual [~~education~~] programs on the list adopted by the commissioner of education, as provided by TEC, §31.0231, may be used as curriculum tools to enhance the learning process. The school district shall ensure ongoing collaboration between bilingual and ESL programs and the general education programs to provide equitable educational access for all learners [~~provide for ongoing coordination between the bilingual/ESL program and the general educational program~~]. Bilingual [~~The bilingual education~~] and ESL programs shall address the affective, linguistic, and cognitive needs of EB [~~emergent bilingual~~] students as follows.

(1) Affective.

(A) EB [~~Emergent bilingual~~] students in a bilingual program shall be provided instruction using content-based language instructional methods in English and/or their home or partner [~~primary~~] language to acclimate students to the school environment and to develop academic language skills, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to consider the students' learning experiences and shall incorporate the cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(B) EB [~~Emergent bilingual~~] students in an ESL program shall be provided instruction using content-based language instructional methods in English to acclimate students to the school environment and to develop academic language skills, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to incorporate the students' home [~~primary~~] languages and learning experiences and shall incorporate the cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(2) Linguistic.

(A) EB [~~Emergent bilingual~~] students in a bilingual program shall be provided targeted and intentional academic language instruction to develop proficiency in listening, speaking, reading, and writing in both English and the home or partner [~~their primary~~] language. The instruction in both languages shall be structured to ensure that the students develop a strong literacy foundation and master the required essential knowledge and skills and higher-order thinking skills in all subjects, providing individualized linguistically accommodated content instruction commensurate with the students' language proficiency levels. The ELPS student expectations are provided for English development in conjunction with the TEKS.

(B) EB [~~Emergent bilingual~~] students in an ESL program shall be provided targeted and intentional academic language instruction to develop proficiency in listening, speaking, reading, and writing in the English language. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects, providing individualized linguistically accommodated content instruction commensurate with the students' language proficiency levels. The ELPS student expectations are provided for English development in conjunction with the TEKS.

(3) Cognitive.

(A) EB [~~Emergent bilingual~~] students in a bilingual program shall be provided instruction in reading and language arts, mathematics, science, and social studies in both the home or partner [~~their primary~~] language and English, using content-based language instructional methods in either the home or partner [~~their primary~~] language, English, or both, depending on the program model(s) implemented by the district. The content area instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(B) EB [~~Emergent bilingual~~] students in an ESL program shall be provided instruction in English in reading and language arts, mathematics, science, and social studies using content-based language instructional methods. The instruction in all academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.

(c) Bilingual programs [~~The bilingual education program~~] shall be implemented through at least one of the following program models.

(1) Transitional bilingual/early exit is a bilingual program model in which [~~students~~] identified EB [~~as emergent bilingual~~] students are served in both English and the students' home [~~primary~~] language and are prepared to meet reclassification criteria to be successful in English instruction with no second language acquisition supports not earlier than two or later than five years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b)(1), for the assigned grade level and content area. The goal of early-exit transitional bilingual education is for program participants to use their home [~~primary~~] language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' home [~~primary~~] language and English using content-based language instruction methods.

(2) Transitional bilingual/late exit is a bilingual program model in which [~~students~~] identified EB [~~as emergent bilingual~~] students are served in both English and the students' home [~~primary~~] language and are prepared to meet reclassification criteria to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction in this program is delivered by a teacher appro-

priately certified in bilingual education under TEC, §29.061(b)(2), for the assigned grade level and content area. The goal of late-exit transitional bilingual education is for program participants to use their home [primary] language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' home [primary] language and English through content-based language instruction.

(3) Dual language immersion/one-way is a bilingual/biliteracy program model in which [students] identified EB [as emergent bilingual] students are served in both English and the program's partner language and are prepared to meet reclassification criteria in order to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction provided in the partner language and English is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061. When the instructional time for both the partner language and English is 50%, a paired-teaching arrangement may be utilized in which instruction provided in English may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061. The goal of one-way dual language immersion is for program participants to attain bilingualism and biliteracy in English and the partner language. This model provides ongoing instruction in literacy and academic content through content-based language instruction in English as well as the program's partner [students' primary] language, with at least half of the instruction delivered in the program's partner [students' primary] language for the duration of the program.

(4) Dual language immersion/two-way is a bilingual/biliteracy program model in which [students] identified EB [as emergent bilingual] students are integrated with non-EB [non-emergent bilingual] students and are served in both English and the program's partner language and are prepared to meet reclassification criteria in order to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction provided in English and the partner language is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061. When the instructional time for both the partner language and English is 50%, a paired-teaching arrangement may be utilized in which instruction provided in English may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061. The goal of two-way dual language immersion is for program participants to attain bilingualism and biliteracy in English as well as the partner language. This model provides ongoing instruction in literacy and academic content through content-based language instruction in English and the partner language with at least half of the instruction delivered in the program's partner language for the duration of the program.

(d) The ESL program shall be implemented through one of the following program models.

(1) An ESL/content-based program model is an English acquisition program that serves [students] identified EB [as emergent bilingual] students through English instruction provided by a teacher appropriately certified in ESL under TEC, §29.061(c), using content-based language instruction methods in reading and language arts, mathematics, science, and social studies. The goal of content-based ESL is for program participants [emergent bilingual students] to attain full proficiency in English in order to participate equitably in school.

(2) An ESL/pull-out program model is an English acquisition program that serves [students] identified EB [as emergent bilingual] students through English instruction using content-based language instruction methods provided by an appropriately certified ESL teacher under TEC, §29.061(c), in [through English] reading and language arts in a pull-out or inclusionary delivery setting. The goal of ESL pull-out is for program participants [emergent bilingual students] to attain full proficiency in English in order to participate equitably in school.

(e) Except in the courses specified in subsection (f) of this section, content-based language instructional methods, which may involve the use of the students' home or the program's partner [primary] language, may be provided in any of the courses or electives required for promotion or graduation to assist program participants in mastering [students identified as emergent bilingual students to master] the essential knowledge and skills for the required subject(s). The use of content-based language instruction shall not impede the awarding of credit toward meeting promotion or graduation requirements.

(f) In subjects such as art, music, and physical education, EB [emergent bilingual] students shall participate with their non-EB [non-emergent bilingual] peers in general education classes provided in the subjects. As noted in TEC, §29.055(d), elective courses included in the curriculum may be taught in a [partner] language other than English. The school district shall ensure that EB [emergent bilingual] students enrolled in bilingual [education] and ESL programs have a meaningful opportunity to participate with non-EB [non-emergent bilingual] peers in all extracurricular activities.

(g) The required bilingual [education] or ESL program shall be provided to every EB [emergent bilingual] student with parental approval until such time that the student meets reclassification criteria as described in §89.1226(i) of this title (relating to Testing and Classification of Students) or graduates from high school. Parental approval is required when the LPAC recommends continuing [continued] dual language immersion program participation beyond reclassification.

§89.1215. Home Language Survey.

(a) For each new student enrolling for the first time in a Texas public school in any grade from prekindergarten through Grade 12, the Texas Education Agency (TEA)-developed home language survey shall be administered. This home language survey will serve as the original and only home language survey throughout the student's educational experience in Texas public schools. School districts shall:

(1) ensure that the student's parent understands the language used in the survey and its implications;

(2) require that the survey be signed by the student's parent for each student in prekindergarten through Grade 8 or by the student in Grades 9-12 as permitted under Texas Education Code, §29.056(a)(1);[.]

(3) ensure the student's parent is aware of the benefits of bilingual and ESL programs; and

(4) maintain the [It is the school district's responsibility to ensure that the student's parent understands the language used in the survey and its implications. The] original copy of the survey [shall be kept] in the student's permanent record and transfer it [transferred] to any subsequent Texas public school districts in which the student enrolls.

(b) The TEA-developed home language survey shall be administered in English and a language that the parents can understand. The home language survey shall include the following questions.

(1) "Which languages are used at home?"

(2) "Which languages are used by the child at home?"

(3) "If the child had a previous home setting, which languages were used? If there was no previous home setting, answer Not Applicable (N/A)."

(c) If any response on the home language survey indicates that a language other than English is or was used for communication, the student shall be tested in accordance with §89.1226 of this title (relating to Testing and Classification of Students).

(d) For students previously enrolled in a Texas public school, the receiving district shall secure the student records, including the original home language survey and language proficiency assessment committee documentation as described in §89.1220(l) of this title (relating to Language Proficiency Assessment Committee (LPAC)), as applicable. All attempts to contact the sending district to request records shall be documented. Multiple attempts to obtain the student's original home language survey shall be made.

(e) If a parent determines an error was made when completing the original home language survey, the parent may request a correction only if:

(1) the student has not yet been assessed for English proficiency; and

(2) corrections are made within two calendar weeks of the student's initial enrollment date in Texas public schools.

§89.1220. Language Proficiency Assessment Committee (LPAC).

(a) School districts shall by local board policy establish and operate one or more Language Proficiency Assessment Committees [~~language proficiency assessment committees~~] (LPACs). The school district shall have on file a policy and procedures for the selection, appointment, and orientation of members of the LPAC(s).

(b) The LPAC shall include an appropriately certified bilingual educator (for students served through a bilingual [~~education~~] program), an appropriately certified English as a second language (ESL) educator (for students served through an ESL program), a parent of an emergent bilingual (EB) student participating in a bilingual or ESL program, and a campus administrator in accordance with Texas Education Code (TEC), §29.063.

(c) In addition to the three required members of the LPAC, the school district may add other [~~trained~~] members to the committee. All required members of an LPAC must be present either in person or virtually to make individualized student decisions.

(d) No parent serving on the LPAC shall be an employee of the school district.

(e) A school district shall establish and operate a sufficient number of LPACs to enable them to discharge their duties within four calendar weeks of the enrollment of an EB [~~emergent bilingual~~] student.

(f) All members of the LPAC, including parents, shall be acting for the school district and shall observe all laws and rules governing confidentiality of information concerning individual students. The school district shall be responsible for the orientation of all members of the LPAC, including the parents. The LPAC may use alternative meeting methods, such as phone or video conferencing and the use of electronic signatures that adhere to district policy.

(g) Upon a student's initial enrollment in Texas public schools, a student's transfer from a previous Texas public school district, and at the end of each school year, the LPAC shall review all pertinent information on all potential and identified EB [~~emergent bilingual~~] students, including EB [~~emergent bilingual~~] students with a parental denial of program participation, in accordance with §89.1226 of this title (relating to Testing and Classification of Students).

(1) For students initially enrolling in Texas public schools, the LPAC shall:

(A) designate the language proficiency level of each EB [~~emergent bilingual~~] student in accordance with the guidelines issued pursuant to §89.1226(b)-(f) of this title;

(B) recommend, subject to parental approval, the initial instructional placement of each EB [~~emergent bilingual~~] student in the required bilingual or ESL program without restricting access due to scheduling, staffing, or class size constraints; and

(C) facilitate the participation of EB [~~emergent bilingual~~] students in other [~~special~~] programs for which they are eligible while ensuring full access to the language program required under TEC, §29.053.

(2) For transferring students previously enrolled in a Texas public school district, the LPAC shall:

(A) review permanent record and LPAC documentation from the previous Texas school district to determine if the student has been identified as an EB [~~emergent bilingual~~] student based on the original home language survey and initial identification process;

(B) identify previous [~~determine the continuation of the required bilingual or ESL~~] program participation with parental approval and recommend appropriate program placement based on student data and available program models [~~for students previously identified as emergent bilingual~~] or determine the need for monitoring of students who have previously met reclassification and are in their first two years of monitoring;

(C) inform parents who have previously denied program services of recommended bilingual or ESL programs available in the current district;

(D) [~~(C)~~] review linguistic progress and academic achievement data of each EB [~~emergent bilingual~~] student to inform instructional practices; and

(E) [~~(D)~~] facilitate the participation of EB [~~emergent bilingual~~] students in other [~~special~~] programs for which they are eligible while ensuring full access to the language program required under TEC, §29.053.

(3) At the end of the school year, for all identified EB [~~emergent bilingual~~] students, including EB [~~emergent bilingual~~] students with a parental denial of program participation, the LPAC shall:

(A) review English language proficiency progress [~~in English~~] and academic achievement data in English for ESL program students[~~, to the extent possible, the primary language of each emergent bilingual student~~];

(B) review English and home/partner language progress as well as academic achievement data in English and the home/partner language for bilingual program students[~~, to the extent possible, the primary language of each emergent bilingual student~~];

(C) reclassify eligible EB [~~emergent bilingual~~] students as English proficient in accordance with the criteria described in §89.1226(i) of this title;

(D) recommend exit from program of reclassified English proficient students, pending parental approval, or continuation of program participation for reclassified students participating in a dual

language immersion one-way or two-way program model, according to the goals of the program; and

(E) prepare parental reports on student progress for all identified EB [~~emergent bilingual~~] students to be provided to parents within the first 30 calendar days after the beginning of the next school year, which include data on linguistic and academic progress, benefits of bilingual or ESL program participation, and the criteria for reclassification as English proficient.

(h) The LPAC shall give written notice to the student's parent, informing the parent that the student has been identified as an EB [~~emergent bilingual~~] student and requesting approval to place the student in the required bilingual [~~education~~] or ESL program not later than the 10th calendar day after the date of the student's identification [~~classification~~] in accordance with TEC, §29.056. The notice shall include information about the benefits of the recommended bilingual [~~education~~] or ESL program [~~for which the student has been recommended~~] and that it is an integral part of the school program.

(i) Before the administration of the state criterion-referenced test each year, the LPAC shall determine the appropriate assessment option for each EB [~~emergent bilingual~~] student as outlined in Chapter 101, Subchapter AA, of this title (relating to Commissioner's Rules Concerning the Participation of English Language Learners in State Assessments).

(j) Pending completion of the identification process, receipt of LPAC documentation for transferring students, or parental approval of an identified EB [~~emergent bilingual~~] student's placement into the bilingual [~~education~~] or ESL program recommended by the LPAC, the school district shall place the student in the recommended program. Only EB [~~emergent bilingual~~] students with parental approval for bilingual or ESL program participation will be included in the bilingual education allotment (BEA).

(k) The LPAC shall monitor the academic progress of each student, including any student who previously had a parental denial of program participation, who has met criteria for reclassification in accordance with TEC, §29.056(g), for the first two years after reclassification. If the student earns a failing grade in a subject in the foundation curriculum under TEC, §28.002(a)(1), during any grading period in the first two school years after the student is reclassified, the LPAC shall determine, based on the student's English [~~second~~] language acquisition needs, whether the student may require targeted instruction or, after careful consideration of multiple linguistic and academic data points, should be reconsidered for placement in a bilingual [~~education~~] or ESL program. In accordance with TEC, §29.0561, the LPAC shall review the student's performance and consider, at a minimum, the following:

(1) the total amount of time the student was enrolled in a bilingual [~~education~~] or ESL program;

(2) the student's grades each grading period in each subject in the foundation curriculum under TEC, §28.002(a)(1);

(3) the student's performance on each assessment instrument administered under TEC, §39.023(a) or (c);

(4) the number of credits the student has earned toward high school graduation, if applicable; and

(5) any disciplinary actions taken against the student under TEC, Chapter 37, Subchapter A (Alternative Settings for Behavior Management).

(l) The student's permanent record shall contain documentation of all actions impacting the EB [~~emergent bilingual~~] student.

(1) Documentation shall include:

(A) the original home language survey;

(B) the identification [~~of the student~~] as an EB [~~emergent bilingual~~] student;

(C) the designation of the student's level of language proficiency;

(D) the recommendation of program placement;

(E) parental approval or denial of placement into the program;

(F) the date of placement in the program;

(G) assessment information as outlined in Chapter 101, Subchapter AA, of this title;

(H) additional instructional linguistic accommodations provided to address the specific language needs of the student;

(I) the date of reclassification and the date of exit from the program with parental approval; and

(J) the results of monitoring for academic success, including students formerly identified [~~classified~~] as EB [~~emergent bilingual~~] students, as required under TEC, §29.063(c)(4).

(2) Current documentation as described in paragraph (1) of this subsection shall be forwarded in the same manner as other student records to another school district in which the student enrolls.

(m) A school district may place a student in or exit a student from a program without written approval of the student's parent if:

(1) the student is 18 years of age or has had the disabilities of minority removed;

(2) the parent provides approval through a phone conversation or e-mail that is documented in writing and retained; or

(3) an adult who the school district recognizes as standing in parental relation to the student provides written approval. This may include a foster parent or employee of a state or local governmental agency with temporary possession or control of the student.

§89.1226. Testing and Classification of Students.

(a) The single state-approved English language proficiency test for identification of emergent bilingual (EB) students described in subsection (c) of this section shall be used as part of the standardized, statewide identification process.

(b) Within four calendar weeks of initial enrollment in a Texas public school, a student with a language other than English indicated on the home language survey shall be administered the state-approved English language proficiency test for identification as described in subsection (c) of this section and shall be identified as an EB student [~~emergent bilingual~~] and recommended for placement into the required bilingual [~~education~~] or English as a second language (ESL) program in accordance with the criteria listed in subsection (f) of this section.

(c) To identify EB [~~emergent bilingual~~] students, school districts shall administer to each student who has a language other than English as identified on the home language survey:

(1) in prekindergarten through Grade 1, the listening and speaking components of the state-approved English language proficiency test for identification; and

(2) in Grades 2-12, the listening, speaking, reading, and writing components of the state-approved English language proficiency test for identification.

(d) School districts that provide a bilingual [~~education~~] program at the elementary grades shall administer a language proficiency test in the home [~~primary~~] language of the student who is eligible to be served in the bilingual [~~education~~] program. If the home [~~primary~~] language of the student is Spanish, the school district shall administer the Spanish version of the state-approved language proficiency test for identification. If a state-approved language proficiency test for identification is not available in the home [~~primary~~] language of the student, the school district shall determine the student's level of proficiency using informal oral language assessment measures.

(e) All language proficiency testing shall be administered by professionals or paraprofessionals who are proficient in the language of the test and trained in the language proficiency testing requirements of the test publisher.

(f) For placement into a bilingual [~~education~~] or ESL program, a student shall be identified as an EB student [~~emergent bilingual~~] using the following criteria.

(1) In prekindergarten through Grade 1, the student's score(s) from the listening and/or speaking components on the state-approved English language proficiency test for identification is/are below the level designated for indicating English proficiency.

(2) In Grades 2-12, the student's score(s) from the listening, speaking, reading, and/or writing components on the state-approved English language proficiency test for identification is/are below the level designated for indicating English proficiency.

(g) A student shall be identified as EB [~~emergent bilingual~~] if the student's beginning English language skills interfere with the completion of the English language proficiency assessment described in subsection (c) of this section.

(h) The Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC), in conjunction with the admission, review, and dismissal (ARD) committee, shall identify a student as EB [~~emergent bilingual~~] if the student's disabilities interfere with the completion of the English language proficiency assessment described in subsection (c) of this section. The [~~decision for placement into a~~] bilingual [~~education~~] or ESL program placement recommendation shall be determined [~~recommended~~] by the LPAC, in conjunction with the ARD committee, in accordance with §89.1220(f) of this title (relating to Language Proficiency Assessment Committee (LPAC)), ensuring access to both the bilingual [~~education~~] or ESL program and the special education and related services needed to provide a free, appropriate public education as identified in the student's individualized education program.

(i) An EB [~~emergent bilingual~~] student may be reclassified as English proficient only at the end of the school year in which a student routinely demonstrates readiness for reclassification as English proficient and the ability to successfully participate in grade level content instruction that is delivered with no second language acquisition supports. EB students, including those with parental denials, are eligible for linguistic or non-linguistic based designated supports or accommodations on the state criterion-referenced English language arts and reading assessment instrument when recommended by the LPAC or any other committee. These designated supports or accommodations do not prevent an EB student from meeting reclassification criteria. An EB student reclassifies as English proficient when all three of the following criteria are met [~~This determination shall be based upon all of the following~~]:

(1) a composite proficiency rating, which includes ratings in the areas of listening, speaking, reading, and writing, on the state-approved English language proficiency test for reclassification that is designated for indicating English proficiency;

(2) passing standard met on the English language arts and reading assessment instrument under Texas Education Code (TEC), §39.023(a) or (c), or, for students at grade levels not assessed by the aforementioned [~~reading~~] assessment instruments [~~instrument~~], a score at or above the 40th percentile on both the English reading and the English language arts sections of the state-approved norm-referenced standardized achievement instrument; and

(3) the results of a subjective teacher evaluation using the state's standardized rubric.

(j) An EB [~~emergent bilingual~~] student may not be reclassified as English proficient in prekindergarten or Kindergarten. A school district shall [~~must~~] ensure that EB [~~emergent bilingual~~] students are prepared to meet academic standards required by TEC, §28.0211.

[~~(k) An emergent bilingual student may not be reclassified as English proficient if the LPAC has recommended designated supports or accommodations on the state reading assessment instrument based on the student's second language acquisition needs. Designated supports or accommodations for non-linguistic purposes that are recommended for student use by any other committee, including the ARD committee for students served in special education, do not prevent the student from being eligible to reclassify.~~]

(k) [~~(l)~~] For EB [~~emergent bilingual~~] students who are also eligible for special education services, the standardized process for [~~emergent bilingual~~] student reclassification is followed in accordance with applicable provisions of subsection (i) of this section. However, annual meetings to review student progress and make recommendations for reclassification shall [~~must~~] be made in all instances by the LPAC, in conjunction with the ARD committee, in accordance with §89.1230(b) of this title (relating to Eligible Students with Disabilities). Additionally, the LPAC, in conjunction with the ARD committee, shall determine participation and designated support or accommodation decisions on state criterion-referenced and English language proficiency assessments that differentiate between language proficiency and disabling conditions in accordance with §89.1230(a) of this title.

(l) [~~(m)~~] For an EB [~~emergent bilingual~~] student with a significant cognitive disability, the LPAC, in conjunction with the ARD committee, may recommend that the state's criterion-referenced and English language proficiency assessments used for reclassification are not appropriate because of the nature of the student's disabling condition. In these cases, the LPAC, in conjunction with the ARD committee, may recommend that the student take the state's alternate criterion-referenced and alternate English language proficiency assessments. Additionally, the LPAC, in conjunction with the ARD committee, may utilize the individualized reclassification process to determine appropriate performance standard requirements for the state standardized reading assessment and English language proficiency assessment by language domain under subsection (i)(1) of this section and utilize the results of a subjective teacher evaluation using the state's standardized alternate rubric.

(m) [~~(n)~~] Notwithstanding §101.101 of this title (relating to Group-Administered Tests), all tests used for the purpose of identification and reclassification of students and approved by TEA shall [~~must~~] be re-normed at least every eight years.

§89.1227. Minimum Requirements for Dual Language Immersion Program Model.

(a) A one-way or two-way dual language immersion (DLI) program model[~~, one-way or two-way,~~] shall address all curriculum requirements specified in Chapter 74, Subchapter A, of this title (re-

lating to Required Curriculum) [~~to include foundation and enrichment areas~~] in [~~both~~ English ~~and~~] the program's partner language and [~~, the~~] English [~~language proficiency standards, and college and career readiness standards~~].

(b) A DLI program model shall be a full-time program of academic instruction in the program's partner language and English for all program participants, emphasizing the participation of identified emergent bilingual (EB) students. Access to the DLI program shall not be restricted based on race, creed, color, religious affiliation, age, or disability.

(c) A DLI program model shall provide equitable, authentic resources in English and the program's partner language to ensure development of bilingualism and biliteracy.

(d) The district shall develop a language allocation plan that ensures a minimum of 50% of content area instructional time is provided in the program's partner language for the duration of the program.

(e) Program implementation shall:

(1) begin at prekindergarten, Kindergarten, or Grade 1, as applicable, according to the district's earliest grade level provided;

(2) continue without interruption incrementally through the elementary grades;

(3) consider expansion to middle school and high school whenever possible; and

(4) include participation of former emergent bilingual students who have reclassified as English proficient for the duration of the program.

(f) A DLI program model shall be developmentally appropriate and based on current best practices identified in research. Particularly, EB [~~emergent bilingual~~] students shall not be restricted access to a one-way or two-way [~~the~~] DLI program model[~~, one-way or two-way,~~] based on any linguistic or academic achievement measures in the program's partner language or English.

§89.1228. Two-Way Dual Language Immersion Program Model Implementation.

(a) Student enrollment in a two-way dual language immersion (DLI) program model is optional for non-emergent bilingual (EB) students in accordance with §89.1233(a) of this title (relating to Participation of Non-Emergent Bilingual Students).

(b) A two-way DLI program model shall fully disclose candidate selection criteria and ensure that access to the program is not based on race, creed, color, religious affiliation, age, or disability. Additionally, identified and reclassified EB [~~emergent bilingual~~] students and non-EB [~~non-emergent bilingual~~] students shall not be restricted access to the two-way DLI program model based on any linguistic or academic achievement measures in the program's partner language or English.

(c) A school district implementing a two-way DLI program model shall develop a policy for [~~on~~] enrollment and continuation for students in this program model. The policy shall address:

(1) equitable access, including the program's intention to maintain a ratio of 50% EB [~~emergent bilingual~~] students to 50% non-EB [~~non-emergent bilingual~~] students and have no more than two-thirds speakers of the partner language to one-third speakers of English in each classroom;

(2) support of program [~~goals and~~] benefits and goals as stated in §89.1210 of this title (relating to Program Content and Design);

(3) the district's commitment to providing equitable access to services for EB [~~emergent bilingual~~] students and to ensuring continuity of program for all program participants;

(4) the program's language allocation plan for the grade levels in which the program will be implemented; and

[~~(5) support of program goals as stated in §89.1210 of this title (relating to Program Content and Design); and~~]

(5) [~~(6)~~] expectations for students, families, and district and campus stakeholders [~~and parents~~].

(d) A school district implementing a two-way DLI program model shall obtain written parental approval as follows.

(1) For EB [~~emergent bilingual~~] students, written parental approval is obtained in accordance with §89.1240 of this title (relating to Parental Authority and Responsibility).

(2) For non-EB [~~non-emergent bilingual~~] students, written parental approval is obtained through a school district-developed process.

(e) A school district implementing a two-way DLI program model shall determine the appropriate assessment option for program participants as follows.

(1) For EB [~~emergent bilingual~~] students, the Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC) shall convene before the administration of the state criterion-referenced test each year to determine the appropriate assessment option for each EB [~~emergent bilingual~~] student in accordance with §89.1220(i) of this title (relating to Language Proficiency Assessment Committee (LPAC)).

(2) For reclassified EB students and non-EB [~~non-emergent bilingual~~] students, the appropriate assessment option for the administration of the state criterion-referenced test each year is determined by the LPAC or through a school district-developed process.

§89.1229. General Standards for Recognition of Dual Language Immersion Program Models.

(a) Campus [~~School~~] recognition. A school district may recognize one or more of its campuses [~~schools~~] that implement an exceptional dual language immersion (DLI) program model if the campus [~~school~~] meets all of the following criteria. The school shall:

(1) [~~The school must~~] meet the minimum requirements stated in §89.1227 of this title (relating to Minimum Requirements for Dual Language Immersion Program Model);[~~.~~]

(2) [~~The school must~~] receive an acceptable performance rating in the state accountability system; and[~~.~~]

(3) [~~The school must~~] not have a bilingual and/or English as a second language program [~~be~~] identified in [~~for~~] any stage of intervention [~~for the district's bilingual and/or English as a second language program~~] under the state's accountability system.

(b) Student recognition. An individual [~~A~~] student participating in a DLI [~~(DLI)~~] program model is eligible for local school district recognitions, including [~~or any other state-approved bilingual or English as a second language program model may be recognized by the program and its local school district board of trustees by earning~~] a performance acknowledgement in accordance with §74.14 of this title (relating to Performance Acknowledgments).

§89.1230. Eligible Students with Disabilities.

(a) For students with disabilities, school districts shall utilize the state's criteria for identification of emergent bilingual (EB) students as described in §89.1226(f) of this title (relating to Testing and

Classification of Students) and shall establish placement procedures that ensure that the placement recommendation by the Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC), in conjunction with the admission, review, and dismissal (ARD) committee, in a bilingual [~~education~~] or English as a second language program is not refused based on the student's disabling condition.

(b) LPAC members shall meet in conjunction with ARD committee members to review progress and provide recommendations regarding the educational needs of each EB [~~emergent bilingual~~] student who also qualifies for services in the school district's special education program.

§89.1233. Participation of Non-Emergent Bilingual Students.

(a) School districts shall fulfill their obligation to provide access to the required bilingual or English as a second language (ESL) program to emergent bilingual (EB) students in accordance with Texas Education Code (TEC), §29.053.

(b) School districts may enroll non-EB [~~non-emergent bilingual~~] students in the bilingual education [~~program~~] or [~~the~~] ESL program in accordance with TEC, §29.058.

(c) For participation of non-EB students in two-way dual language immersion programs, see §89.1228(c)(1) of this title (relating to Two-Way Dual Language Immersion Program Model Implementation). For all other program models, the [~~The~~] number of participating non-EB [~~non-emergent bilingual~~] students shall not exceed 40% of the number of students enrolled in those [~~the~~] bilingual or ESL [~~education~~] program models district-wide in accordance with TEC, §29.058.

§89.1235. Facilities.

(a) Bilingual [~~education~~] and English as a second language (ESL) programs shall be located in the public schools of the school district with equitable access to all educational resources rather than in separate facilities.

(b) In order to provide the required bilingual [~~education~~] or ESL programs, school districts may cluster [~~concentrate~~] the programs at designated [~~a limited number of~~] facilities within the school district.

(c) Recent immigrant emergent bilingual students shall not remain enrolled in newcomer centers for longer than two years.

§89.1240. Parental Authority and Responsibility.

(a) Identification and placement approval.

(1) [~~(a)~~] The parent shall be notified in English and the parent's home [~~primary~~] language that their child has been identified as an emergent bilingual (EB) student and recommended for placement in the required bilingual [~~education~~] or English as a second language (ESL) program using the Texas Education Agency (TEA)-developed identification and approval of placement letter.

(2) The parent shall be provided information describing the bilingual [~~education~~] or ESL program recommended, its benefits and goals, and its being an integral part of the school program to ensure that the parent understands the purposes and content of the program and their parental rights. [~~Procedures for parental approval include the following.~~]

(3) [~~(1)~~] The placement of a student in the bilingual [~~education~~] or ESL program shall [~~must~~] be approved in writing by the student's parent, or through allowable alternatives described in §89.1220(m) of this title (relating to Language Proficiency Assessment Committee (LPAC)), in order to have the student included in the bilingual education allotment (BEA).

(4) [~~(2)~~] The parent's approval shall be considered valid for the student's continued participation in the required bilingual [~~education~~] or ESL program until:

(A) the student meets the reclassification criteria described in §89.1226(i) of this title (relating to Testing and Classification of Students);[~~,~~]

(B) the student graduates from high school;[~~,~~] or

(C) a change occurs in program placement. A change between bilingual [~~education~~] and ESL program placement requires new parental approval using the TEA-developed continuation of language program services [~~change in placement~~] letter.

(5) [~~(3)~~] If a parent denies program placement at any point, the TEA-developed parental denial of program services letter shall be used to ensure parents are informed of the implications of program denial, including understanding that the child will continue to be identified as an EB [~~emergent bilingual~~] student and will continue to be assessed annually using the Texas English Language Proficiency Assessment System (TELPAS) until reclassification criteria have been met.

(b) Reclassification and exit approval.

(1) [~~(b)~~] The school district shall use the TEA-developed parent notification of reclassification and approval of program exit letter to give written notification to the student's parent of the student's reclassification as English proficient and acquire written approval for their [~~his or her~~] exit from the bilingual [~~education~~] or ESL program as required under Texas Education Code, §29.056(a).

(2) The school district shall use the TEA-developed parent notification of reclassification and option to continue in a dual language immersion program letter to give written notification to the student's parent of the student's reclassification as English proficient and acquire written approval for continued program participation as an English proficient student.

(3) Students meeting reclassification criteria who have been recommended for exit by the Language Proficiency Assessment Committee [~~language proficiency assessment committee~~] (LPAC) may only exit the bilingual [~~education~~] or ESL program with parental approval. [~~Parental approval is also required for students participating in a dual language immersion program who have met reclassification criteria and for whom the LPAC has recommended continued program participation as an English proficient student.~~]

(c) Appeals.

(1) [~~(c)~~] The parent of a student enrolled in a school district that is required to offer bilingual [~~education~~] or ESL programs may appeal to the commissioner of education if the school district fails to comply with the law or the rules.

(2) Appeals shall be filed in accordance with Chapter 157 of this title (relating to Hearings and Appeals).

§89.1245. Staffing and Staff Development.

(a) School districts shall take all reasonable affirmative steps to assign appropriately certified teachers to the required bilingual [~~education~~] and English as a second language (ESL) programs in accordance with Texas Education Code (TEC), §29.061, concerning bilingual [~~education~~] and ESL program teachers. School districts that are unable to secure a sufficient number of appropriately certified bilingual [~~education~~] and/or ESL teachers to provide the required programs may request activation of the appropriate permits in accordance with Chapter 230 of this title (relating to Professional Educator Preparation and Certification).

(b) School districts that are unable to employ a sufficient number of teachers, including part-time teachers, who meet the requirements of subsection (a) of this section for the bilingual [~~education~~] and ESL programs shall apply on or before November 1 for an exception to the bilingual [~~education~~] program or a waiver for the ESL program as provided in §89.1207(a) and (b) of this title (relating to Bilingual [~~Education~~] Exceptions and English as a Second Language Program Waivers) [~~or a waiver of the certification requirements in the ESL program as provided in §89.1207(b) of this title as needed~~].

(c) Teachers assigned to the bilingual or [~~education program and/or~~] ESL program may receive salary supplements through bilingual education allotment funds as authorized by TEC, §48.105.

(d) School districts may compensate teachers and aides assigned to bilingual or [~~education and~~] ESL programs for participation in virtual, face-to-face, and hybrid professional development outside of regular work hours designed to increase their skills or lead to bilingual [~~education~~] or ESL certification.

(e) The commissioner of education shall encourage school districts to cooperate with colleges and universities to provide training for teachers assigned to [~~the~~] bilingual or [~~education and/or~~] ESL programs.

(f) The Texas Education Agency shall develop, in collaboration with education service centers, resources for implementing bilingual [~~education~~] and ESL training programs. The materials shall provide a framework for:

(1) developmentally appropriate bilingual and ESL [~~education~~] programs for prekindergarten through Grade 12 [~~early childhood through the elementary grades~~];

(2) affectively, linguistically, and cognitively appropriate instruction in bilingual [~~education~~] and ESL programs in accordance with §89.1210(b)(1)-(3) of this title (relating to Program Content and Design); and

(3) developmentally appropriate programs for emergent bilingual students identified with multiple needs and/or exceptionalities.

§89.1250. Required Summer School Programs.

(a) Criteria. Summer school programs that are provided under Texas Education Code (TEC), §29.060, for emergent bilingual (EB) students who will be eligible for admission to Kindergarten or Grade 1 at the beginning of the next school year shall be implemented in accordance with this section.

(b) [~~(1)~~] Purpose of summer school programs.

(1) [~~(A)~~] EB [~~Emergent bilingual~~] students, including those also receiving special education services, shall have an opportunity to receive targeted [~~special~~] instruction designed to prepare them to be successful in Kindergarten and Grade 1.

(2) [~~(B)~~] Instruction shall focus on language development and essential knowledge and skills appropriate to the level of the student, including instruction in English and the home [~~primary~~] or partner language according to the program model.

(3) [~~(C)~~] The program shall address the affective, linguistic, and cognitive needs of EB [~~the emergent bilingual~~] students in accordance with §89.1210(b) of this title (relating to Program Content and Design).

(c) [~~(2)~~] Establishment of, and eligibility for, the program.

(1) [~~(A)~~] Each school district required to offer a bilingual or English as a second language (ESL) program in accordance with TEC, §29.053, shall offer the summer program.

(2) [~~(B)~~] To be eligible for enrollment:

(A) [~~(i)~~] a student shall [~~must~~] be eligible for admission to Kindergarten or to Grade 1 at the beginning of the next school year and shall [~~must~~] be identified as an EB [~~emergent bilingual~~] student; and

(B) [~~(ii)~~] a parent shall [~~must~~] have approved placement of the EB [~~emergent bilingual~~] student in the required bilingual or ESL program following the procedures described in §89.1220(g) of this title (relating to Language Proficiency Assessment Committee (LPAC)) and §89.1226(b)-(f) of this title (relating to Testing and Classification of Students) prior to participation in the summer school program.

(d) [~~(3)~~] Operation of the program.

(1) [~~(A)~~] Enrollment is optional.

(2) School districts that operate on a semester system shall offer 120 hours of instruction:

(A) during the period that school is recessed for the summer; and

(B) on a one-half day basis for eight weeks or on a similar schedule approved by the board of trustees.

(3) School districts that operate on a system other than a semester system shall offer 120 hours of instruction on a schedule approved by the board of trustees.

[~~(B) The program shall be operated on a one-half day basis, a minimum of three hours each day, for eight weeks or the equivalent of 120 hours of instruction.~~]

(4) [~~(C)~~] The student/teacher ratio for the program districtwide shall not exceed 18 to 1.

(5) [~~(D)~~] A school district is not required to provide transportation for the summer program.

(6) [~~(E)~~] Employees providing summer school instruction [~~Teachers~~] shall possess certification as required in TEC, §29.061, and §89.1245 of this title (relating to Staffing and Staff Development).

(7) [~~(F)~~] Reporting of student progress shall be approved [~~determined~~] by the board of trustees. A summary of student progress shall be provided to parents at the conclusion of the program. This summary shall be provided to the student's teacher at the beginning of the next regular school term.

(8) [~~(G)~~] A school district may join with other school districts in cooperative efforts to plan and implement programs.

(9) [~~(H)~~] The summer school program shall not substitute for any other program required to be provided during the regular school term, including those required in TEC, §29.153.

(e) [~~(4)~~] Funding and records for programs.

(1) [~~(A)~~] A school district shall use state and local funds for program purposes.

(A) [~~(i)~~] Available funds appropriated by the legislature for the support of summer school programs provided under TEC, §29.060, shall be allocated to school districts in accordance with this subsection.

(B) [~~(ii)~~] Funding for the summer school program shall be on a unit basis in such an allocation system to ensure a pupil/teacher

ratio of not more than 18 to 1. The numbers of students required to earn units shall be established by the commissioner. The allotment per unit shall be determined by the commissioner based on funds available.

(C) [~~(iii)~~] Any school district required to offer the program under paragraph (2)(A) of this subsection that has fewer than 10 students district-wide desiring to participate is not required to operate the program. However, those school districts shall [~~must~~] document that they have encouraged students' participation in multiple ways.

(D) [~~(iv)~~] Reimbursement payments [~~Payment~~] to school districts for summer school programs shall be based on units employed. This information shall [~~must~~] be submitted in a manner and according to a schedule established by the commissioner in order for a school district to be eligible for funding.

(2) [~~(B)~~] A school district shall maintain records of eligibility, attendance, and progress of students.

§89.1265. Program Evaluation.

(a) All school districts required to implement a bilingual [~~education~~] or English as a second language (ESL) program shall conduct an annual evaluation in accordance with Texas Education Code (TEC), §29.053, collecting a full range of data to determine program effectiveness to ensure student academic success. The annual evaluation report shall be presented to the board of trustees before November 1 of each year and the report shall be retained at the school district level in accordance with TEC, §29.062.

(b) Annual school district reports of educational performance shall reflect:

(1) the academic progress in the language(s) of instruction for emergent bilingual (EB) students by bilingual [~~education~~] and/or ESL program model;

(2) the extent to which EB [~~emergent bilingual~~] students are developing English proficiency by bilingual [~~education~~] and/or ESL program model, including proficiency in the partner language for students participating in a dual language immersion program model;

(3) the number of students who have been reclassified as English proficient and their continued academic progress after reclassification; and

(4) the number of teachers and aides trained and the frequency, scope, and results of the professional development in approaches and strategies that support second language acquisition.

(c) In addition, for those school districts that filed in the previous year and/or will be filing a bilingual [~~education~~] exception and/or ESL waiver in the current year, the annual district report of educational performance shall also reflect:

(1) the number of teachers for whom a bilingual [~~education~~] exception or ESL waiver was/is being filed;

(2) the number of teachers for whom a bilingual [~~education~~] exception or ESL waiver was filed in the previous year who successfully obtained certification;

(3) the frequency and scope of a comprehensive professional development plan, implemented as required under §89.1207 of this title (relating to Bilingual [~~Education~~] Exceptions and English as a Second Language Program Waivers), and results of such plan if a bilingual [~~education~~] exception and/or ESL waiver was filed in the previous school year; and

(4) the number of students under the bilingual [~~education~~] exception and/or [~~or~~] ESL waiver who were/are temporarily served with [~~in an~~] alternative methods [~~language program~~].

(d) School districts shall report to parents their child's English proficiency development [~~the progress of their child in acquiring English~~] as a result of participation in the program offered to EB [~~emergent bilingual~~] students.

(e) In alignment with the district improvement plan, each school year, the principal of each school campus, with the assistance of the campus level committee, shall develop, review, and revise the campus improvement plan described in TEC, §11.253, for the purpose of improving student performance for EB [~~emergent bilingual~~] students.

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

Filed with the Office of the Secretary of State on September 30, 2024.

TRD-202404697
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 475-1497

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 210. USE OF RECLAIMED WATER

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§210.1 - 210.4

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§210.1 - 210.4.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking will implement Senate Bill (SB) 1289, 88th Texas Regular Legislative Session (2023), which amended the Texas Water Code (TWC), Chapter 26, by adding §26.02715. The bill allows a wastewater treatment facility that treats domestic wastewater for reuse to dispose of the treated wastewater without a permit for an alternative means of disposal, if the facility disposes of the treated wastewater through a wastewater collection system and has consent of the operator of the wastewater collection system that will receive the treated wastewater, and any treatment facility that will further treat the water.

The bill requires TCEQ to expand the existing requirements established under 30 Texas Administrative Code (TAC) Chapter 210 (Use of Reclaimed Water), Subchapter A (General Provisions) to clarify the applicability of 30 TAC Chapter 321 (Control of Certain Activities by Rule), Subchapter P (Reclaimed Water Production Facilities) and related definitions.

Section by Section Discussion

Proposed amended section §210.1, Applicability, would be restructured into subsections for clarity. Existing provisions restructured under new subsection (b), are proposed to be amended to clarify that the requirements of this chapter are not

applicable to the use of treated wastewater identified in a water quality permit authorizing disposal by irrigation. Existing provisions restructured under new subsection (c)(1), are proposed to be amended to clarify requirements for reclaimed water producers that have a domestic wastewater discharge permit for a domestic wastewater treatment facility that is located at the terminus of the collection system to which the reclaimed water production facility is or will be connected. Proposed amended subsection (c) would also add requirements under proposed new subsection (c)(2) for reclaimed water producers that obtain consent from an associated domestic wastewater treatment facility and collection system to which the reclaimed water production facility is or will be connected, then the use of reclaimed water would be permissible only if the use occurs after the wastewater has been treated in accordance with the producer's reuse authorization issued under this Chapter.

Proposed amended section §210.2, Purpose and Scope, would expand the list of regulatory citations associated with the definition of reclaimed water activity types to include reference to Chapter 321, Subchapter P of this title (relating to Reclaimed Water Production Facilities) and Chapter 309, Subchapter C of this title (relating to Land Application of Sewage Effluent). The proposed amended section would clarify reference to Chapter 297, Subchapter A of this title (relating to Definitions and Applicability). Additionally, the proposed amended section would add new subsection (e) to clarify that a producer must obtain an approved Texas Pollutant Discharge Elimination System (TPDES) permit, Texas Land Application Permit (TLAP), or permit under 30 TAC Chapter 321, Subchapter P, of this title prior to commencement of construction and operation of the treatment facility.

Proposed amended section §210.3, Definitions, would add a definition for "associated domestic wastewater treatment facility". Subsequent definitions would be renumbered. The proposed amended section would also clarify the definition of "permit or permitted" by adding appropriate regulatory citations to TWC, §5.581 (relating to Definitions), Chapter 305 of this title (relating to Consolidated Permits), and Chapter 321, Subchapter P. The proposed amended section would also clarify that the definition is applicable to a wastewater treatment facility or reclaimed water production facility. Additionally, the proposed amended section would update reference of "Agency" to "commission" and update reference of Chapter "317" to "217" for clarity and consistency.

Proposed amended section §210.4, Notification, would add a reference to the permits described in §210.2(e) that contain reclaimed water quality requirements for entities that obtain consent to dispose of reclaimed water through the wastewater collection system to an associated domestic wastewater treatment facility for final treatment and disposal.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, fiscal impacts may result for municipal wastewater treatment facilities as a result of implementation of the proposed rule. The rulemaking does not include any additional mandatory requirements for these entities. The rulemaking would not result in fiscal implications for TCEQ, state government, or other units of local government.

This rulemaking, in addition to concurrent rulemaking in Chapter 321, would allow for an alternative means for disposal of treated wastewater by allowing for reclaimed water production facilities (RWPFs) to dispose of the water without an additional permit. Any of the 7,913 public domestic wastewater treatment facilities that agree to receive and treat the reclaimed water from the RWPF may incur additional costs for construction and operation. This potentially includes costs related to adding additional capacity, connection to collection systems, installation or modification of an influent monitoring system, and additional treatment or maintenance.

This rulemaking would also allow municipal entities to establish RWPFs without needing an additional permit for an alternative means of disposal, and without needing to construct, own, and operate an associated domestic wastewater treatment facility to be used as an alternative means of disposal. Therefore, the establishment and operation of such facilities could be done at a significantly lower cost than would otherwise have been possible.

In total, the costs or cost savings for municipal entities will depend on the amount of reclaimed water generated, used, and disposed of through the collection system of an associated domestic wastewater treatment facility.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit will be consistent with state law, specifically SB 1289 from the 88th Texas Regular Legislative Session (2023). The rulemaking would also benefit the public by providing an alternate mechanism for establishing RWPFs through eliminating the requirement to obtain a permit for an alternative method of disposal for reclaimed water. Allowing RWPFs to obtain consent to disposal of reclaimed water through the collection system of an associated domestic wastewater treatment facility is expected to increase the number entities authorized to construct RWPFs within the State. An increase in reclaimed water production would increase the availability of water resources for a variety of uses, particularly during times of high demand such as during droughts.

This rulemaking, in addition to concurrent rulemaking in Chapter 321, would provide an alternative means for disposal of treated wastewater by allowing for RWPFs to dispose of the reclaimed water without an additional permit. Any of the 3,063 private domestic wastewater treatment facilities that agree to receive and treat the reclaimed water from the reclaimed water production facility may incur additional costs for construction and operation. This potentially includes costs related to adding additional capacity, connection to collection systems, installation or modification of an influent monitoring system, and additional treatment or maintenance.

This rulemaking would also allow private entities to establish RWPFs to do so without needing a permit for an alternative means of disposal, and without needing to construct, own, and operate an associated domestic wastewater treatment facility to be used as an alternative means of disposal. Therefore, the establishment and operation of such facilities could be done at a significantly lower cost than would otherwise have been possible.

In total, the costs or cost savings for industries or businesses will depend on the amount of reclaimed water generated, used, and disposed of through the collection system of an associated domestic wastewater treatment facility.

The proposed rulemaking could result in an increase or decrease in costs for individuals. The construction and operation of addi-

tional reclaimed water production infrastructure could result in higher water bills or additional fees that could be passed along to water users and consumers. However, cost savings could occur from additional reclaimed water production infrastructure because the increased availability of reclaimed water could alleviate demand on existing potable water resources during times of high demand or drought. This reduction in demand could lead to lower water bills for users and consumers.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation, and it does not create, expand, repeal, or limit this regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule could positively affect the state's economy by increasing opportunities for manufacturers, suppliers, and operators of reclaimed water infrastructure. Additionally, streamlining existing regulations for obtaining an alternative method of disposal for reclaimed water could increase reclaimed water production infrastructure and could increase overall potable water resources. Increased availability of potable water resources could positively affect the state's economy.

Draft Regulatory Impact Analysis Determination

TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code (TGC), §2001.0225, and determined that the rulemaking is not subject to TGC, §2001.0225(a) because it does not meet the definition of a "Major environmental rule" as defined in TGC, §2001.0225(g)(3). The following is a summary of that review.

Section 2001.0225 applies to a "Major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector or the state.

The Texas Legislature enacted SB 1289, amending the TWC, Chapter 26 (Water Quality Control), Subchapter B (General Water Quality Power and Duties), by adding §26.02715 to the TWC. The intent is to provide more flexibility in TCEQ's rules for 30 TAC 210 (Use of Reclaimed Water) and in 30 TAC Chapters 321(Control of Certain Activities by Rule), Subchapter P (Reclaimed Water Production Facilities).

SB 1289 directed TCEQ to provide flexibility, through rulemaking, for facilities that use domestic wastewater treated onsite for reuse (reclaimed water), to dispose of any reclaimed water without an additional permit under certain conditions.

A Reclaimed Water Producer is currently authorized to use its treated reclaimed water only if it obtains a permit for an alternative means of disposal during times when there is no demand for its reclaimed water. TCEQ rules also require that the owner of any RWPF authorized by TCEQ, be the owner of a wastewater treatment facility permitted by TCEQ.

SB 1289 instructs TCEQ to promulgate rules that authorize facilities to convey reclaimed water to a willing "associated domestic wastewater treatment facility" and its wastewater collection system, as an "alternative means of disposal," as required under 30 TAC Chapter 210.

SB 1289 also prohibits TCEQ from requiring an owner of a RWPF to be the owner of the associated domestic wastewater treatment facility that is permitted by TCEQ.

SB 1289 directs TCEQ to amend TCEQ rules in 30 TAC Chapter 321 (Control of Certain Activities by Rule), Subchapter P (Reclaimed Water Production Facilities), which relate to facilities treating domestic wastewater for reuse purposes ("Reclaimed Water"). The simplistic changes to 30 TAC Chapter 210 (Use of Reclaimed Water), Subchapter A (General Provisions) are minor but necessary for clarity and consistency with proposed amended 30 TAC Chapter 321.

Specifically, SB 1289 instructs TCEQ to adopt rules that authorize RWPFs to dispose of treated reclaimed water without an additional permit, if the RWPF disposes of the treated reclaimed water through an "associated domestic wastewater treatment facility" and its wastewater collection system, after receiving consent from the owner and operator of the associated domestic wastewater treatment facility that will receive the reclaimed water for further or final treatment and disposal.

Therefore, the specific intent of the proposed rulemaking is related to providing flexibility, in the form of additional options for facilities that produce reclaimed water, as identified in SB 1289.

Certain aspects of TCEQ's Reclaimed Water Rules are intended to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the TGC, §2001.0225 definition of "Major environmental rule."

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather amends authorizations in state law and TCEQ rules. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under a specific state statute enacted in SB 1289 in the 88th Texas Regular Legislative Session (2023) and implements existing state law. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required.

Therefore, the commission does not adopt the rule solely under the commission's general powers.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code (TGC), Chapter 2007. The following is a summary of that analysis.

Under TGC, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to implement the legislative amendments to the TWC in SB 1289 by amending TCEQ's Reclaimed Water Rules to expand the regulatory options for disposal of reclaimed water, as identified in SB 1289. The proposed rulemaking will substantially advance the stated purpose of SB 1289 by adopting new rule language that provides for disposal of reclaimed water without an additional permit under the conditions identified in SB 1289.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The primary purpose of the proposed rules is to implement SB 1289 by providing for the authorization, under conditions identified in SB 1289, for disposal of reclaimed water without an additional permit when conveyed to an associated domestic wastewater treatment facility. This proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a hold a hybrid virtual and in-person public hearing on this proposal in Austin on November 12, 2024 at 10:00 a.m. in Building D, Room 191 located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by November 7, 2024. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 8, 2024, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_MzdkZDBiNGItNzhhOS00ZDNkLTgzNTEtNGIwZTgwNjRjMWEx-%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800)

RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at: https://tceq.commentinput.com/comment/search. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-137-321-OW. The comment period closes on November 12, 2024. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Erika Crespo, Water Quality Division, (512) 239-1827.

Statutory Authority

The commission proposes these amendments to the Texas Commission on Environmental Quality (TCEQ) rules under the Texas Water Code (TWC). TWC, §5.013 establishes the general jurisdiction of the commission, while TWC, §5.102 provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103. TWC, §5.103 requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state. TWC, §5.120 requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state. TWC, §26.02715 authorizes disposal of Reclaimed Water without an additional permit under certain conditions.

The amendments implement Senate Bill 1289, 88th Texas Regular Legislative Session (2023), TWC, §§5.013, 5.102, 5.103, 5.120, and 26.02715.

§210.1. Applicability.

(a) This chapter applies to the reclaimed water producer, provider, and user. [~~If the entity which is the producer of the reclaimed water is the same as the user, then the use of reclaimed water is permissible only if the use occurs after the wastewater has been treated in accordance with the producer's wastewater permit and the permit provides for an alternative means of disposal during times when there is no demand for the use of the reclaimed water.~~]

(b) This chapter does not apply to treatment or disposal of wastewater permitted by the commission in accordance with the requirements of Chapter 305 of this title (relating to Consolidated Permits), or to the use [~~user~~] of such treated wastewater identified in a water quality [~~the producer's wastewater discharge~~] permit authorizing disposal by irrigation. This chapter does not apply to those systems authorized under Chapter 285 of this title (relating to On-Site Wastewater Treatment) which utilizes surface irrigation as an approved disposal method.

(c) If the entity which is the producer of the reclaimed water is the same as the user and:

(1) has a domestic wastewater permit for a domestic wastewater treatment facility that is located at the terminus of the collection system to which the reclaimed water production facility is or will be connected, then the use of reclaimed water is permissible only if the use occurs after the wastewater has been treated in accordance with the producer's wastewater permit and the permit provides for an alternative means of disposal during times when there is no demand for the use of the reclaimed water; or

(2) obtains consent from an associated domestic wastewater treatment facility and collection system to which the reclaimed water production facility is or will be connected to be used as an alternative means of disposal during times when there is no demand for the use of the reclaimed water, then the use of reclaimed water is permissible only if the use occurs after the wastewater has been treated in accordance with the producer's reuse authorization issued under this Chapter.

§210.2. Purpose and Scope.

(a) The purpose of this chapter is to establish general requirements, quality criteria, design, and operational requirements for the beneficial use of reclaimed water which may be substituted for potable water and/or raw water. As defined and specified in this chapter, the requirements must be met by producers, providers, and/or users of reclaimed water. Specific use categories are defined with corresponding reclaimed water quality requirements. These criteria are intended to allow the safe utilization of reclaimed water for conservation of surface and groundwater; to ensure the protection of public health; to protect ground and surface waters; and to help ensure an adequate supply of water resources for present and future needs.

(b) The commission has defined other types of reclaimed water activity in separate regulations, including Chapter 321, Subchapter P of this title (relating to Reclaimed Water Production Facilities), Chapter 309 [~~§309.20~~] of this title (relating to Land Application of Sewage Effluent), and Chapter 297 [~~§297.1~~] of this title (relating to Definitions). These regulations do not modify those definitions. The term reclaimed water is limited in scope for the purpose of this rule as defined in §210.3 of this title (relating to Definitions).

(c) Approval by the executive director of a reclaimed water use project under this chapter does not affect any existing water rights. If applicable, a reclaimed water use authorization in no way affects the need of a producer, provider and/or user to obtain a separate water right authorization from the commission.

(d) Reclaimed water projects approved under this chapter do not require a new or amended waste discharge permit from the commission except as provided in §210.5 of this title (relating to Permits Required). Persons who desire to develop projects not specifically authorized by this chapter may seek authorization pursuant to provisions of Subchapter D or apply for a new or amended waste discharge permit under Chapter 305 of this title (relating to Consolidated Permits).

(e) A producer of reclaimed water must obtain an approved Texas Pollutant Discharge Elimination System (TPDES) permit, Texas Land Application Permit (TLAP), or authorization under 30 TAC Chapter 321, Subchapter P, of this title (relating to Reclaimed Water Production Facilities) prior to commencement of construction and operation of the treatment facility.

§210.3. Definitions.

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

(1) Associated Domestic Wastewater Treatment Facility - a commission-authorized wastewater treatment facility located at the terminus of the collection system that consents to the acceptance of treated effluent, untreated effluent, and sludge from a reclaimed water production facility for final treatment and disposal.

(2) [~~(1)~~] Beneficial use--An economic use of wastewater in accordance with the purposes, applicable requirements, and quality criteria of this chapter, and which takes the place of potable and/or raw

water that could otherwise be needed from another source. The use of reclaimed water in a quantity either less than or the economically optimal amount may be considered a beneficial use as long as it does not constitute a nuisance.

(3) [~~(2)~~] BOD_5 --Five-day biochemical oxygen demand.

(4) [~~(3)~~] $CBOD_5$ --Five-day carbonaceous biochemical oxygen demand.

(5) [~~(4)~~] CFU--Colony forming units.

(6) [~~(5)~~] Domestic wastewater--Waste and wastewater from humans or household operations that are discharged to a wastewater collection system or otherwise enters a treatment works. Also, this includes waterborne human waste and waste from domestic activities such as washing, bathing, and food preparation, including greywater and blackwater, that is disposed in an on-site wastewater system as defined in Chapter 285 of this title (relating to On-Site Wastewater Treatment).
Figure: 30 TAC §210.3(6) (No change.)

(7) [~~(6)~~] DRASTIC--A classification system for comparing land units on the basis of their vulnerability to ground-water pollution, a detailed description of which is found in Appendix 1 of this chapter.

(8) [~~(7)~~] Edwards Aquifer--That portion of an arcuate belt of porous, water bearing, predominantly carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis, and Williamson counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devil's River Limestone, Person Formation, Kainer Formation, Edwards Formation, and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally. (See Chapter 213 of this title (relating to Edwards Aquifer).)

(9) [~~(8)~~] Edwards Aquifer Recharge zone--Generally, that area where the stratigraphic units constituting the Edwards Aquifer crop out, and including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area designated as such on official maps located in the offices of the commission and the Edwards Underground Water District. (See Chapter 213 of this title (relating to Edwards Aquifer).)

(10) [~~(9)~~] Food crop--Any crops intended for direct human consumption.

(11) [~~(10)~~] Initial holding pond--An impoundment which first receives reclaimed water from a producer at the quality levels established by this chapter, not including subsequent holding ponds.

(12) [~~(11)~~] Geometric mean--The nth root of the product of all measurements made in a particular period of time, for example in a month's time, where n equals the number of measurements made. In the alternative, the geometric mean can also be computed as the antilogarithm of the sum of the logarithm of each measurement made. Where any measurement using either computation method equals zero, it must be substituted with the value of one.

(13) [~~(12)~~] l--Liter.

(14) [~~(13)~~] Landscape impoundment--Body of reclaimed water which is used for aesthetic enjoyment or which otherwise serves a function not intended to include contact recreation.

(15) [~~(14)~~] Leak detection system--A system or device designed, constructed, maintained, and operated with a pond that is capable of immediately detecting a release of leachate or reclaimed water that migrates through a liner. The system may typically include a leachate collection system along with either leak detection sensors or view ports.

(16) [~~(15)~~] Municipal wastewater--Waste or wastewater discharged into a publicly owned or a privately owned sewerage treatment works primarily consisting of domestic waste.

(17) [~~(16)~~] mg/l--Milligram per liter.

(18) [~~(17)~~] NTU--Nephelometric turbidity units.

(19) [~~(18)~~] Nuisance--Any distribution, storage, or use of reclaimed water, in such concentration and of such duration that is or may tend to be injurious to or which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

(20) [~~(19)~~] On-channel pond--An impoundment wholly or partially within a definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. The water may flow continuously or intermittently, and if intermittently, with some degree of regularity, dependent on the characteristics of the source or sources.

(21) [~~(20)~~] Permit or permitted--A written document issued by the commission or executive director in accordance with Texas Water Code (TWC), §5.581, Chapter 305 of this title (relating to Consolidated Permits), and Chapter 321, Subchapter P of this title (related to Reclaimed Water Production Facilities) which, by its conditions, may authorize the permittee to construct, install, modify, or operate, in accordance with stated limitations, a specified wastewater treatment or reclaimed water production facility [~~for waste discharge, including a wastewater discharge permit~~].

(22) [~~(21)~~] Pond system--Wastewater facility in which primary treatment followed by stabilization ponds are used for secondary treatment and in which the ponds have been designed and constructed in accordance with applicable design criteria. (See Chapter 217 [~~317~~] of this title (relating to the Design Criteria for Domestic Wastewater [~~Sewerage~~] Systems).)

(23) [~~(22)~~] Producer--A person or entity that produces reclaimed water by treating domestic wastewater or municipal wastewater, in accordance with a permit or other authorization of the commission [~~Agency~~], to meet the quality criteria established in this chapter.

(24) [~~(23)~~] Provider--A person or entity that distributes reclaimed water to a user(s) of reclaimed water. For purposes of this chapter, the reclaimed water provider may also be a reclaimed water producer.

(25) [~~(24)~~] Reclaimed water--Domestic or municipal wastewater which has been treated to a quality suitable for a beneficial use, pursuant to the provisions of this chapter and other applicable rules and permits.

(26) [~~(25)~~] Restricted landscaped area--Land which has vegetative cover to which public access is controlled in some manner. Access may be controlled by either legal means (e.g. state or city ordinance) or controlled by some type of physical barrier (e.g., fence or wall). Example of such areas are: golf courses; cemeteries; roadway rights-of-way; median dividers.

(27) [~~(26)~~] Restricted recreational impoundment--Body of reclaimed water in which recreation is limited to fishing, boating and other non-contact [~~non-contract~~] recreational activities.

(28) [~~(27)~~] Single grab sample--An individual sample collected in less than 15 minutes.

(29) [~~(28)~~] Spray irrigation--Application of finely divided water droplets using artificial means.

(30) [~~(29)~~] Subsequent holding pond--A pond or impoundment which receives reclaimed water from an initial holding pond where the quality of the water changes after management in the initial holding pond, due to factors which may include:

(A) the addition of water occurs such as contributions from surface water or ground water sources, but not including contributions of reclaimed water, domestic wastewater, or municipal wastewater;

(B) some type of utilization of the reclaimed water for a beneficial use occurs; or

(C) commingling of reclaimed water with surface water runoff where it occurs between storage in an initial holding pond and the subsequent holding pond.

(31) [~~(30)~~] Surface irrigation--Application of water by means other than spraying so that contact between the edible portion of any food crop and the irrigation water is prevented.

(32) [~~(31)~~] Type I reclaimed water use--Use of reclaimed water where contact between humans and the reclaimed water is likely.

(33) [~~(32)~~] Type II reclaimed water use--Use of reclaimed water where contact between humans and the reclaimed water is unlikely.

(34) [~~(33)~~] Unrestricted landscaped area--Land which has had its plant cover modified and access to which is uncontrolled. Examples of such areas are: parks; school yards; greenbelts; residences.

(35) [~~(34)~~] User--Person or entity utilizing reclaimed water for a beneficial use, in accordance with the requirements of this chapter. A reclaimed water user may also be a producer or a provider.

§210.4. Notification.

(a) Before providing reclaimed water to another for a use allowable under this chapter, the reclaimed water provider shall notify the executive director and obtain written approval to provide the reclaimed water. The notification shall include:

(1) a description of the intended use of the reclaimed water, including quantity, quality, origin, and location and purpose of intended use;

(2) a clear indication of the means for compliance with this chapter, including documentation that a user will be apprised of their responsibilities under this chapter as a part of the water supply contract or other binding agreement;

(3) evidence in a water supply contract or other binding agreement of the provider's authority to terminate reclaimed water use that is noncompliant with this chapter; and

(4) an operation and maintenance plan that is required under ordinance or is to be a part of the water supply contract or other binding agreement, where applicable, and which shall contain, as a minimum, the following:

(A) a labeling and separation plan for the prevention of cross connections between reclaimed water distribution lines and potable water lines;

(B) the measures that will prevent unauthorized access to reclaimed water facilities (e.g., secured valves);

(C) procedures for monitoring reclaimed water transfers and use;

(D) steps the user must utilize to minimize the risk of inadvertent human exposure;

(E) schedules for routine maintenance;

(F) a plan for carrying out provider employee training and safety relating to reclaimed water treatment, distribution, and management; and

(G) contingency plan for remedy of system failures, unauthorized discharges, or upsets.

(b) If the provider is not the producer, a description of the origin of the reclaimed water, its quality based upon the parameters contained in the underlying [~~waste discharge~~] permit(s) described in §210.2(e) of this title (related to Purpose and Scope), as applicable, and a signed agreement from the producer authorizing the transfer of the reclaimed water to the provider. If applicable, a reclaimed water provider or user may need to obtain a separate water right authorization from the commission.

(c) A producer who chooses to use reclaimed water for a beneficial use only within the boundaries of a wastewater treatment facility permitted by the commission, may do so without notification otherwise required by this section. In such instances, the producer is still required to comply with all applicable requirements of this chapter pertaining to the reclaimed water use.

(d) If effluent is to be used for irrigation within the Edwards Aquifer recharge zone, plans and specifications for the disposal system must be submitted to the executive director for review and approval prior to construction of the facility in accordance with Chapter 313 of this title (relating to Edwards Aquifer).

(e) Major changes from a prior notification for use of reclaimed water must be approved by the executive director. A major change includes:

(1) a change in the boundary of the approved service area not including the conversion of individual lots within a subdivision to reclaimed water use;

(2) the addition of a new producer;

(3) major changes in the intended use, such as conversion from irrigation of a golf course to residential irrigation; or

(4) changes from either Type I or Type II uses to the other.

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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Todd Galiga
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 239-3578

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CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE

SUBCHAPTER P. RECLAIMED WATER PRODUCTION FACILITIES

30 TAC §§321.301, 321.303, 321.305, 321.307, 321.309, 321.313, 321.315, 321.319, 321.321

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§321.301, 321.303, 321.305, 321.307, 321.309, 321.313, 321.315, 321.319, and 321.321.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking will implement Senate Bill (SB) 1289, 88th Texas Regular Legislative Session (2023), which amended the Texas Water Code (TWC), Chapter 26, by adding §26.02715. The bill allows a wastewater treatment facility that treats domestic wastewater for reuse to dispose of the treated wastewater without a permit for an alternative means of disposal, if the facility disposes of the treated wastewater through a wastewater collection system and has consent of the operator of the wastewater collection system that will receive the treated wastewater, and any treatment facility that will further treat the wastewater.

The bill requires TCEQ to expand the existing requirements established under Title 30 of the Texas Administrative Code (TAC) Chapter 321 (Control of Certain Activities by Rule), Subchapter P (Reclaimed Water Production Facilities) to allow a reclaimed water production facility to dispose of reclaimed water through a collection system to an associated domestic wastewater treatment facility by obtaining consent from the owner and operator of the collection system and the associated domestic wastewater treatment facility that will receive the reclaimed water for final treatment and disposal.

Section by Section Discussion

Proposed amended §321.301, *Purpose and Applicability*, would clarify that an additional disposal or discharge permit from the commission is not required for reclaimed water production facilities that meet certain requirements. The proposed amended section would also clarify that a reclaimed water production facility may be authorized to dispose of treated wastewater under this subchapter if the owner of the reclaimed water production facility has documented consent from the owner and operator of an associated domestic wastewater treatment facility, and the owner of the wastewater collection system to which the reclaimed water production facility is or will be connected, if applicable.

Proposed amended §321.303, *Definitions*, would add a new definition for Collection System. The subsequent definition would be renumbered.

Proposed amended §321.305, *General Requirements*, would expand existing requirements to allow for a reclaimed water production facility with consent from the owner and operator of the associated domestic wastewater treatment facility and collection system to dispose of the treated wastewater through a wastewater collection system; and removes the requirement for a discharge or disposal permit for those facilities. The proposed amended section would clarify that the authorization for a reclaimed water production facility does not alter the permitted flow or effluent limits of the associated domestic wastewater treatment facility. The proposed amended section would add requirements for the owner or operator of the reclaimed water production facility to provide TCEQ with written notice of the termination of consent and confirmation that reclaimed water production facility operations have ceased within five working days of being notified that the consent has been withdrawn.

Proposed amended §321.307, *Restrictions*, would clarify that the discharge of pollutants from a reclaimed water production facility to water in the state requires a Texas Pollutant Discharge Elimination System permit. The proposed amended section would also establish that sludge from a reclaimed water production facility that has obtained consent from the owner and operator of an associated domestic wastewater treatment facility, and the owner of the wastewater collection system to which the reclaimed water production facility is or will be connected, must be conveyed to an associated domestic wastewater treatment facility through the collection system.

Proposed amended §321.309, *Application Requirements*, would clarify that applications submitted under this subchapter must comply with §305.42(a) relating to *Application Required*. The proposed amended section would revise the requirement to provide a wastewater permit number for the permit number information required in a reclaimed water production facility authorization application. The proposed amended section would add a requirement for reclaimed water production facilities seeking coverage for disposal through an associated domestic wastewater treatment facility to submit documentation of consent from the owner and operator of the associated domestic wastewater treatment facility and collection system, if applicable. Subsequent requirements were renumbered for clarity.

Proposed amended §321.313, *Authorization*, would clarify that the executive director shall not authorize a reclaimed water production facility that disposes of treated reclaimed water through the collection system of an associated domestic wastewater treatment facility with an unsatisfactory compliance history rating. The proposed amended section would also update the compliance history rating term "poor" to "unsatisfactory" for consistency with current agency terminology.

Proposed amended §321.315, *Design Requirements*, would clarify that reclaimed water production facilities must be designed such that all wastewater is conveyed to the associated domestic wastewater treatment facility any time that the facility is not in operation. The proposed amended section would also clarify that reclaimed water production facilities must be designed to convey all sludge to the associated domestic wastewater treatment facility.

Proposed amended §321.319, *Public Notice Requirements*, would clarify that the applicant will describe the proposed reclaimed water production facility at a public meeting. In addition, a subsection was renumbered for consistency.

Proposed amended §321.321, *Additional Reclaimed Water Production Facility Requirements*, would clarify the requirement for the operator of a reclaimed water production facility to have the same level of license or higher as the operator of the domestic or associated domestic wastewater treatment facility.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, fiscal impacts may result for municipal wastewater treatment facilities as a result of implementation of the proposed rule. The rulemaking does not include any additional mandatory requirements for these entities. The rulemaking would not result in fiscal implications for TCEQ, state government, or other units of local government.

This rulemaking, in addition to concurrent rulemaking in Chapter 210, would allow for an alternative means for disposal of treated wastewater by allowing for reclaimed water production facilities (RWPFs) to dispose of the water without an additional permit. Any of the 7,913 public domestic wastewater treatment facilities that agree to receive and treat the reclaimed water from the RWPF may incur additional costs for construction and operation. This potentially includes costs related to adding additional capacity, connection to collection systems, installation or modification of an influent monitoring system, and additional treatment or maintenance.

This rulemaking would also allow municipal entities to establish RWPFs without needing an additional permit for an alternative means of disposal, and without needing to construct, own, and operate an associated domestic wastewater treatment facility. Therefore, the establishment and operation of such facilities could be done at a significantly lower cost than would otherwise have been possible.

In total, the costs or cost savings for municipal entities will depend on the amount of reclaimed water generated, used, and disposed of through the collection system of an associated domestic wastewater treatment facility.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit will be consistent with state law, specifically SB 1289 from the 88th Texas Regular Legislative Session (2023). The rulemaking would also benefit the public by providing an alternate mechanism for establishing RWPFs through eliminating the requirement to obtain a permit for an alternative method of disposal for reclaimed water. Allowing RWPFs to obtain consent for disposal of reclaimed water through the collection system of an associated domestic wastewater treatment facility is expected to increase the number of entities authorized to construct RWPFs within the State. An increase in reclaimed water production would increase the availability of water resources for a variety of uses, particularly during times of high demand such as during droughts, by offsetting the use of potable water with reclaimed water.

This rulemaking, in addition to concurrent rulemaking in Chapter 210, would allow for an alternative means for disposal of treated wastewater by allowing for RWPFs to dispose of the reclaimed water without a permit. Any of the 3,063 private domestic wastewater treatment facilities that agree to receive and treat the reclaimed water from the RWPF may incur additional costs for construction and operation. This potentially includes costs related to adding additional capacity, connection to collection systems, installation or modification of an influent monitoring system, and additional treatment or maintenance.

This rulemaking would also allow private entities to establish RWPFs to do so without needing a permit, and without needing to construct, own, and operate an associated domestic wastewater treatment facility for an alternative means of disposal. Therefore, the establishment and operation of such facilities could be done at a significantly lower cost than would otherwise have been possible.

In total, the costs or cost savings for industries or businesses will depend on the amount of reclaimed water generated, used, and disposed of through the collection system of an associated domestic wastewater treatment facility.

The proposed rulemaking could result in an increase or decrease in costs for individuals. The construction and operation of additional reclaimed water production infrastructure could result in higher water bills or additional fees that could be passed along to water users and consumers. However, cost savings could occur from additional reclaimed water production infrastructure because the increased availability of reclaimed water could alleviate demand on existing potable water resources during times of high demand or drought. This reduction in demand could lead to lower water bills for users and consumers.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation, and it does not create, expand, repeal, or limit this regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule could positively affect the state's economy by increasing opportunities for manufacturers, suppliers, and operators of reclaimed water infrastructure. Additionally, streamlining existing regulations for obtaining an alternative method of disposal for reclaimed water could increase reclaimed water production infrastructure and could increase overall potable water resources. Increased availability of potable water resources could positively affect the state's economy.

Draft Regulatory Impact Analysis Determination

TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by

Texas Government Code (TGC), §2001.0225, and determined that the rulemaking is not subject to TGC, §2001.0225(a) because it does not meet the definition of a "Major environmental rule" as defined in TGC, §2001.0225(g)(3). The following is a summary of that review.

Section 2001.0225 applies to a "Major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector or the state.

The Texas Legislature enacted SB 1289, amending TWC, Chapter 26 (Water Quality Control), Subchapter B (General Water Quality Power and Duties), by adding §26.02715 to the TWC. The intent is to increase the efficiency of water treatment and production facilities by providing more flexibility in TCEQ's rules for Wastewater Treatment and Reclaimed Water Production Facilities, related to 30 TAC Chapters 321 *Control of Certain Activities by Rule*, Subchapter P, *Reclaimed Water Production Facilities* and 30 TAC Chapter 210, *Use of Reclaimed Water*.

SB 1289 directs TCEQ to provide flexibility, through rulemaking, for facilities that use domestic wastewater treated for reuse (reclaimed water), to dispose of any reclaimed water without an additional permit under certain conditions.

Reclaimed water producers are currently authorized to use its treated reclaimed water only if it obtains a permit for an alternative means of disposal during times when there is no demand for its reclaimed water. TCEQ rules also require that the owner of any RWPF authorized by TCEQ, be the owner of a wastewater treatment facility permitted by TCEQ.

SB 1289 instructs TCEQ to promulgate rules that authorize facilities to convey reclaimed water to a willing "associated domestic wastewater treatment facility" and its wastewater collection system, as an "alternative means of disposal," as required under 30 TAC Chapter 210.

SB 1289 also prohibits TCEQ from requiring an owner of a reclaimed water production facility to be the owner of the associated domestic wastewater treatment facility that is permitted by TCEQ.

SB 1289 directs TCEQ to amend TCEQ rules in 30 TAC Chapter 321, *Control of Certain Activities by Rule*, Subchapter P *Reclaimed Water Production Facilities*, which relate to facilities treating domestic wastewater for reuse purposes ("Reclaimed Water").

Specifically, SB 1289 instructs TCEQ to adopt rules that authorize RWPFs to dispose of treated reclaimed water without an additional permit, if the RWPF disposes of the treated reclaimed water through an "associated domestic wastewater treatment facility" and its wastewater collection system, after receiving consent from the owner and operator of the associated domestic wastewater treatment facility that will receive the reclaimed water for further or final treatment and disposal.

Therefore, the specific intent of the proposed rulemaking is related to providing flexibility, in the form of additional options for facilities that produce reclaimed water, as identified in SB 1289.

Certain aspects of TCEQ's Reclaimed Water Rules are intended to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the TGC, §2001.0225 definition of "Major environmental rule."

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in TGC, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather amends authorizations in state law and TCEQ rules. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under TCEQ's general rulemaking authority. This rulemaking is being proposed under a specific state statute enacted in SB 1289 in the 88th Texas Regular Legislative Session (2023) and implements existing state law. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required.

Therefore, the commission does not adopt the rule solely under the commission's general powers.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under TGC, Chapter 2007. The following is a summary of that analysis.

Under TGC, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to implement the legislative amendments to the TWC in SB 1289 by amending TCEQ's Reclaimed Water Rules to expand the regulatory options for disposal of reclaimed water, as identified in SB 1289. The proposed rulemaking will substantially advance the stated purpose of SB 1289 by adopting new rule language that provides

for disposal of reclaimed water without an additional permit under the conditions identified in SB 1289.

Promulgation and enforcement of the proposed rules would not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, TGC, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The primary purpose of the proposed rules is to implement SB 1289 by providing for the authorization, under conditions identified in SB 1289, for disposal of reclaimed water without an additional permit when conveyed to an associated domestic wastewater treatment facility. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking will not cause a taking under TGC, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §§505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a hold a hybrid virtual and in-person public hearing on this proposal in Austin on November 12, 2024 at 10:00 a.m. in Building D, Room 191 located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by November 7, 2024. To register for the hearing, please email *Rules@tceq.texas.gov* and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 8, 2024, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_MzdkZDBiNGItNzhhOS00ZDNkLTgzNTEtNGIwZTgwNjRjMWEx-%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: *https://tceq.commentinput.com/comment/search*. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-137-321-OW. The comment period closes on November 12, 2024. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Erika Crespo, Water Quality Division, (512) 239-1827.

Statutory Authority

The commission proposes these amendments to the Texas Commission on Environmental Quality (TCEQ) rules under the Texas Water Code (TWC). TWC, §5.013 establishes the general jurisdiction of the commission, while TWC, §5.102 provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103. TWC, §5.103 requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state. TWC, §5.120 requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state. TWC, §26.02715. authorizes disposal of Reclaimed Water without an additional permit under certain conditions.

The amendments implement Senate Bill 1289, 88th Texas Regular Legislative Session (2023), TWC, §§5.013, 5.102, 5.103, 5.120, and 26.02715.

§321.301. Purpose and Applicability.

(a) The purpose of this subchapter is to establish authorization procedures, general design criteria, and operational requirements for reclaimed water production facilities and thereby promote the beneficial use of reclaimed water that may be substituted for potable water or raw water.

(b) This subchapter authorizes a reclaimed water production facility to produce reclaimed domestic wastewater at a site other than a permitted domestic or associated domestic wastewater treatment facility.

(c) A reclaimed water production facility authorized according to this subchapter is not required to hold a wastewater discharge or disposal permit from the commission, except as provided in §210.5 of this title (relating to Authorization for the Use of Reclaimed Water).

(d) A reclaimed water production facility may be authorized under this subchapter [~~only~~] if:

(1) the owner of the reclaimed water production facility is also the [~~an~~] owner of the associated domestic wastewater treatment facility that is permitted by the commission; or[.]

(2) the owner of the reclaimed water production facility has documented consent, as required in §321.309(d)(11) of this title (relating to Public Notice Requirements), from the owner and operator of an associated domestic wastewater treatment facility and, if applicable, the owner of the wastewater collection system to which the reclaimed water production facility is or will be connected.

(e) If the wastewater discharge or disposal permit for the domestic wastewater treatment facility associated with a reclaimed water production facility expires, lapses, is surrendered, suspended, or revoked, the authorization to operate the reclaimed water production facility is automatically cancelled.

§321.303. Definitions.

All definitions in Texas Water Code, §26.001 and 30 TAC Chapters 210 and 305 of this title (relating to Use of Reclaimed Water, and Consolidated Permits) shall apply to this subchapter and are incorporated by reference. Specific definitions of words or phrases used in this subchapter are as follows:

(1) Authorization--a written document issued by the commission allowing an owner to construct and operate a reclaimed water production facility in accordance with the provisions of this subchapter.

(2) Collection System--pipes, conduits, lift stations, force mains, and all other constructions, devices, and appurtenant appliances used to transport domestic wastewater to a wastewater treatment facility, as defined in Chapter 217 of this title (relating to Design Criteria for Domestic Wastewater Systems).

(3) [~~(2)~~] Reclaimed Water Production Facility--a domestic wastewater treatment facility authorized in accordance with this subchapter that treats [~~municipal~~] wastewater for reuse on an as-needed basis and is located at a different location from the domestic or associated [~~permitted~~] domestic wastewater treatment facility.

(4) [~~(3)~~] Treatment unit--Any apparatus necessary for treating wastewater located at the reclaimed water production facility.

§321.305. General Requirements.

(a) An applicant for authorization to produce reclaimed water at a reclaimed water production facility must have:

(1) a domestic wastewater permit for a domestic wastewater treatment facility that is located at the terminus of the collection system to which the reclaimed water production facility is or will be connected; or [~~and~~]

(2) documented consent from the owner and operator of the wastewater collection system and associated domestic wastewater treatment facility to which the reclaimed water production facility is or will be connected; and

(3) [~~(2)~~] an authorization to use reclaimed water under Chapter 210 of this title (relating to the Use of Reclaimed Water).

(b) Applications for reclaimed water production facilities and for authorization to beneficially reuse reclaimed water under Chapter 210 of this title may be submitted concurrently.

(c) The authorization for [~~of~~] a reclaimed water production facility does not alter the permitted flow or effluent limits of the associated domestic wastewater treatment facility.

(d) If the consent under subsection (a)(2) of this section is withdrawn by the collection system or associated domestic wastewater treatment facility owner(s), the authorization to operate the reclaimed water production facility without an alternate disposal permit is terminated. The owner or operator of the reclaimed water production facility must provide the executive director with written notice of the withdrawn consent, and confirmation that the reclaimed water production facility has ceased operation within five (5) business days after the owner or operator is notified that the consent has been withdrawn.

§321.307. Restrictions.

(a) A reclaimed water production facility may not discharge [~~wastewater or~~] pollutants into water in the state without a Texas Pollutant Discharge Elimination System permit.

(b) The hydraulic capacity of the reclaimed water production facilities may not individually nor collectively exceed the permitted hydraulic capacity of the associated domestic wastewater treatment facility.

(c) A reclaimed water production facility may not be authorized at a flow rate that could cause interference with the operation of the associated domestic wastewater treatment facility or a violation of the associated domestic wastewater treatment facility's permit.

(d) A reclaimed water production facility may not treat or dispose of sludge. All sludge must be conveyed through the collection system to the associated [~~permitted~~] domestic wastewater treatment facility, treated, and disposed of in accordance with the associated facility's permit and all applicable rules.

(e) The owner may not accept trucked or hauled wastes at a reclaimed water production facility.

(f) Authorization under this chapter does not convey or alter any property right and does not grant any exclusive privilege.

§321.309. Application Requirements.

(a) An applicant shall comply with the provisions of §§305.42(a), 305.43, 305.44, and 305.47 of this title (relating to Application Required; Who Applies; Signatories to Applications; and Retention of Application Data).

(b) An application for an authorization of a reclaimed water production facility under this subchapter must be made on forms prescribed by the executive director.

(c) An applicant shall submit one original application with attachments to the executive director and one additional copy of the application with attachments to the appropriate regional office. Additional copies may be required as noted in the application.

(d) The application must contain, at a minimum, the following information:

(1) the applicant's name, mailing address, and telephone number;

(2) the [~~wastewater~~] permit number of the associated domestic wastewater treatment facility;

(3) a brief description of the nature of the reclaimed water use;

(4) the signature of the applicant, in accordance with §305.44 of this title;

(5) a copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner of any lands to be used for the reclaimed water production facility;

(6) a copy of the applicant's reuse authorization issued under Chapter 210 of this title (relating to Use of Reclaimed Water), or a copy of a concurrent application;

(7) a [~~preliminary~~] design report for the reclaimed water production facility that includes the design flow, design calculations,

the size of the proposed treatment units, a flow diagram, and the proposed [~~adopted~~] effluent quality;

(8) a buffer zone map and report indicating how the reclaimed water production facility will meet buffer zone requirements;

(9) a County General Highway Map (with scale clearly shown) to identify the relative location of the domestic wastewater treatment facility, the main lines of the collection system, and the reclaimed water production facility and at least a one-mile area surrounding the reclaimed water production facility;

(10) one original (remainder in color copies, if required) United States Geological Survey 7.5-minute quadrangle topographic map or an equivalent high quality color copy showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of the reclaimed water production facility. The map shall extend at least a one-mile beyond the facility boundaries and shall be sufficient to show the following:

(A) each well, spring, and surface water body or other water in the state within the one-mile area; and

(B) the general character of the areas adjacent to the facility, including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, and undeveloped.

(11) For reclaimed water production facilities seeking coverage for disposal through an associated domestic wastewater treatment facility, copies of the following documented consent must be submitted with the application:

(A) the documented consent from the owner and operator of the associated domestic wastewater treatment facility demonstrating that the facility has capacity to receive discharges of reclaimed water, untreated wastewater, and sludge from the reclaimed water production facility without exceeding or violating any permit requirements in the event that reclaimed water cannot be beneficially reused or the reclaimed water production facility is out of service.

(B) the documented consent from the owner of the collection system to which the reclaimed water production facility is or will be connected, if applicable.

(12) [~~(11)~~] any other information requested by the executive director.

§321.313. Authorization.

(a) The executive director shall not authorize a reclaimed water production facility unless the following conditions are met:

(1) the applicant has obtained plans and specifications approval for the reclaimed water production facility according to the design criteria according to §321.315 of this title (relating to Design Requirements); and

(2) the applicant has an authorization according to Chapter 210 of this title (relating to Use of Reclaimed Water).

(b) The executive director shall not authorize a reclaimed water production facility owned or operated by an applicant that has a compliance history rating of unsatisfactory [~~poor~~], as defined by Chapter 60 of this title (relating to Compliance History).

(c) The executive director shall not authorize a reclaimed water production facility that discharges to a domestic or associated domestic wastewater treatment facility that has a compliance history site rating of unsatisfactory [~~poor~~], as defined by Chapter 60 of this title.

(d) The applicant, public interest counsel or other persons may file with the Office of the Chief Clerk a motion to overturn the executive director's final action on an authorization for a reclaimed water production facility under §50.139(a), (b), and (d) - (g) of this title (relating to Motion to Overturn Executive Director's Decision).

§321.315. Design Requirements.

(a) Plans and specifications for a reclaimed water production facility must meet the design criteria and the operation, maintenance, and safety requirements in Chapter 217 of this title (relating to Design Criteria for Wastewater Treatment Systems) except for redundant treatment units or processes, including power supplies, if the design incorporates sufficient provisions to ensure the effluent quality meets the required limits in the event of a failure of a power supply or a treatment unit or process.

(b) The reclaimed water production facility must be designed to convey all wastewater to the domestic or associated domestic wastewater treatment facility any time the facility is not in operation.

(c) The reclaimed water production facility must be designed to convey all sludge received or produced by the facility to the domestic or associated domestic wastewater treatment facility. Sludge may be held in an aerated storage vessel for discharge to the collection system if the entire sludge contents are completely discharged at least once within every 24-hour period.

(d) The reclaimed water production facility must be designed and operated to minimize odor and other nuisance conditions.

(e) The following treatment processes and units are prohibited:

(1) unaerated primary treatment units (including Imhoff tanks and primary clarifiers);

(2) trickling filters;

(3) pond or lagoon treatment systems;

(4) flow equalization basins; and

(5) unenclosed screenings storage containers.

§321.319. Public Notice Requirements.

(a) Public notice is not required if an applicant for a reclaimed water production facility qualifies for an enhanced buffer zone designation in accordance with §321.317(d) of this title (relating to Buffer Zone Requirements).

(b) An applicant for a reclaimed water production facility that does not qualify for an enhanced buffer zone designation shall place a sign at the proposed site during the public comment period as defined in subsection (c)(3) of this section.

(1) The sign must include no less than two-inch, black, block-lettering on a white background. The sign must include the following information:

(A) the legal name and address of the applicant;

(B) notice that the applicant has applied for authorization to construct a reclaimed water production facility at the site;

(C) how the public may provide comments to the TCEQ; and

(D) where copies of the application, executive director's technical summary, and draft authorization may be reviewed.

(2) The sign placed at the site shall be located at or near the site main entrance, provided that the sign is legible from the public street. If the sign would not be legible from the public street, then the sign shall be placed within ten feet of a property line paralleling a public street.

(A) The executive director may approve variations if the applicant has demonstrated that it is not practical to comply with the specific sign-posting requirements.

(B) Alternative sign-posting plans proposed by the applicant must be at least as effective in providing notice to the public.

(C) The executive director must approve the variations before signs are posted.

(c) An applicant for a reclaimed water production facility that does not qualify for an enhanced buffer zone designation shall publish notice of the executive director's preliminary determination on the application at least once in a newspaper of general circulation in the county where the reclaimed water production facility is located or adopted to be located. The notice shall be published at the applicant's expense.

(1) The applicant must publish notice no later than 30 days after receiving instructions to publish notice from the Texas Commission on Environmental Quality's (TCEQ's) Office of the Chief Clerk. The notice must include:

(A) the legal name of the applicant and the address of the applicant;

(B) a brief summary of the information included in the application;

(C) the location of the reclaimed water production facility;

(D) the location and mailing address where the public may provide comments to the TCEQ;

(E) the public location or the publicly accessible internet Web site where copies of the application, executive director's technical summary, and authorization may be reviewed;

(F) an opportunity for the public to submit comments on the application and executive director's technical summary; and

(G) instructions to the public on how to request a public meeting for a new reclaimed water production facility.

(2) The applicant must file with the Office of the Chief Clerk no later than 30 days after receiving the instruction to publish the notice of the executive director's preliminary determination on the application, and if applicable the notice of public meeting:

(A) a signed affidavit from the publisher acknowledging that the notice was published and the date of publication; and

(B) a copy of the newspaper clipping.

(3) The public comment period begins on the first date the notice is published and ends 30 days later unless a public meeting is held. If a public meeting is held, the public comment period ends either 30 days after the initial notice is published or at the conclusion of the public meeting, whichever is later.

(4) The public may submit written comments to the Office of the Chief Clerk during the comment period detailing how the application for the reclaimed water production facility fails to meet the technical requirements or conditions of this rule. The executive director will consider all comments received during the comment period.

(5) The public may submit a written request for a public meeting to the Office of the Chief Clerk during the comment period.

(A) The executive director will determine if there is significant interest to hold a public meeting.

(B) If the executive director determines that there is significant interest to hold a public meeting:

(i) TCEQ staff will facilitate the meeting; and

(ii) the applicant will:

(I) arrange accommodations for the public meeting to be held in the county where the reclaimed water production facility will be located; and

(II) publish notice of the public meeting in the same newspaper as the initial notice was published at least 30 days prior to the meeting.

(iii) At the public meeting the applicant will:

(I) describe the proposed [~~adopted~~] reclaimed water production facility and provide maps and other facility data; and

(II) provide a sign-in sheet for attendees to register their names and addresses and furnish the sheet to the executive director.

(C) [~~(B)~~] A public meeting held under this rule is not an evidentiary proceeding.

(6) The TCEQ Office of the Chief Clerk will mail the executive director's decision and final technical summary on which the decision was based to the applicant, persons whose names and addresses appear legibly on the sign-in sheet from the public meeting, and persons who submitted written comments.

§321.321. Additional Reclaimed Water Production Facility Requirements.

(a) The owner shall employ or contract with one or more licensed wastewater treatment facility operators or wastewater facility operations companies holding a valid license or registration according to the requirements of Chapter 30, Subchapter J of this title (relating to Wastewater Operators And Operations Companies).

(b) The operator or wastewater facility operations company shall have the same level of license or higher as the operator license of the permitted domestic or associated domestic wastewater treatment facility associated with the reclaimed water production facility.

(c) The owner shall notify the executive director at least 45 days prior to completion and at least 45 days prior to operation of a reclaimed water production facility.

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

Filed with the Office of the Secretary of State on September 27, 2024.

TRD-202404661
Todd Galiga
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 239-3578

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 43. CONTESTED CASES

34 TAC §§43.1 - 43.21, 43.23 - 43.29, 43.33 - 43.48

The Teacher Retirement System of Texas (TRS) proposes to repeal §§43.1 - 43.21, 43.23 - 43.29, and 43.33 - 43.48 of Chapter 43 (relating to Contested Cases) in Part 3 of Title 34 of the Texas Administrative Code. These repeals are proposed in conjunction with the proposed new rules under Chapter 43 published elsewhere in this issue of the *Texas Register.*

BACKGROUND AND PURPOSE

In 2022, the TRS board of trustees approved the adoption of TRS's four-year rule review. As part of that adopted rule review, TRS staff recommended amending or repealing and readopting all of Chapter 43 of TRS rules, which govern the pension appeals process, in order to improve the readability of the chapter for TRS members and staff. To implement this recommendation, TRS proposes to repeal its existing 44 rules under Chapter 43 as part of a complete restructuring and revision of that chapter. In addition, TRS has proposed 49 new rules to replace these proposed repealed rules in Chapter 43. The proposed new rules are published elsewhere in this issue of the *Texas Register*

TRS has determined that the proposed repealed rules, if adopted, shall become effective on the same date that the proposed new Chapter 43 rules become effective.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed repealed rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed repealed rules.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed repealed rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed repealed rules will permit TRS to permit to adopt its proposed new Chapter 43 rules, which will improve the readability and clarity of TRS's existing pension appeal process and make administrative improvements to that process.

Mr. Green has also determined that the public will incur no new costs as a result of the proposed repealed rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed repealed rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed repealed rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed repealed rules are in effect, the proposed repealed rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand or limit an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

The proposed repealed rules will repeal 44 existing rules for the reasons stated above in this preamble.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed repealed rules, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed repealed rules because the proposed repealed rules do not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register.*

STATUTORY AUTHORITY

The proposed repealed rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; and Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

CROSS-REFERENCE TO STATUTE

The proposed repealed rules will affect Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

§43.1. Administrative Review of Individual Requests.
§43.2. Effect of Invalidity of Rule.
§43.3. Definitions.
§43.4. Decisions Subject to Review by an Adjudicative Hearing.
§43.5. Request for Adjudicative Hearing.
§43.6. Filing of Documents.
§43.7. Computation of Time.
§43.8. Extensions.
§43.9. Docketing of Appeal for Adjudicative Hearing and Dismissal for Failure to Obtain Setting.
§43.10. Authority to Grant Relief.
§43.11. Classification of Pleadings.
§43.12. Form of Petitions and Other Pleadings.
§43.13. Filing of Pleadings and Amendments.
§43.14. Briefs.
§43.15. Motions.
§43.16. Notice of Hearing and Other Action.
§43.17. Agreements To Be in Writing.
§43.18. Motion for Consolidation.
§43.19. Additional Parties.
§43.20. Appearance and Representation.
§43.21. Lead Counsel.

§43.23. Powers of the Administrative Law Judge.

§43.24. Prehearing Conference and Orders.

§43.25. Conduct of Hearing.

§43.26. General Admissibility.

§43.27. Exhibits.

§43.28. Pre-filed Direct Testimony in Disability Appeal Proceedings.

§43.29. Limit on Number of Witnesses.

§43.33. Failure to Appear.

§43.34. Conduct and Decorum at Hearing.

§43.35. Official Notice.

§43.36. Ex Parte Consultations.

§43.37. Recording of the Hearing; Certified Language Interpreter.

§43.38. Dismissal without Hearing.

§43.39. Summary Disposition.

§43.40. The Record.

§43.41. Findings of Fact.

§43.42. Reopening of Hearing.

§43.43. Subpoenas and Commissions.

§43.44. Discovery.

§43.45. Proposals for Decision, Exceptions, and Appeals to the Board of Trustees.

§43.46. Rehearings.

§43.47. Procedures Not Otherwise Provided.

§43.48. Cost of Preparing Administrative Record.

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

Filed with the Office of the Secretary of State on September 30, 2024.

TRD-202404686

Don Green

Chief Financial Officer

Teacher Retirement System of Texas

Earliest possible date of adoption: November 10, 2024

For further information, please call: (512) 542-6506

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CHAPTER 43. CONTESTED CASES

The Teacher Retirement System of Texas (TRS) proposes new §§43.1 - 43.7 under new Subchapter A (relating to General Administration) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; new §§43.101 - 43.107 under new Subchapter B (relating to Requests for Adjudicative Hearing) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; new §§43.201 - 43.228 under new Subchapter C (relating to Hearings Not Docketed at SOAH) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; and new §§43.301 - 43.307 under new Subchapter D (relating to Final Decisions of TRS) of Chapter 43 (relating to Contested Cases) in Part 3 of Title 34 of the Texas Administrative Code. These new rules are proposed in conjunction with the proposed repeals of all current rules under Chapter 43 (relating to Contested Cases) in Part 3 of Title 34 of the Texas Administrative Code as published elsewhere in this issue of the *Texas Register.*

BACKGROUND AND PURPOSE

In 2022, the TRS board of trustees approved the adoption of TRS's four-year rule review. As part of that adopted rule review, TRS staff recommended amending or repealing and readopting all of Chapter 43 of TRS rules, which govern the pension appeals process, in order to improve the readability of the chapter for TRS members and staff. To implement this recommendation, TRS proposes 49 new rules in Chapter 43. In addition, elsewhere in this issue of the *Texas Register*, TRS is also proposing the repeal of all 44 current rules in Chapter 43.

As recommended in rule review, the proposed new rules primarily restructure the existing Chapter 43 rules to increase readability and usability for both TRS members and TRS staff. For instance, the proposed new rules are divided into four new subchapters to clarify which rules apply at which point in the TRS appeal process. In addition, 42 of the 44 current Chapter 43 rules are being readopted wholly or in part with, primarily, nonsubstantive style and structural changes.

The proposed new rules also provide for several minor administrative improvements to the pension appeals process. These improvements include clarifying the exceptions process after the administrative law judge issues a proposal for decision and the deadline for members to resubmit petitions for adjudicative hearing that were rejected for formal deficiencies.

Lastly, the proposed new rules make substantive changes to the hearing process for appeals to the board of trustees. These changes include: delegating the board's authority to determine whether to have oral argument to the executive director in consultation with the board chair; providing an expanded opportunity for parties to submit written briefs to the board; and clarifying the hearing process for disability appeals that come before the board.

These changes will improve the hearing process by expediting the process to determine whether oral argument will be granted while simultaneously ensuring that all parties have equal opportunity to provide written argument to the board. Further, the changes to the disability appeal process clarify how confidentiality, oral argument, and the board's review of the ALJ's proposal for decision shall proceed.

A full rule-by-rule description of the proposed new rules is provided below.

SECTION-BY-SECTION SUMMARY

Proposed new §43.1 of this title (relating to the Applicability) readopts portions of current §43.1 of this title (relating to Administrative Review of Individual Requests) and §43.9 of this title (relating to Docketing of Appeal for Adjudicative Hearing and Dismissal for Failure to Obtain Setting) in proposed new subsections (a) and (c), respectively. In addition, proposed new §43.1(b) clarifies that appeals relating to qualified domestic relations orders are governed by Chapter 47 of this title (relating to Qualified Domestic Relations Order) and not governed by Chapter 43.

Proposed new §43.2 of this title (relating to Definitions) largely readopts the existing provisions of current §43.3 of this title (relating to Definitions) with minor, nonsubstantive changes for style and clarity purposes.

Proposed new §43.3 of this title (relating to Filing of Documents) largely readopts the existing provisions of current §43.6 of this title (relating to Filing of Documents) with minor, nonsubstantive changes for style and clarity purposes. In addition, proposed

new §43.3 also provides the procedures for filing of documents if TRS has referred an appeal for hearing before an administrative law judge (ALJ) not affiliated with the State Office of Administrative Hearings (SOAH).

Proposed new §43.4 of this title (relating to Computation of Time) primarily readopts current §43.7 of this title (relating to Computation of Time) with minor, clarifying changes.

Proposed new §43.5 of this title (relating to Extensions) readopts current §43.8 of this title (relating to Extensions) with minor, nonsubstantive changes for style and clarity purposes.

Proposed new §43.6 (relating to Ex Parte Consultations) readopts the provisions of current §43.36 of this title (relating to Ex Parte Consultations) and also clarifies that its provisions apply to all contested cases under Chapter 43, not just those heard before a hearing officer not affiliated with SOAH.

Proposed new §43.7 of this title (relating to Procedures Not Otherwise Provided) readopts current §43.47 of this title (relating to Procedures Not Otherwise Provided) with a clarifying change that the board of trustees and TRS deputy director may also, in addition to the ALJ and executive director, resolve procedural issues as necessary in accordance with this provision when there are no other applicable TRS rules or statutes.

Proposed new §43.1 through proposed new §43.7 are proposed to be included in proposed new Subchapter A (relating to General Administration) in Chapter 43 of TRS rules.

Proposed new §43.101 of this title (relating to Administrative Review of Individual Requests) readopts portions of current §43.1 of this title (relating to Administrative Review of Individual Requests) that pertain to the administrative review of pension appeals that do not relate to eligibility for disability retirement. Proposed new §43.101 also makes minor, conforming changes to the text of current §43.1.

Proposed new §43.102 of this title (relating to Administrative Review of Disability Determinations) readopts subsection (f) of current §43.1 of this title, which relates to the administrative review of disability determinations made by the TRS Medical Board. Proposed new §43.102 also provides procedural steps for the review that are analogous to the steps for administrative reviews under proposed new §43.101. Lastly, proposed new §43.102 provides that a TRS member who pursues an adjudicative hearing on the member's eligibility for disability retirement consents to public hearing of that appeal once it reaches the TRS Board of Trustees.

Proposed new §43.103 of this title (relating to Administrative Review of Option Beneficiary or Optional Retirement Annuity Plan Changes) readopts subsection (b) of current §43.4 of this title (relating to Decisions Subject to Review by an Adjudicative Hearing).

Proposed new §43.104 of this title (relating to Request for Adjudicative Hearing) largely readopts provisions from current §43.5 of this title (relating to Request for Adjudicative Hearing) and subsections (d) and (e) of current §43.12 of this title (relating to Form of Petitions and Other Pleadings). In addition, proposed new §43.104 provides that a petition for adjudicative hearing must include "a concise statement of the facts supporting the petition and a statement of the specific relief requested from TRS" to correspond with analogous provisions in paragraphs (f)(2)-(3) of current §43.12.

Proposed new §43.105 of this title (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting) readopts provisions from current §43.4 of this title and §43.9 of this title that relate to the determination to docket or decline to docket a petition for adjudicative hearing. In addition, proposed new §43.105 clarifies the deadline for how long a party has to resubmit a petition that the deputy director rejects for formatting purposes.

Proposed new §43.106 of this title (relating to Authority to Grant Relief) primarily readopts current § 43.10 of this title (relating to Authority to Grant Relief) with minor, nonsubstantive changes for style and clarity. Proposed new §43.106 also clarifies that the chief benefit officer has the authority to grant an appeal while it remains in the docketing process.

Proposed new §43.107 of this title (relating to Subpoenas and Commissions) primarily readopts current § 43.43 (relating to Subpoenas and Commissions). In addition, proposed new § 43.107 simplifies the subpoena and commission process by placing all authority to issue subpoenas and commissions with the deputy director and providing that only the parties and the ALJ may request a subpoena or commission.

Proposed new §43.101 through proposed new §43.107 are proposed to be included in proposed new Subchapter B (relating to Requests for Adjudicative Hearing) in Chapter 43 of TRS rules.

Proposed new §43.201 of this title (relating to Applicability) is a new rule that provides that the provisions of new Subchapter C of Chapter 43 (relating to Hearings Not Docketed at SOAH) only apply to hearings docketed to be heard by a hearing official not affiliated with SOAH.

Proposed new §43.202 of this title (relating to Form of Pleadings) primarily readopts the provisions relating to pleadings of current §43.12 of this title with only minor conforming changes except the provisions related to petitions (specifically subsections (d)-(e) of current §43.12). Those subsections are readopted in proposed new §43.104 of this title (relating to Request for Adjudicative Hearing).

Proposed new §43.203 of this title (relating to Filing of Pleadings and Amendments) primarily readopts the provisions of current §43.13 of this title (relating to Filing of Pleadings and Amendments) with only minor conforming changes.

Proposed new §43.204 of this title (relating to Briefs) primarily readopts the provisions of current §43.14 of this title (relating to Briefs) with only minor conforming changes.

Proposed new §43.205 of this title (relating to Motions) primarily readopts the provisions of current §43.15 of this title (relating to Motions) with only minor conforming changes.

Proposed new §43.206 of this title (relating to Discovery) primarily readopts the provisions of current §43.44 of this title (relating to Discovery) with only minor conforming changes and to update the reference to SOAH's procedural rules regarding discovery.

Proposed new §43.207 of this title (relating to Notice of Hearing and Other Action) primarily readopts the provisions of current §43.16 of this title (relating to Notice of Hearing and Other Action) with only minor changes for style and clarity.

Proposed new §43.208 of this title (relating to Agreements To Be in Writing) primarily readopts the provisions of current §43.17 of this title (relating to Agreements To Be in Writing) with only minor conforming changes.

Proposed new §43.209 of this title (relating to Motion for Consolidation) primarily readopts the provisions of current §43.18 of this title (relating to Motion for Consolidation) with only minor conforming changes.

Proposed new §43.210 of this title (relating to Additional Parties) primarily readopts the provisions of current §43.19 of this title (relating to Additional Parties) with only minor changes for style and clarity.

Proposed new §43.211 of this title (relating to Appearance and Representation) primarily readopts the provisions of current §43.20 of this title (relating to Appearance and Representation) with only minor conforming changes.

Proposed new §43.212 of this title (relating to Lead Counsel) readopts the provisions of current §43.21 of this title (relating to Lead Counsel).

Proposed new §43.213 of this title (relating to Powers of the Administrative Law Judge) primarily readopts the provisions of current §43.23 of this title (relating to Powers of the Administrative Law Judge) with only minor conforming changes.

Proposed new §43.214 of this title (relating to Prehearing Conference and Orders) readopts the provisions of current §43.24 of this title (relating to Prehearing Conference and Orders).

Proposed new §43.215 of this title (relating to Conduct of Hearing) primarily readopts the provisions of current §43.25 of this title (relating to Conduct of Hearing) with minor conforming changes and a clarification that all TRS contested case hearings before a hearing officer not affiliated with SOAH are confidential. This is the same standard as contested case hearings heard before SOAH.

Proposed new §43.216 of this title (relating to General Admissibility) readopts the provisions of current §43.26 of this title (relating to General Admissibility).

Proposed new §43.217 (relating to Exhibits) primarily readopts the provisions of current §43.27 of this title (relating to Exhibits) with only minor conforming changes and changes for style and clarity.

Proposed new §43.218 of this title (relating to Pre-filed Direct Testimony in Disability Appeal Proceedings) readopts the provisions of current § 43.28 (relating to Pre-filed Direct Testimony in Disability Appeal Proceedings).

Proposed new §43.219 of this title (relating to Limit on Number of Witnesses) readopts the provisions of current §43.29 of this title (relating to Limit on Number of Witnesses).

Proposed new §43.220 of this title (relating to Failure to Appear) readopts the provisions of current §43.33 of this title (relating to Failure to Appear).

Proposed new §43.221 of this title (relating to Conduct and Decorum at Hearing) primarily readopts the provisions of §43.34 of this title (relating to Conduct and Decorum at Hearing) with only minor conforming changes.

Proposed new §43.222 of this title (relating to Official Notice) readopts the provisions of §43.35 of this title (relating to Official Notice).

Proposed new §43.223 of this title (relating to Recording of the Hearing; Certified Language Interpreter) primarily readopts the provisions of current §43.37 of this title (relating to Recording of the Hearing; Certified Language Interpreter) with only minor conforming changes.

Proposed new §43.224 of this title (relating to Dismissal without Hearing) primarily readopts the provisions of current §43.38 of this title (relating to Dismissal without Hearing) with only minor conforming changes.

Proposed new §43.225 of this title (relating to Summary Disposition) primarily readopts the provisions of current §43.39 of this title (relating to Summary Disposition) but changes the deadline for filing a motion for summary disposition from 25 days before the hearing on the merits to 30 days before the hearing. This change is necessary to ensure non-SOAH hearings conform with SOAH hearings on key procedural deadlines and provide sufficient time for the administrative law judge to consider the motion prior to the hearing on the merits.

Proposed new §43.226 (relating to The Record) readopts the provisions of current §43.40 of this title (relating to The Record).

Proposed new §43.227 (relating to Findings of Fact) readopts the provisions of current §43.41 of this title (relating to Findings of Fact).

Proposed new §43.228 of this title (relating to Reopening of Hearing) readopts some provisions of current §43.42 of this title (relating to the Reopening of Hearing) but removes provisions relating to reopening the hearing after the administrative law judge issues a PFD and the executive director or board of trustees have begun to consider the appeal. Because proposed new §43.228 only applies at the contested case level, these elements of current §43.42 have been readopted in provisions related to those later stages of the appeal process.

Proposed new §43.201 through proposed new §43.228 are proposed to be included in proposed new Subchapter C (relating to Hearings Not Docketed at SOAH) of Chapter 43 of TRS rules.

Proposed new §43.301 of this title (relating to Proposals for Decision and Exceptions) readopts subsection (b) of current §43.45 of this title (relating to Proposals for Decision, Exceptions, and Appeals to the Board of Trustees). In addition, proposed new §43.301 further clarifies the exceptions process after an ALJ issues a proposal for decision after a contested case. Specifically, proposed new §43.301 provides that exceptions shall be filed with and reviewed by the ALJ, not the executive director, and the ALJ shall inform TRS whether any action was taken pursuant to the parties' exceptions.

Proposed new §43.302 of this title (relating to Decision of Executive Director) readopts, in part, subsections (c), (e), (h), and (i) of current §43.45 of this title to the extent the provisions involve the duties of the executive director after an ALJ issues a proposal for decision to TRS. Proposed new §43.302 also adds provisions to clarify the executive director's authority to remand a case to the administrative law judge and to modify a proposal for decision if a finding of fact is against the weight of the evidence.

Proposed new §43.303 of this title (relating to Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement) readopts, in part, subsections (c), (h), and (i) of current §43.45 of this title as they relate to the duties of the board of trustees to review an ALJ's proposal for decision in a case relating to a member's eligibility for disability retirement. Proposed new §43.303 primarily expands upon these provisions to provide for the procedure for a proposal for decision to be reviewed by the board of trustees in such a case. The proposed new proce-

dures are similar to those followed by the executive director in a pension appeal not related to eligibility for disability retirement.

Proposed new §43.304 of this title (relating to Appeals to the Board of Trustees) readopts, in part, subsections (c) through (i) and (k) of current §43.45 of this title as they relate to the duties of the board of trustees when reviewing a decision of the executive director. In addition, proposed new §43.304 makes several member-friendly changes to the board of trustees' portion of the appeals process. These changes include providing all parties with the opportunity to submit written briefs or exceptions to the board of trustees in every appeal to the board, not only those appeals when the executive director made a change to the ALJ's proposal for decision. The changes also include offering the parties the opportunity to express their preference on whether oral argument is needed in a case and delegates the determination on whether to have oral argument from the board to the executive director in consultation with the chairman of the board of trustees in order to expedite the decision-making process on that issue. Lastly, similar to the changes made in proposed new §43.302 of this title, proposed new §43.304 also adds provisions to clarify the board of trustees' authority to remand a case to the administrative law judge and to modify a proposal for decision if a finding of fact is against the weight of the evidence.

Proposed new §43.305 of this title (relating to Final Decision of TRS) readopts subsection (j) of current §43.45 of this title.

Proposed new §43.306 of this title (relating to Rehearings) primarily readopts current §43.46 of this title (relating to Rehearings) but also clarifies that the deputy director may also act upon a motion for rehearing or other related motions when the deputy director makes a decision not to docket an appeal in accordance with proposed new §43.105 of this title.

Proposed new §43.307 of this title (relating to Cost of Preparing Administrative Record) readopts current §43.48 of this title (relating to Cost of Preparing Administrative Record).

Proposed new §43.301 through proposed new §43.307 are proposed to be included in proposed new Subchapter D (relating to Final Decisions of TRS) of Chapter 43 of TRS rules.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed new rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed new rules.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed new rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed new rules will be to improve the readability and clarity of TRS's existing pension appeal rules. In addition, Mr. Green has determined that the administrative changes to docketing process and board hearing process will increase the clarity of those processes and increase their efficiency.

Mr. Green has also determined that the public will incur no new costs as a result of complying with the proposed new rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed new rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed new rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed new rules are in effect, the proposed new rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; 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 affect the state's economy.

The proposed new rules will create 49 new rules but almost all these provisions substantively reincorporate provisions from existing Chapter 43 rules that are proposed for repeal elsewhere in this issue of the *Texas Register.* In addition, as described above, many of the proposed new rules add administrative improvements to the TRS pension appeal process.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed new rules, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed new rules because the proposed new rules do not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register.*

SUBCHAPTER A. GENERAL ADMINISTRATION

34 TAC §§43.1 - 43.7

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

§43.1. Applicability.

(a) The procedures of this chapter apply only to administrative decisions, appeals, and adjudicative hearings relating to the TRS pension plan, unless rules relating to other programs specifically adopt by reference the provisions of this chapter.

(b) The procedures of this chapter do not apply to determinations of whether a domestic relations order is a qualified domestic relations order (QDRO) under Chapter 47 of this title (relating to Qualified Domestic Relations Orders). Appeals relating to QDROs are subject to the requirements of Chapter 47.

(c) If a contested case under this chapter is referred to the State Office of Administrative Hearings (SOAH) for adjudicative hearing, then during the period of time the case is before SOAH, the procedural rules for SOAH (1 TAC Chapter 155) shall apply unless inconsistent with applicable statutes or constitutional provisions. If a matter is referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of Subchapter C of this chapter (relating to Hearings Not Docketed at SOAH) shall apply to the conduct of the hearing while pending before the hearing official.

§43.2. Definitions.

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

(1) Administrative law judge--An individual appointed to conduct the adjudicative hearing in a contested case. The deputy director may refer an appeal to be heard by an administrative law judge employed by the State Office of Administrative Hearings or may employ, select, or contract for the services of another administrative law judge or hearing examiner to conduct a hearing.

(2) Appeal--A formal request to the executive director or board, as applicable under this chapter, to reverse or modify a final administrative decision by the chief benefit officer or the Medical Board on a matter over which TRS has jurisdiction and authority to grant relief.

(3) Board--The Board of Trustees of TRS.

(4) Chief Benefit Officer--The Chief Benefit Officer of TRS or person acting in that position.

(5) Contested case--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by TRS after an opportunity for adjudicative hearing on a matter over which TRS has jurisdiction and authority to grant relief and the relief sought does not conflict with the terms of the pension plan.

(6) Deputy Director--The Deputy Director of TRS or person acting in that position.

(7) Executive director--The executive director of TRS or person acting in that position; when the executive director determines that a need exists, the executive director at his or her discretion may designate a person to accomplish the duties assigned in this chapter to the executive director.

(8) Final administrative decision--An action, determination, or decision by the chief benefit officer or the Medical Board, as applicable, based on review of a person's request on an administrative basis (i.e., without an adjudicative hearing).

(9) Final decision of TRS--A decision that may not be appealed further within TRS, either because of exhaustion of all opportunities for appeal within TRS or because of a failure to appeal the decision further within TRS in the manner provided for in this chapter.

(10) Medical board--The medical board appointed by the TRS board of trustees under Government Code §825.204.

(11) Member--A person who is a member, retiree, or beneficiary of TRS.

(12) Order--The whole or a part of the final disposition of an appeal, whether affirmative, negative, injunctive, or declaratory in form, of the executive director, deputy director, or the board in a contested case.

(13) Party--Each person named or admitted in a contested case.

(14) Person--Any natural person or other legal entity.

(15) Pleading--A written document that is submitted by a party, by TRS staff, or by a person seeking to participate in a case as a party and that requests procedural or substantive relief, makes claims or allegations, presents legal arguments, or otherwise addresses matters involved in a contested case.

(16) SOAH--The State Office of Administrative Hearings.

(17) State Office of Administrative Hearings--The state agency established by Chapter 2003, Government Code, which may serve as the forum for the conduct of an adjudicative hearing upon referral of an appeal by TRS.

(18) Third party respondent or petitioner--A person joined as an additional party to a proceeding; a party shall be designated as either a third party respondent or third party petitioner based on whether the person opposes the action requested in the petition or supports it or whether the person's interests are aligned with petitioner or respondent.

(19) TRS--The Teacher Retirement System of Texas.

(20) Trustee--One of the members of the board.

(21) With prejudice--Barring a subsequent contested case on the same claim, allegation, or cause of action.

§43.3. Filing of Documents.

(a) All documents relating to any appeal of a final administrative decision shall be filed with the deputy director at TRS, 1000 Red River Street, Austin, Texas 78701-2698. A document may be filed with TRS by hand-delivery, courier-receipted delivery, facsimile transmission, or regular, certified, or registered mail. A document is deemed filed when mailed if it is received by TRS within a timely manner under Rule 5 of the Texas Rules of Civil Procedure and the sender provides adequate proof of the mailing date.

(b) If the deputy director has docketed an appeal and referred it for adjudicative hearing at SOAH, documents shall be filed in accordance with the procedural rules of SOAH and served upon TRS in accordance with those rules.

(c) If the deputy director has docketed an appeal and referred it to an administrative law judge or other hearing official not affiliated with SOAH, documents shall be filed with the administrative law judge and a copy provided to the TRS docket clerk during the time the matter is pending before the administrative law judge.

§43.4. Computation of Time.

In computing any period of time prescribed or allowed by this chapter, by order of the deputy director, executive director, or board, or by any applicable statute, the period shall begin on the day after the act, event, or default in question, and it shall conclude on the last day of that designated period, unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

§43.5. Extensions.

(a) Unless otherwise provided by statute, the time for filing pleadings or other documents may be extended, upon the filing of a

motion, prior to the expiration of the applicable period of time, showing that there is good cause for such extension of time and that the need for the extension is not caused by the neglect, indifference, or lack of diligence of the party making the motion.

(b) A copy of any such motion shall be served upon all other parties of record to the proceeding contemporaneously with its filing.

(c) In the case of filings that initiate a proceeding or that are made before an appeal has been referred for an adjudicative hearing, the deputy director will determine whether good cause exists and whether an extension should be granted.

(d) In the case of filings made in a proceeding after TRS has referred the appeal for an adjudicative hearing, rules governing hearings before SOAH will control so long as the matter is before SOAH.

(e) If a matter is referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of this chapter shall apply to the conduct of the hearing while pending before the hearing official.

(f) For matters returned by an administrative law judge or hearing examiner to TRS, either through dismissal from the adjudicative hearing docket or through issuance of a proposal for decision, the executive director may determine whether good cause exists and whether an extension should be granted.

(g) The executive director is authorized to rule on motions for extensions on matters directed to the Board if no Board meeting is scheduled before the expiration of the applicable period of time.

§43.6 Ex Parte Consultations.

Unless required for the disposition of ex parte matters authorized by law, the executive director, the administrative law judge, and any member of the board who may render a decision that may become final under this chapter or make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate. To the extent permitted by law, the executive director, the administrative law judge, and any member of the board who may render a decision that may become final under this chapter or make findings of fact and conclusions of law in a contested case, may communicate ex parte with employees of TRS who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of TRS and its staff in evaluating the evidence.

§43.7 Procedures Not Otherwise Provided.

If, in connection with any hearing, the board of trustees, the executive director, the deputy director, or the administrative law judge, as applicable, determines that there are no statutes or other applicable rules resolving particular procedural questions in the proceedings, the parties shall follow procedures consistent with the purpose of this chapter.

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

Filed with the Office of the Secretary of State on September 30, 2024.

TRD-202404688
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 542-6506

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SUBCHAPTER B. REQUESTS FOR ADJUDICATIVE HEARING

34 TAC §§43.101 - 43.107

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority; Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision; and Section 12 of House Bill 1585, as enrolled by the 87th Texas Legislature, Regular Session, on May 13, 2021 and effective on May 26, 2021.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision

§43.101. Administrative Review of Individual Requests.

(a) TRS is divided into administrative divisions, which are further divided into departments, for the efficient implementation of its duties. Any person who desires any action from TRS must consult with the proper department within TRS and comply with all proper requirements for completing forms and providing information to that department.

(b) In the event that a person is adversely affected by a determination, decision, or action of department personnel, the person may appeal the determination, decision, or action to the appropriate manager within the department, and then to the chief benefit officer of TRS. The chief benefit officer shall mail a final written administrative decision, which shall include:

(1) the chief benefit officer's determination regarding the person's appeal and reasons for denying the appeal, if applicable; and

(2) a statement that if the person is adversely affected by the decision, the person may request an adjudicative hearing to appeal the decision and the deadline for doing so.

(c) An appeal to the chief benefit officer as described by subsection (b) of this section must be submitted by the later of:

(1) 45 days after the date the decision of the department manager is mailed; or

(2) the number of days after the date the decision of the department manager is mailed equal to the number of days it took TRS to issue the decision of the department manager.

(d) The number of days it took TRS to issue the decision of the department manager is calculated from the date TRS received the person's appeal of the determination, decision, or action of department personnel to the date TRS mailed the decision of the department manager.

(e) A person adversely affected by a decision of the chief benefit officer may request an adjudicative hearing to appeal the decision of the chief benefit officer as provided in §43.104 of this chapter (relating to Request for Adjudicative Hearing). The deputy director shall determine whether the appeal should be docketed and set for a contested case hearing pursuant to §43.105 of this chapter (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

§43.102. Administrative Review of Disability Determinations.

(a) In the event that the Medical Board does not certify disability of a member under Government Code §824.303(b), or the Medical Board certifies that a disability retiree is no longer mentally or physically incapacitated for the performance of duty under Government Code §824.307(a), the member or retiree may request reconsideration and submit additional information to the Medical Board.

(b) The Medical Board shall consider a request for reconsideration and additional information and make a determination on the disability of the member or retiree. If a request for reconsideration has been denied, a member or retiree may appeal the decision by requesting an adjudicative hearing as provided in §43.104 of this chapter (relating to Request for Adjudicative Hearing).

(c) The deputy director shall determine whether the petition should be docketed and set for a contested case hearing pursuant to §43.105 of this chapter (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

(d) A party who requests to adjudicative hearing pursuant to this section consents to the public discussion by the board of trustees of all relevant facts, including information in the member's file that may otherwise be confidential by law, when the board considers the proposal of decision of an administrative law judge in the party's appeal.

§43.103. Administrative Review of Option Beneficiary or Optional Retirement Annuity Plan Changes.

A determination by the executive director or the executive director's designee regarding whether a court with jurisdiction over the marriage of a retiree and the beneficiary of an optional annuity selected by the retiree under Government Code §824.204(c)(1), (c)(2), or (c)(5) or an optional disability annuity selected by the retiree under Government Code §824.308(c)(1), (c)(2), or (c)(5) has approved or ordered a change in retirement plan under Government Code §824.1012, or a change in beneficiary under Government Code §824.1013, is a final decision by TRS. No appeal to the board of trustees of TRS is authorized. A party adversely affected by a determination of the executive director or the designee must file a motion for reconsideration with the executive director no later than 25 days after the date such a determination is rendered if the party wishes to contest the determination.

§43.104. Request for Adjudicative Hearing.

(a) On a matter over which TRS has jurisdiction and authority to grant relief that does not conflict with the terms of the pension plan, a person may appeal a final administrative decision by filing a petition for adjudicative hearing with the deputy director.

(b) A petition for adjudicative hearing must be filed by the later of:

(1) 45 days after the date the final administrative decision is mailed; or

(2) a number of days after the final administrative decision is mailed equal to the number of days it took TRS to issue the final administrative decision.

(c) The number of days it took TRS to issue the final administrative decision is calculated from the date TRS received the person's appeal of the department manager's decision to the date TRS mailed the final administrative decision.

(d) The original petition for an adjudicative hearing should be styled: "Petition of (Name of Petitioner)" and must be filed with TRS, directed to the attention of the deputy director. The petition must include:

(1) the name, address, telephone number, and email address of petitioner;

(2) the name, address, telephone number, email address, and, if known, the tax number of any member whose interest or whose beneficiary's interest may be involved in the case. In lieu of the tax number, the petition may include other information sufficient to identify the member or beneficiary whose interest may be involved in the case;

(3) the identity of other all persons who may have a material interest in the outcome of the case, the basis for that interest, and such person's last known address, telephone number, and email address; and

(4) a concise statement of the facts supporting the petition and a statement of the specific relief requested from TRS.

§43.105. Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting.

(a) Subject to subsection (b) of this section, the deputy director shall assign a petition for adjudicative hearing a TRS docket number, provide all parties notice of the docket number, and refer the matter for an adjudicative hearing before SOAH or otherwise as authorized by law if the petition regards the following:

(1) any matter related to a member's service or disability retirement, death or survivor benefits, or request for refund of accumulated contributions;

(2) the eligibility of a person for membership in TRS;

(3) the amount of annual compensation credited by TRS;

(4) the amount of deposits or fees required of a member;

(5) any matter involving the granting, purchase, transfer, or establishment of service credit;

(6) any application for correction of error in the file of a member, beneficiary, or alternate payee, other than a determination of whether an order is a QDRO;

(7) the cancellation or suspension of retirement, survivor, or death benefits; or

(8) any other matter affecting eligibility for retirement and related disability and death benefits or the amount of such benefits payable under the laws governing TRS.

(b) Notwithstanding subsection (a) of this section, the deputy director may decline to docket an appeal for the following reasons:

(1) TRS has no jurisdiction over the subject matter of the petition;

(2) TRS does not have the authority to grant the relief requested by the petition;

(3) the petition is not timely filed; or

(4) the petition otherwise fails to comply with this chapter.

(c) The deputy director's decision declining to docket an appeal is the final decision of TRS when the circumstances described in Government Code §2001.144, are met. A person may not appeal such decision to the executive director or the board. A person may file a motion for rehearing with the deputy director in accordance with §43.306 of this chapter (relating to Rehearings).

(d) Prior to docketing a petition, the deputy director may review the request filed with TRS to determine whether it meets the requirements of §43.104 of this chapter (relating to Request for Adjudicative Hearing). If the petition does not materially comply with §43.104 of this chapter, the deputy director shall return the petition to the person who filed it, along with reasons for the return. The person shall be given 60 days from the date the deputy director sends the notice to file a corrected petition. If the petition is not corrected to substantially comply with §43.104 of this chapter within the time given, the deputy director may decline to docket the appeal.

(e) A party that files an appeal and causes a matter to be docketed and referred to for adjudicative hearing shall have the responsibility of prosecuting the appeal within a reasonable time period. TRS may seek dismissal with prejudice of an appeal if a responsible party fails to obtain a setting for a hearing on the merits within two years of referral of the matter for an adjudicative hearing.

§43.106. Authority to Grant Relief.

(a) At any time before an appeal is referred for adjudicative hearing, the chief benefit officer or, in the matter of certification for disability retirement, the Medical Board may grant the relief sought by the petitioner and dismiss the appeal, provided that the interests of other individual parties are not adversely affected and the relief does not conflict with the terms of the pension plan.

(b) If the granted appeal has been referred to SOAH, the parties shall request that the SOAH administrative law judge dismiss the case from the SOAH docket in accordance with SOAH rules. If the granted appeal was referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of Subchapter C of this chapter (realting to Hearing Not Docketed at SOAH) shall apply to the dismissal of the case.

§43.107. Subpoenas and Commissions.

(a) Except as provided in subsection (d) of this section, the issuance of a subpoena in any proceeding under this chapter shall be governed by the Administrative Procedure Act, Government Code §2001.089. Upon a written request by a party showing good cause and payment of required fees, or upon the request of the administrative law judge, the deputy director may issue a subpoena addressed to the sheriff or a constable to require the attendance of witnesses or the production of books, records, papers, or other objects as may be necessary and proper for the purposes of a hearing.

(b) The issuance of a commission in any proceeding under this subchapter shall be governed by the Administrative Procedure Act, Government Code §2001.094. Upon a written motion of a party and payment of required fees, or on the request of the administrative law judge, the deputy director may issue a commission addressed to the officers authorized by statute to take a deposition, requiring that the deposition of a witness be taken.

(c) Subpoenas and commissions shall be issued by the deputy director only after a deposit of sums sufficient to ensure payment of expenses incident to the subpoenas. Payment of witness fees shall be made in the manner prescribed in the Administrative Procedure Act, Government Code §2001.103.

(d) Members of the Medical Board may not be the subject of a subpoena regarding findings or determinations made in assisting the deputy director or the board of trustees in all matters referred to it.

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

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SUBCHAPTER C. HEARINGS NOT DOCKETED AT SOAH

34 TAC §§43.201 - 43.228

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; and Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and to refer a contested case to a hearing officer not affiliated with the State Office of Administrative Hearings.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and to refer a contested case to a hearing officer not affiliated with the State Office of Administrative Hearings..

§43.201. Applicability.

The provisions of this subchapter only apply to an adjudicative hearing referred to a hearing official not affiliated with SOAH.

§43.202. Form of Pleadings.

(a) Briefs and other pleadings shall be typed or printed on paper not to exceed 8 1/2 inches by 11 inches with an inside margin of at least one inch width. Annexed exhibits shall be folded to the same size. Only one side of the paper shall be used. Copies may be used, provided they are clear and permanently legible.

(b) The pleadings shall state their object and shall contain a concise statement of the supporting facts.

(c) The original of any pleading filed with TRS shall be signed by the party filing it or by his or her authorized representative. Pleadings shall contain the address, telephone number, and email address of the party filing the documents or the name, business address, telephone number, email address, and fax number of counsel.

(d) If a TRS or other adjudicative hearing docket number has been assigned, pleadings shall contain the docket number.

(e) All pleadings shall contain the following:

(1) the name of the party filing the pleading;

(2) a concise statement of the facts relied upon by the party;

(3) a request stating the type of relief, action, or order desired by the party;

(4) a certificate of service conforming to subsection (f) of this section; and

(5) any other matter required by statute.

(f) Written pleadings may be served by hand-delivery, courier-receipted delivery, fax, or regular, certified, or registered mail upon all other known parties of record, and a certification of such service should be submitted with the original copy of the pleading filed with TRS. If a party is represented by an attorney, service may be made upon a party by serving the attorney of record. The following form of certification will be sufficient: "I hereby certify that I have this _____ day of _____, 20__, served copies of the foregoing pleading upon all other parties to this proceeding, by (state the manner of service). Signature."

(g) A party may object to the form or sufficiency of a pleading by filing the objections in writing at least 15 days before the hearing date. If the objections are sustained, the administrative law judge shall allow a reasonable time for amendment.

§43.203. Filing of Pleadings and Amendments.

(a) Any party to a case may file answers, amendments to pleadings (as permitted by this subchapter), and motions that conform to the requirements of this subchapter. Any amendment that operates as a surprise to any other party may be allowed only upon a written motion showing no harm will result. Failure to file an answer shall in no case result in a default judgment.

(b) The filing of motions, answers, amended pleadings, and corrected pleadings shall not be permitted to delay any hearing unless the executive director, board of trustees, or administrative law judge determines that such delay is necessary in order to prevent injustice or to protect the public interest and welfare.

§43.204. Briefs.

Briefs shall conform, where practicable, to the form requirements of pleadings set out in this subchapter. The points involved shall be concisely stated, the allegations in support of each point shall be summarized, and the argument and authorities shall be organized and directed to each point in a concise and logical manner.

§43.205. Motions.

A motion, unless made during a hearing, shall be made in writing, set forth the relief or order sought, state the grounds for such relief, and be timely filed with TRS, and the administrative law judge. A copy shall be served by the movant on each party of record. Any reply to the motion shall be timely filed with TRS or the administrative law judge, as applicable, with a copy served on the movant and other parties of record. Failure to serve copies may be grounds for withholding consideration of the motions or replies. Unless otherwise directed by the administrative law judge, executive director, or board, motions based on matters which do not appear of record must be supported by affidavit. When necessary, a hearing will be held to consider any motion.

§43.206. Discovery.

If a matter was referred for an adjudicative hearing to a hearing official not affiliated with SOAH, parties may obtain discovery under this subchapter or under SOAH's relevant procedural rules (1 TAC §§155.251-155.259 (relating to Discovery)) to the extent those rules do not conflict with this subchapter.

§43.207. Notice of Hearing and Other Action.

(a) Notices of hearing, proposals for decision, and all other rulings, orders, and actions by TRS, or an administrative law judge, as applicable, shall be served upon all parties or their attorneys of record in person or at their last known address by mail. Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid if it is received by TRS within a timely manner under Rule 5 of the Texas Rules of Civil Procedure and the sender provides adequate proof of the mailing date. Service may also be accomplished by electronic mail or facsimile transmission if all parties agree. In that case, the sender shall retain the original of the document and file it upon request with the administrative law judge or the executive director, as applicable. Upon request, the sender has the burden of proving the date and time of receipt of the document served by facsimile transmission or electronic mail. Electronic mail may not be used with documents produced pursuant to a discovery request. On motion by any party or on its own motion, TRS may serve notice of a hearing on any person whose interest in the subject matter will be directly affected by the final decision in the case.

(b) All initial hearing notices shall include the following:

(1) a statement of time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short, plain statement of the factual matters asserted. If TRS or a party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon written application filed not less than ten days before the date set for hearing, a more definite and detailed statement must be furnished not less than seven days prior to the date set for the hearing; and

(5) a statement that failure to appear at the prehearing conference or any scheduled hearing may result in the following: the facts alleged by TRS may be admitted as true; the relief requested by TRS may be granted; petitioner's appeal may be denied; or petitioner's appeal may be dismissed with prejudice for failure to prosecute the claim; or any or all of the foregoing actions.

(c) After service of the initial notice, any party wishing to raise issues or matters not set forth in the initial notice must do so by filing a motion which sets forth such issues or matters not less than 30 days before the date set for hearing. If the motion is granted, the administrative law judge shall give notice, not less than 20 days before the date of hearing, of the additional issues and matters to be decided in the contested case.

(d) All other notices in a contested case shall set forth only the additional issues and matters to be decided.

§43.208 Agreements to be in Writing.

No stipulation or agreement between the parties, their attorneys, or representatives, with regard to any matter involved in any proceeding governed by this subchapter, shall be enforced unless it shall have been reduced to writing and signed by the parties or the representatives authorized by this subchapter to appear for them, or unless it shall have been dictated into the record by them during the course of a hearing or incorporated into an order bearing their written approval. This section does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by this subchapter, unless precluded by law.

§43.209 Motion for Consolidation.

A motion for consolidation of two or more appeals, applications, petitions, or other proceedings shall be in writing, signed by the movant or the movant's attorney, and filed with SOAH, TRS, or the administrative law judge, as applicable, prior to the date set for hearing. The motion shall state the number and style of all proceedings sought to be consolidated, and the movant shall file a copy of the motion in each proceeding. No two or more appeals, applications, petitions, or other proceedings shall be consolidated or heard jointly without the consent of all parties to all such proceedings unless the administrative law judge or executive director shall find that the two or more appeals, applications, petitions, or other proceedings involve common questions of law or fact, or both, and shall further find that separate hearings would result in unwarranted expense, delay, or substantial injustice. Special hearings on separate issues may also be allowed.

§43.210 Additional Parties.

(a) A person who may be affected by a decision of TRS in the proceeding may file a written motion to intervene at least 15 days in advance of the hearing date. The person may request an opportunity to present any relevant, material, and proper testimony and evidence bearing upon the request to intervene.

(b) A party may move to join other persons as parties to the proceeding if they may be affected by a final decision of TRS. A motion to join other parties shall identify the person by name, address, and telephone number; shall state the nature of the other person's relationship to the proceeding or potential interest in the proceeding; and shall state why the person is needed for the just adjudication of the appeal or other grounds for the motion. The motion shall also state whether joinder of the person is feasible. If the motion is granted, the person shall be a party to the proceeding.

§43.211. Appearance and Representation.

(a) A party or person seeking to be admitted as a party may appear at a hearing or prehearing conference in person or by an attorney. A natural person may not be represented by another person who is not an attorney. An entity other than a natural person that is a party or that seeks to be admitted as a party may appear through a person with legal authority to act on behalf of the entity, such as an officer, director, or trustee, or may be represented by an attorney.

(b) An attorney representing a person or party in a proceeding must be authorized to practice law in the court of highest jurisdiction of any state of the United States or the District of Columbia. The attorney of record of any party shall be the attorney who signs the first pleading filed on behalf of the party or who files with TRS or the administrative law judge, as applicable, a written notice signed by the party designating the attorney as attorney of record in the case. An attorney appearing on behalf of a party may be required to show authority to act for the party. Nothing in this subchapter shall be interpreted to require a party to the hearing to be represented by counsel.

§43.212. Lead Counsel.

A party represented by more than one attorney in a proceeding may be required to designate a lead counsel who shall have control in the management of the matter. The administrative law judge, executive director, or board may limit the number of counsel heard on any matter.

§43.213. Powers of the Administrative Law Judge.

The presiding administrative law judge shall have the authority established by applicable statutes and the rules of this subchapter. Additionally, the administrative law judge may:

(1) determine the jurisdiction of TRS concerning the matter under consideration;

(2) determine the scope of the matter referred to the administrative law judge; and

(3) limit testimony to matters under TRS's jurisdiction and to matters referred to the administrative law judge by TRS.

§43.214. Prehearing Conference and Orders.

(a) The administrative law judge may hold a prehearing conference prior to any adjudicative hearing.

(b) At the prehearing conference or by prehearing conference order, the administrative law judge may require parties to file and serve the following in order to expedite the hearing:

(1) a list of witnesses the party intends to have testify, with a brief narrative summary of their expected testimony;

(2) a written statement of the disputed issues; or

(3) a copy of any documentary evidence the party intends to use at the hearing.

(c) Witnesses and proposed documentary evidence may be added and narrative summaries of expected testimony amended at the hearing only upon a finding of the administrative law judge that good cause existed for failure to serve the additional or amended material by the established date.

(d) At any prehearing conference, or in a prehearing conference order, the administrative law judge:

(1) may obtain stipulations and admissions, and otherwise identify matters on which there is agreement;

(2) shall identify disputed issues for consideration at the hearing;

(3) may consider and rule prospectively upon objections to the introduction into evidence at the hearing on the merits of any written testimony, documents, papers, exhibits, or other materials;

(4) may identify matters of which official notice may be taken;

(5) may strike issues not material or not relevant, including issues not within the scope of the matter referred by TRS; and

(6) may consider any other matter that may expedite the hearing or aid in the disposition of the matter.

(e) A prehearing conference may be held by means of a conference telephone call.

(f) Rulings or decisions made at a prehearing conference shall be summarized in a written order by the administrative law judge and made part of the record.

§43.215. Conduct of Hearing.

(a) A hearing shall be confidential to ensure the information of a member's file is not disclosed. The member may expressly waive the member's right to maintain confidentiality of the information before the proceedings will be opened to the public.

(b) All hearings will be held in Austin, Texas unless all parties agree to another site.

(c) The petitioner has the burden of proving by a preponderance of the evidence that the relief sought in the petition should be granted. The petitioner shall present his or her direct case first at hearing.

(d) Where the proceeding is initiated at the executive director's or the board's own call, or where several proceedings are heard on a consolidated record, the administrative law judge shall designate who

shall open and close and at what stage intervenors or other parties shall be permitted to offer evidence.

(e) The administrative law judge may call upon any party or staff of TRS for further material or relevant evidence upon any issue before the issuance of a proposal for decision; however, no such evidence shall be allowed into the record without an opportunity for inspection, cross-examination, and rebuttal by the other interested parties.

(f) At the request of a party, the administrative law judge shall order the witnesses excluded so that they cannot hear the testimony of other witnesses. This section does not authorize exclusion of a party.

(g) During the hearing, formal exceptions to rulings of the administrative law judge are not required. It shall be sufficient that a party, at the time of any ruling is made or sought, shall make known to the administrative law judge the action sought.

§43.216. General Admissibility.

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in nonjury civil cases in the district courts of Texas shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by a reasonably prudent person in the conduct of the person's affairs. The administrative law judge shall give effect to the rules of privilege recognized by law.

(b) When testimony is excluded by ruling of the administrative law judge, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony prior to the conclusion of the hearing. Such offer of proof shall be sufficient to preserve the point for review. The administrative law judge may ask questions of the witness as he or she deems necessary to satisfy himself or herself that the witness would testify as presented in the offer of proof.

§43.217. Exhibits.

(a) Exhibits of documentary character shall be of a size which will not unduly encumber the files and records of TRS and whenever practicable, shall conform to the requirements set forth in §43.202 of this chapter (relating to Form of Pleadings).

(b) The original of each exhibit offered shall be tendered to the court reporter or administrative law judge for identification; one copy shall be furnished to the administrative law judge and one copy to each other party of record or his or her attorney of record.

(c) In the event an exhibit has been identified, objected to, and excluded, the administrative law judge shall determine whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to that party. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification, shall be endorsed by the administrative law judge with the ruling, and shall be included in the record for the purpose only of preserving the exception.

(d) Unless specifically permitted by the administrative law judge, no exhibit will be permitted to be filed in any proceeding under this subchapter after the conclusion of the hearing. In the event the administrative law judge allows an exhibit to be filed after the conclusion of a hearing, copies of the late-filed exhibit shall be served on all parties of record.

§43.218. Pre-filed Direct Testimony in Disability Appeal Proceedings.

(a) In a contested case concerning Medical Board denial of certification of disability or a finding that a disability retiree is no longer mentally or physically incapacitated from the performance of duty, all testimony and other evidence, including medical or employment records, that the petitioner intends to offer in petitioner's direct case shall be pre-filed at least 90 days before the date of the hearing on the merits. Testimony shall include all expert and fact witnesses, including that of a petitioner who intends to testify. In order to avoid any unnecessary expense and time associated with adjudicative hearings and in accordance with Government Code §824.303, which requires Medical Board certification in order for a person to be retired, TRS staff shall be given adequate opportunity to present such information to the Medical Board for consideration before the hearing on the merits. If, upon consideration of the information petitioner intends to offer at hearing, the Medical Board certifies the person as disabled, TRS staff or petitioner may move for dismissal of the appeal. If, however, the Medical Board does not certify the person as disabled, the petitioner may continue to prosecute the appeal as previously docketed and referred for an adjudicative hearing. The petitioner shall not be permitted to introduce direct testimony and evidence that has not been pre-filed and made available to the Medical Board for consideration.

(b) The pre-filed testimony of a witness upon direct examination shall be in question and answer form. The qualifications of an expert witness shall be described in question and answer testimony or by attachment of a resume as an exhibit to the testimony. Pre-filed testimony of a witness may be offered into the record by a party during its direct case. The testimony shall not be admitted into the hearing record in whole or in part unless the witness is available at the hearing on the merits and, upon being sworn, identifies the pre-filed testimony as a true and accurate record of what his or her testimony would be if the witness were testifying orally. A witness may be given an opportunity to correct errors. After calling the witness and authenticating the testimony in this manner, a party may offer the testimony into the record. Pre-filed testimony is subject to the rules of evidence, including objections or motions to strike when such testimony is offered, as if the testimony were presented orally at a hearing. Such testimony, if admitted, may be incorporated in the record as if read or received as an exhibit. The witness shall be subject to cross-examination by other parties after the admission of the pre-filed testimony in whole or in part, and the party offering the testimony may conduct re-direct examination of the witness at the conclusion of cross-examination.

(c) Pre-filed documentary evidence other than testimony of witnesses may be offered into the record by a party during its direct case. All pre-filed documentary evidence is subject to the rules of evidence.

§43.219. Limit on Number of Witnesses.

The administrative law judge shall have the right in any proceeding under this subchapter to limit the number of witnesses whose testimony is merely cumulative.

§43.220. Failure to Appear.

The petitioner or the petitioner's attorney shall appear at the hearing. Failure to so appear may be grounds for withholding consideration of a matter, denial of the appeal with or without prejudice, or dismissal of the appeal. However, no default judgment may be taken against a third party petitioner or respondent for failure to appear.

§43.221. Conduct and Decorum at Hearing.

Every participant in the proceedings shall conduct himself with proper dignity, courtesy, and respect for TRS, the administrative law judge, all other participants, and all other persons attending the proceedings. TRS or the administrative law judge may take such action as appropriate and necessary to enforce this rule.

§43.222. Official Notice.

Official notice may be taken of all facts judicially cognizable. In addition, official notice may be taken of generally recognizable facts within the specialized knowledge of TRS. All parties shall be notified either before or during the hearing, or by reference in preliminary reports, drafts of orders, or otherwise, of any material officially noticed, including any staff memoranda or data. All parties will be afforded an opportunity to contest the material so noticed.

§43.223. Recording of the Hearing; Certified Language Interpreter.

(a) A record of a hearing or prehearing conference shall be made in a manner consistent with the purpose of 1 TAC §155.423 (relating to Making a Record of Proceeding). Because of the nature of TRS proceedings and the expense of stenographic recordings and transcripts, it is the policy of TRS to rely on an audio or video recording as the official record of the proceeding, regardless of the anticipated length of the hearing.

(b) TRS may assess the cost of preparation of a stenographic recording or transcript against a party requesting such, or against other parties as appropriate. Cost of a transcript copy ordered by a party shall be paid by that party. TRS may require a deposit or full payment of the estimated costs by a party against whom costs have been assessed in advance of arranging for a court reporter to be present at the hearing or in advance of preparation of the transcript. If no party requests stenographic recording of a proceeding or preparation of a transcript by a court reporter but the administrative law judge so requires, TRS may assess the cost to one or more parties or may request that TRS not be required to bear the costs.

(c) In the alternative to a stenographic recording or transcript prepared by a court reporter, TRS may prepare a transcript from a video or audio tape of the proceeding. The transcript prepared by TRS may be considered the official record of the proceeding. TRS may obtain the official audio or video recording from the administrative law judge for purposes of preparing the transcript. A party who objects to a TRS-prepared transcript and requests that proceedings be stenographically recorded or transcribed by a court reporter may be required to pay the costs of such recording and transcription.

(d) A stenographic reporter shall recognize that TRS may print and distribute additional copies of the transcript as necessary to conduct its business and shall maintain the confidentiality of information presented at hearing.

(e) A party who desires the services of a certified language interpreter for any part of the contested case proceedings is responsible for arranging for the interpreter and paying for the services.

§43.224. Dismissal without Hearing.

(a) The administrative law judge may consider motions for dismissal from the adjudicative hearing docket without a hearing and recommend dismissal with or without prejudice for any of the following reasons:

(1) failure to prosecute a claim;

(2) unnecessary duplication of proceedings or res judicata;

(3) withdrawal or voluntary dismissal of appeal;

(4) moot questions, obsolete petitions, or laches;

(5) lack of jurisdiction; or

(6) failure to comply with §43.104 of this chapter (relating to Request for Adjudicative Hearing) or other applicable sections.

(b) The administrative law judge shall dismiss from the adjudicative hearing docket and recommend dismissal by TRS of the appeal of a petitioner who has defaulted by:

(1) failing to appear at the hearing; or

(2) failing to request a hearing or take some other action specified by the administrative law judge within 30 days after notice is mailed of intention to dismiss the claim.

(c) For good cause, the executive director may permit reinstatement of a dismissed appeal.

§43.225. Summary Disposition.

(a) A party may move with or without supporting affidavits for a summary disposition any time after an appeal has been referred for an adjudicative hearing. The motion for summary disposition shall specify the grounds for resolving the appeal without an evidentiary hearing. The motion and any supporting affidavits shall be filed and served at least 30 days before the time specified for the hearing. The motion may be granted if the pleadings, discovery, affidavits, stipulation of the parties, and authenticated or certified public records submitted in support of the motion show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on the issues expressly set out in the motion.

(b) A proposal for decision by the administrative law judge recommending summary disposition is subject to exceptions in the same manner as a proposal for decision issued after an evidentiary hearing.

§43.226. The Record.

The record in a contested case shall include the items identified in Government Code §2001.060.

§43.227. Findings of Fact.

Findings of fact shall be based exclusively on the evidence admitted in accordance with applicable rules and statutes and on matters officially noticed.

§43.228. Reopening of Hearing.

Upon motion of any party or upon the order of the administrative law judge the hearing may be reopened for good cause at any time before the proposal for decision is issued.

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

Filed with the Office of the Secretary of State on September 30, 2024.

TRD-202404691
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 542-6506

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SUBCHAPTER D. FINAL DECISIONS OF TRS

34 TAC §§43.301 - 43.307

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which

authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority; Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision; and Section 12 of House Bill 1585, as enrolled by the 87th Texas Legislature, Regular Session, on May 13, 2021 and effective on May 26, 2021.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision

§43.301. Proposals for Decision and Exceptions.

(a) The administrative law judge shall issue a proposal for decision with proposed conclusions of law and findings of fact in accordance with Government Code, Chapter 2001 and other applicable law.

(b) Exceptions to the proposal for decision, if any, shall be filed with the SOAH administrative law judge or the administrative law judge in accordance with 1 TAC §155.507 (relating to Proposals for Decision; Exceptions and Replies). The exceptions shall also be filed with TRS, directed to the attention of the executive director.

(c) The administrative law judge shall notify TRS and the parties whether the administrative law judge made any changes to the proposal for decision based on the exceptions and replies of the parties.

§43.302. Decision of Executive Director.

(a) After TRS receives notice from the administrative law judge under §43.301(c) of this chapter (relating to Proposals for Decision and Exceptions), the executive director shall review the proposal for decision of the administrative law judge and render a decision in the proceeding, except as provided by §43.303 of this chapter (relating to Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement).The executive director may accept or modify the proposed conclusions of law or proposed findings of fact or may vacate or modify an order issued by an administrative law judge in the manner set forth in subsection (c) of this section. If changes are made, the decision shall state in writing the specific reason and legal basis for each change. A copy of the decision shall be served on the parties.

(b) The executive director's decision shall be based upon the existing record in the case, including any exceptions and replies to exceptions filed with the administrative law judge.

(c) The executive director, in the executive director's sole discretion may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(d) In exercising the director's discretion, the executive director, may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(e) The executive director may delegate any of the authority under this subchapter to the deputy director or another TRS employee for any appeal.

§43.303. Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement.

(a) In a proceeding relating to a member's eligibility for disability retirement, an administrative law judge's proposal for decision shall be reviewed by the board of trustees.

(b) After TRS receives notice from the administrative law judge under §43.301(c) of this chapter (relating to Proposals for Decision and Exceptions), the board of trustees shall review the proposal for decision of the administrative law judge and render a decision in the proceeding. The board of trustees may accept or modify the proposed conclusions of law or proposed findings of fact or may vacate or modify an order issued by an administrative law judge in the manner set forth in subsection (d) of this section. If changes are made, the decision shall state in writing the specific reason and legal basis for each change. A copy of the decision shall be served on the parties.

(c) The decision of the board of trustees shall be based upon the existing record in the case, including any exceptions and replies to exceptions filed with the administrative law judge.

(d) The board of trustees, in the board's sole discretion may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(e) In exercising the board's discretion, the board of trustees may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(f) The board of trustees shall consider a proposal for decision under this section in open meeting to the extent required by law. The board in its sole discretion may determine whether to hear oral argument from the parties when considering a proposal for decision under this section.

§43.304. Appeals to the Board of Trustees.

(a) Any party adversely affected by a decision of the executive director in a docketed appeal may appeal the decision to the board of trustees, unless by statute or other rule the decision of the executive director is the final decision of TRS. Written notice of appeal and any associated exceptions or briefing under subsection (d) of this section must be filed with the executive director by the later of:

(1) 20 days after the decision of the executive director is mailed; or

(2) the number of days after the date the decision of the executive director is mailed equal to the number of days it took the executive director to render the decision in the proceeding.

(b) The number of days it took the executive director to render the decision in a proceeding is calculated from:

(1) if exceptions to a proposal for decision are not filed, the date of the deadline to file exceptions to a proposal for decision in the proceeding under §43.301(b) of this chapter (relating to Proposals for Decision and Exceptions) to the date the decision of the executive director is mailed; or,

(2) if exceptions to a proposal for decision are filed, the date the administrative law judge takes action on the filed exceptions to the date the decision of the executive director is mailed.

(c) If notice of appeal is timely filed, the decision of the executive director shall serve as a proposal for decision to the board.

(d) If a decision of the executive director is appealed, the parties may file additional exceptions or briefs and replies. Additional exceptions or briefs must be filed and served at the same time as the notice of appeal. Replies shall be filed and served within 15 days of the filing of the notice of appeal and exceptions or briefs. The executive director may modify the filing deadlines. Briefs and replies filed under this section may not include additional evidence not previously admitted into the administrative record of the proceeding.

(e) A notice of appeal to the Board of Trustees must also include a statement whether the appealing party is requesting oral argument before the board of trustees and, if oral argument is set, whether the party prefers to appear in person or virtually. A notice of appeal that does not include a statement regarding oral argument shall be deemed as not requesting oral argument. A notice of appeal that does not include how the party requests to appear for oral argument shall be deemed as a request to appear in person.

(f) A nonappealing party may also request oral argument before the board of trustees or request that oral argument not be granted in the party's reply to the appealing party's notice of appeal. The nonappealing party may also state whether the party requests to appear in person or virtually for oral argument.

(g) The executive director, in the executive director's sole discretion, shall determine whether to grant oral argument in a given appeal and how the parties shall appear for oral argument, if granted. The executive director shall consult with the chairman of the board of trustees in making a determination under this subsection and shall make the determination by order no later than 30 days prior to the date of the hearing. The order shall be provided to all parties to the appeal.

(h) The final decision in an appeal shall be based upon the existing record in the case, including any exceptions, oral argument, or briefing filed with the board of trustees under this section. In its sole discretion, the board of trustees may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(i) In exercising its discretion, the board of trustees may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(j) An appeal to the board of trustees shall be considered in open meeting to the extent required by law.

§43.305. Final Decision of TRS.

An administrative decision of TRS staff, a decision by the Medical Board, or a decision by the executive director is the final decision of TRS unless a party exhausts any right to appeal a matter to the board of trustees, if applicable.

§43.306. Rehearings.

(a) A decision of the executive director or deputy director is the final decision of TRS when, under applicable law or rule, the decision is not subject to appeal to the board and when the circumstances described in Government Code §2001.144, are met.

(b) A decision by the board of trustees in a contested case is the final decision of TRS when the circumstances described in Government Code §2001.144, are met.

(c) A party adversely affected by a decision that may be the final decision of TRS may file a motion for rehearing with TRS, not later than the 25th day after the date on which the decision or order that is the subject of the motion is signed, unless the time for filing the motion has been extended under Government Code §2001.142, by an agreement under Government Code §2001.147, or by written order of the executive director or deputy director under subsection (g) of this section. A timely motion for rehearing is a prerequisite to an appeal in a contested case under Government Code §2001.145, if an appeal is otherwise permitted by law.

(d) A reply to the motion for rehearing must be filed with TRS not later than the 40th day after the date on which the decision or order that is the subject of the motion is signed, or not later than the 10th day after the date a motion for rehearing is filed if the time for filing the motion for rehearing has been extended by an agreement under Government Code §2001.147 or by a written order of the executive director or deputy director under subsection (g) of this section.

(e) The board of trustees, the executive director, or the deputy director, as applicable, shall act on a motion for rehearing not later than the 55th day after the date on which the decision or order that is the subject of the motion is signed. If the motion is not acted on within the time specified, the motion is overruled by operation of law.

(f) The board of trustees may rule on a motion for rehearing in the manner provided for in Government Code §2001.146. A subsequent motion for rehearing is not required after the board of trustees rules on a motion for rehearing unless a motion is required under Government Code §2001.146(h).

(g) The executive director or the deputy director if the motion for rehearing concerns a decision of the deputy director may by written order extend the time for filing a motion or reply or for TRS to act on a motion for rehearing, in accordance with Government Code §2001.146.

(h) A motion for rehearing under this section must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

§43.307. Cost of Preparing Administrative Record.

In the event an appeal of the Final Decision of the Board of Trustees is authorized by law, any cost associated with pursuing the appeal is the responsibility of the appealing party, including the cost of the record of the administrative proceedings and the transcription of any video or audio recordings of administrative proceedings.

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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Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 542-6506

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

The Department of Family and Protective Services (DFPS) proposes to amend rules in Title 40, Texas Administrative Code (TAC), Part 19, Chapter 700, Subchapters B, C, H, J, M, Q, & W, and add a new Subchapter E.

BACKGROUND AND PURPOSE

The new and amended rules aim to implement the provisions of the General Appropriations Act, Senate Bill 1 Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26). The Department of Family and Protective Services (DFPS) with the assistance of HHSC, developed an alternative reimbursement methodology proposal for the 87th Legislature for foster care and Community-based Care (CBC) rates.

The purpose of the proposed rule amendments is to implement the alternative reimbursement methodology, which will transform the foster care system to better align and support the success of CBC by establishing clearly defined foster care models/service packages with new corresponding foster care rates.

SECTION-BY-SECTION SUMMARY

New §700.115 defines the Texas Child-Centered Care (T3C) system as defined service packages and add-on support services, whereby children, youth, and young adults will be matched through a uniform assessment tool. The rule also implements an agency rule waiver process, as long as the waiver does not conflict with state or federal law. Upon full implementation, T3C will replace the use of the Service Level System; however, during this process the Commissioner of the DFPS may waive a provision in any section in this chapter if the waiver is necessary to implement T3C.

The proposed amendment to §700.211 allows Court-Appointed Volunteer Advocates to receive information regarding the child's service package if they are placed under the T3C System in addition to the information they had already been receiving about the child's authorized service level.

The proposed amendment to §700.328 adds T3C, stating that foster care maintenance payments will be tied to the child's service level or T3C service package.

The proposed amendment to §700.332 adds T3C, stating DFPS may provide day care for authorized purposes to a foster parent if (among other things) the child's service level is basic or if placed in a T3C Basic Foster Family Home Service Package.

The proposed amendment to §700.334 adds T3C, allowing DFPS to provide special needs foster child day care services for authorized purposes to a foster parent if the child (among other things): has a billing service level of Basic or receives an approved waiver of the required basic service level through the regional day care coordinator or is placed in the T3C Basic Foster Family Home Service Package.

New §700.501 defines what a T3C Basic Foster Family Home Support Service Package is.

New §700.502 defines what a Substance Use Support Services Package is for a Foster Family Home.

New §700.503 defines what a Short-Term Assessment Support Services Package is for a Foster Family Home.

New §700.504 defines what a Mental & Behavioral Health Support Services Package is for a Foster Family Home.

New §700.505 defines what a Sexual Aggression/Sex Offender Support Services Package is for a Foster Family Home.

New §700.506 defines what a Complex Medical Needs or Medically Fragile Support Services Package is for a Foster Family Home.

New §700.507 defines what a Human Trafficking Victim/Survivor Support Service Package is for a Foster Family Home.

New §700.508 defines what an Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Support Service Package is for a Foster Family Home

New §700.509 defines what a T3C Treatment Foster Family Care Support Service Package is for a Foster Family Home.

New §700.510 defines what a Transition Support Services for Youth and Young Adults Add-On is for a Foster Family Home.

New §700.511 defines what a Kinship Caregiver Support Services Add-On is for a Foster Family Home.

New §700.512 defines what a Pregnant & Parenting Youth or Young Adult Support Services Add-On is for a Foster Family Home.

New §700.513 explains that Division 2 will outline the parameters/requirements associated with the Tier I Service Packages under T3C for General Residential Operations (GRO).

New §700.514 defines what a Tier I: T3C Basic Child Care Operation Package is for a GRO.

New §700.515 defines what a Tier I: Services to Support Community Transition for Youth & Young Adults who are Pregnant or Parenting Package is for a GRO.

New §700.516 defines what a Tier I: Sexual Aggression/Sex Offender Treatment Services to Support Community Transition Package is for a GRO.

New §700.517 defines what a Tier I: Substance Use Treatment Services to Support Community Transition Package is for a GRO.

New §700.518 defines what a Tier I: Emergency Emotional Support & Assessment Center Package is for a GRO.

New §700.519 defines what a Tier I: Complex Medical Needs Treatment to Support Community Transition Package is for a GRO.

New §700.520 defines what a Tier I: Mental & Behavioral Health Treatment Services to Support Community Transition Package is for a GRO.

New §700.521 defines what a Tier I: Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Treatment Services to Support Community Transition Package is for a GRO.

New §700.522 defines what a Tier I: Human Trafficking Victim/Survivor Treatment Services to Support Community Transition Package is for a GRO.

New §700.523 defines what a Tier II: Sexual Aggression/Sex Offender Services to Support Stabilization Package is for a GRO.

New §700.524 defines what a Tier II: Substance Use Services to Support stabilization Package is for a GRO.

New §700.525 defines what a Tier II: Aggression/Defiance Disorder Services to Support Stabilization Package is for a GRO.

New §700.526 defines what a Tier II: Complex Mental Health Services to Support Stabilization Package is for a GRO.

New §700.527 defines what a Tier II: Complex Medical Services to Support Stabilization Package is for a GRO.

New §700.528 defines what a Tier II: Human Trafficking Victim/Survivor Services to Support Stabilization Package is for a GRO.

The proposed amendment to §700.844 explains that under T3C, the maximum monthly payment for Adoption Assistance depends on the child's recommended service package at the beginning of the adoptive placement. The payment ceiling for a child who is placed in the T3C Basic Foster Family Support Services is $400 per month; the payment ceiling for a child placed in any other Service Package is $545 per month.

The proposed amendment to §700.1039 explains that under T3C, the maximum monthly payment for the Permanency Care Assistance Program depends on the child's recommended service package at the beginning of the adoptive placement. The payment ceiling for a child who is placed in the T3C Basic Foster Family Support Services is $400 per month; the payment ceiling for a child placed in any other Service Package is $545 per month.

The proposed amendment to §700.1733 states that for residential treatment services (in addition to other requirements) the client must have an initial service level determination of Specialized or Intense or if under the Texas Child-Centered Care (T3C) System, must be placed and receiving a T3C Service Package other than the T3C Basic Family Foster Family Home Service Package.FISCAL NOTE

Lea Ann Biggar, Chief Financial Officer of DFPS, has determined that for the first five years that the section(s) will be in effect, there will be a fiscal impact of $106.3 million in estimated administrative costs to support the transition and implementation of the Texas Child-Centered Care System. There will be no fiscal implications to local governments as a result of enforcing and administering the section(s) as proposed.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

(2) implementation of the proposed rule amendments will affect the number of employee positions;

(3) implementation of the proposed rule amendments will require an increase or decrease in future legislative appropriations to the agency;

(4) the proposed rule amendments will not affect fees paid to the agency;

(5) the proposed rule amendments will create a new regulation;

(6) the proposed rule amendments will limit an existing regulation;

(7) the proposed rule amendments will change the number of individuals subject to the rule; and

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

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

Ms. Biggar has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as the rule does not apply to small or micro-businesses, or rural communities.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section(s) as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Pursuant to subsection (c)(7) of Texas Government Code §2001.0045, the statute does not apply to a rule that is adopted by the Department of Family and Protective Services.

PUBLIC BENEFIT

Ms. Biggar has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the section(s). The anticipated public benefit will be that the Texas Child-Centered Care System will transform the foster care system to better align and support the success of Community Based Care (CBC).

TAKINGS IMPACT ASSESSMENT

DFPS 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments and questions on this proposal must be submitted within 30 days of publication of the proposal in the *Texas Register.* Electronic comments and questions may be submitted to Katharine McLaughlin, Senior Policy Attorney, Katharine.McLaughlin@dfps.texas.gov or RULES@dfps.texas.gov . Hard copy comments may be submitted to the DFPS Rules Coordinator, Legal Services Sanjuanita Maltos, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030.

SUBCHAPTER A. ADMINISTRATION

40 TAC §700.115

STATUTORY AUTHORITY

The proposed new rule implements the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.115. Waiver Provision for Implementation of Texas Child-Centered Care.

(a) As used in this section, the term "Texas Child-Centered Care" (T3C) is defined as:

(1) Service Packages, that children, youth, and young adults will be matched to through a uniform assessment tool, as described in Subchapter E. Each Service Package has a corresponding rate methodology; and

(2) Add-on support services as described in §§700.510, 700.511, and 700.512 of this title (relating to What is the Transition Support Services for Youth and Young Adults Add-On? What is the Kinship Caregiver Support Services Add-On? What is the Pregnant & Parenting Youth or Young Adult Support Services Add-On?, respectively), for foster family homes.

(b) For purposes of T3C, a Child Placing Agency (CPA), General Residential Operation (GRO) or foster family home has to meet qualifications, as defined by Department of Family and Protective Services (DFPS), to become credentialed to offer a specific Service Package or Add-On Service as described by §§700.510, 700.511, and 700.512 of this title. DFPS will make the determination if a CPA or GRO is credentialed to offer services under T3C, while a credentialed CPA agency will make the determination if the individual foster family home meets the necessary requirements.

(c) Upon full implementation, as specified in the T3C Blue Print, T3C will replace the use of the Service Level System, described in Subchapter W. Effective January 1, 2025, the DFPS will pay for foster care and adoption assistance through either the service level or the T3C system.

(d) Notwithstanding any other provision in Chapter 700, to the extent necessary for the implementation of T3C, the DFPS may waive a provision in any section in this chapter as provided under subsection (e) of this section.

(e) The waiver of any rule provision contained in this chapter must be approved by the Commissioner of the DFPS, or that person's designee, after consultation with agency legal counsel to ensure that the waiver does not conflict with state or federal law.

(f) Nothing in this section shall be construed to authorize the Department of Family and Protective Services to waive a provision of any section in this chapter if such waiver violates state or federal law.

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

Filed with the Office of the Secretary of State on September 23, 2024.

TRD-202404573
Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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SUBCHAPTER B. CONFIDENTIALITY AND RELEASE OF RECORDS

40 TAC §700.211

STATUTORY AUTHORITY

The proposed amended rule implements the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.211. Internet Application for Court-Appointed Volunteer Advocates.

(a) The Department of Family and Protective Services (DFPS) shall develop an Internet application that allows a court-appointed volunteer advocate representing a child in DFPS' managing conservatorship to:

(1) access the child's case file, as further specified in subsection (b) of this section and Memorandum of Understanding (MOU) entered into pursuant thereto; and

(2) add the volunteer advocate's findings and reports to the child's case file.

(b) DFPS shall enter into a MOU with the statewide organization representing court-appointed volunteer advocates in order to set forth the portions of a child's case file to which an appointed volunteer advocate shall have access. The MOU shall at a minimum:

(1) grant access to the following as it relates to the current conservatorship case of the child for whom the advocate has been appointed:

(A) demographic, locating, and contact information for principal and collateral participants;

(B) information regarding the child's current placement and any prior placements during the same conservatorship episode;

(C) information regarding the child's authorized service level or if placed under the Texas Child-Centered Care (T3C) System the child's Service Package, including supporting documentation in the current Common Application for Placement of Children in Residential Care;

(D) the case plan as that term is defined in §700.1319 of this title (relating to What is a case plan?), including the child service plan and any family service plan then in effect;

(E) information related to the child's permanency plan, including documentation related to permanency planning meetings held on the child's behalf;

(F) the temporary visitation schedule or visitation plan in effect for the case;

(G) list of all legal actions and statuses in the case;

(H) educational status information;

(I) information regarding the child's medical care, including the identity of the child's medical consenter, a listing of the child's medical and mental health assessments, and the child's medical and developmental history page; and

(J) a listing of the external documents associated with the case.

(2) provide that the types of information to which a volunteer advocate may gain access through the Internet application will be expanded upon the mutual agreement of the parties as technological enhancements are made to the Internet application and to DFPS' Information Management Protecting Adults and Children of Texas (IMPACT) case management system;

(3) set forth minimum security protocols CASA organizations and their volunteers must adhere to in order to minimize the unauthorized redisclosure of the information contained in the Internet application;

(4) detail the consequences for breaches of security or the unauthorized redisclosure of information accessed through the Internet application; and

(5) clarify the responsibilities of each party to the MOU, including any responsibilities for volunteer advocates in registering for the application and conditions of continued access to the system.

(c) Information available to court-appointed volunteer advocates through the Internet application remains confidential, and nothing in this rule shall be construed as a waiver of the confidentiality of the information transmitted by the application.

(d) For purposes of this rule, the term "volunteer advocate" includes any staff of the volunteer advocate organization with authority to access the records of a child in DFPS' managing conservatorship.

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

Filed with the Office of the Secretary of State on September 23, 2024.

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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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SUBCHAPTER C. ELIGIBILITY FOR CHILD PROTECTIVE SERVICES

40 TAC §§700.328, 700.332, 700.334

STATUTORY AUTHORITY

The proposed amended rules implement the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.328. Foster Care Maintenance Payments.

(a) Other than in a catchment area in which the Department of Family and Protective Services (DFPS) contracts with a Single Source Continuum Contractor, all providers of 24-hour residential child care, including foster family homes verified by DFPS, general residential operations, residential treatment centers, independent foster family homes, independent foster group homes, Supervised Independent Living (SIL) providers, child-placing agencies, and any other entity

that meets the definition of "child-care institution" under 42 U.S.C. §672 must complete a contract or agreement with DFPS in order to receive foster care maintenance payments.

(b) DFPS's foster care rates are approved by the Health and Human Services Commission in accordance with 1 TAC §355.7103 (relating to Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements) and 1 TAC §355.7105 (relating to Reimbursement Methodology for Supervised Independent Living). Except as otherwise provided in those rules, the foster care payment rate is tied to the child's service level or under the Texas Child-Centered Care (T3C) System, the child's Service Package.

(c) Any entity that receives foster care maintenance payments in accordance with subsection (a) of this section must accept DFPS's Common Application for Placement of Children in Residential Child Care as the uniform assessment form and application for admission.

(d) General residential operations, residential treatment centers, independent foster family homes, independent foster group homes, SIL providers, Single Source Continuum Contractors, and child-placing agencies that receive payment from DFPS either directly or indirectly must submit cost reports in compliance with 1 TAC §355.7101 (relating to Cost Determination Process) and as specified in the entity's contract or agreement with DFPS. Failure to complete and submit a cost report is grounds for placing a hold on payments to the provider or for terminating the contract or agreement.

§700.332. Eligibility for Foster Care Day Care Services.

(a) In this subchapter, the following terms have the following meanings:

(1) "Day care" means the assessment, care, training, education, custody, treatment, or supervision of a foster child by a person other than the child's foster parent for less than 24 hours a day, but at least two hours a day, three or more days a week.

(2) "Emergency placement that is in the child's best interest" means that despite the exercise of reasonable diligence, compliance with the Department's verification process regarding the availability of community day care resources would interfere with a placement that is in the child's best interest.

(3) "School-aged child" means a child who has reached the age of 6 by September 1 of the current year or who enrolls in school and reaches the age of 6 during the school year.

(b) To the extent funds are available and in accordance with any priority system established under subsection (e) of this section, DFPS may provide day care for authorized purposes to a foster parent if:

(1) the child is 13 years or younger and either:

(A) placed in a foster family home or foster group home where each foster parent in the home works outside the home 40 hours per week or more; or

(B) the child of a parent who is a minor in foster care if the child:

(i) is not in the conservatorship of DFPS;

(ii) resides with the child's minor parent in a foster home where all caregivers are employed full-time;

(iii) receives primary care from the minor parent outside of school hours;

(iv) needs day care to allow the minor parent to remain in school and complete the minor parent's educational goals; and

(v) has a minor parent who is unable to access child care through a Texas Workforce Commission work or training program or through a school-based operation.

(2) the foster parent is a resident of Texas;

(3) the child's service level is basic or if placed in a T3C Basic Foster Family Home Service Package under the Texas Child-Centered (T3C) System;

(4) the child is in DFPS' managing conservatorship and not in an adoptive placement; and

(5) there is no other available type of day care provided by the community, and the foster parent verifies in writing that the foster parent has attempted to find appropriate day care services for the child through community services, including:

(A) Head Start programs;

(B) Prekindergarten classes;

(C) Early education programs offered in public schools; and

(D) Any other available and appropriate resources in the foster parent's community.

(c) Day care for foster parents is authorized for the purpose of providing daily supervision:

(1) during the foster parents' work hours; or

(2) while the foster parents are attending judicial reviews, case conferences, or foster parent training.

(d) Day care for foster parents is not authorized for the following:

(1) full-time day care during school holidays;

(2) teacher in-service days;

(3) inclement-weather days;

(4) short breaks between semesters in a year-round school program;

(5) part-time care; or

(6) after-school care for school-aged children.

(e) To monitor the spending of funds, a priority system among foster parents will also be established in policy. The priority system will be based upon need, but at a minimum will require:

(1) a determination by DFPS that the provision of day care is critical to maintaining the placement of the child with the foster parent; and

(2) at least one child placed by DFPS:

(A) is under six years of age; or

(B) has a developmental delay (including physical, emotional, and cognitive or language) or physical disability.

(f) Notwithstanding any other provision of this section, if DFPS determines that requiring the written verification of a foster parent's attempts to find appropriate community day care services would prevent an emergency placement in the child's best interest, DFPS may waive the submission of the written verification of the foster parent's attempts. DFPS is authorized to require the submission of the written verification at any point following the initial authorization of day care services.

(g) The Associate Commissioner for Child Protective Services, the Associate Commissioner for Child Protective Investigations, or the Associate Commissioners' designees, may grant a good cause waiver of any of the requirements in subsection (b) or (d) of this section, if that person determines that:

(1) the placement cannot be sustained or is unlikely to be sustained if the foster parent cannot receive day care;

(2) there is no reasonable alternative to the provision of day care, such as a change in working hours; and

(3) day care services are only authorized in increments that are commensurate with the hours and days the foster parent and caregivers must be outside the home for employment.

(h) For a child who becomes ineligible during the term of a prior authorization, DFPS may in its discretion permit day care to continue through the end of the previously authorized period.

(i) DFPS pays for day care only in licensed child care centers and registered child care homes that are contracted through the local child care management service agency, unless care is self-arranged and DFPS gives prior approval to pay day care in the arrangement.

§700.334. Eligibility for Special Needs Foster Child Day Care Services.

(a) To the extent funds are available, DFPS may provide special needs foster child day care services for authorized purposes to a foster parent if the child:

(1) meets all eligibility requirements in §700.332 of this title (relating to Eligibility for Foster Care Day Care Services);

(2) is placed in a foster family or foster group home;

(3) has a billing service level of Basic or receives an approved waiver of the required basic service level through the regional day care coordinator or is placed in the T3C Basic Foster Family Home Service Package, under the Texas Child-Centered Care (T3C) System;

(4) is age 5 or younger;

(5) has been diagnosed by a professional as having a developmental delay, which is documented in the case record, in at least one of the following areas: physical, social, emotional, cognitive or language development; and

(6) has a service plan that specifies:

(A) the need for therapeutic or habilitative child day care; and

(B) how therapeutic child day care will meet specific needs related to the child's developmental delays that cannot be met by the foster parents.

(b) DFPS pays for special needs foster child day care only in licensed child-care centers and registered child-care homes that are contracted through the local child care management service agency, provide services beyond basic supervision, and are certified to provide care for children with special needs.

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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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
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For further information, please call: (512) 929-6633

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SUBCHAPTER E. TEXAS CHILD-CENTERED CARE SYSTEM SERVICE PACKAGES
DIVISION 1. BASIC FOSTER FAMILY HOME SUPPORT SERVICE PACKAGES

40 TAC §§700.501 - 700.512

STATUTORY AUTHORITY

The proposed new rules implement the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.501. What is T3C Basic Foster Family Home Support Service Package?

(a) A trauma-informed foster family home that provides a child's basic living needs, including food, clothing, shelter, education, vocation, transportation, recreation, and extracurricular needs, which may vary based on age and developmental level.

(b) This Service Package is designed to offer community-based care for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide T3C Basic Foster Family Home Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.502. What is the Substance Use Support Services Package?

(a) A trauma-informed foster family home that in addition to providing a child's basic living needs, has enhanced training and skill in coordinating services and providing care for children, youth, and young adults that may present with a DSM diagnosis of substance-related disorder or with challenges with recurring substance use, and who require routine clinical intervention to support and manage day-to-day activities.

(b) This Service Package is designed to offer community-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goals.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Substance Use Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.503. What is the Short-Term Assessment Support Services Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, provides short-term coordination of comprehensive assessments and evaluations for children, youth, and young adults who are in need of further assessment(s) and evaluation (s) to identify an appropriate Service Package and subsequent placement, who may present as:

(1) New to care, or transitioning from an unpaid placement, and where more information is needed to understand the child's custom service need(s); or

(2) Returning to foster care after an unauthorized absence or unauthorized placement; or

(3) Transitioning based on a recent, un-planned, disruption in placement..

(b) This Service Package is designed to offer community-based care, assessment, and treatment services for children, youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal. This Service Package is not eligible for Add-On Services and is time-limited.

(c) Child Placing Agency and Foster Family Home Caregivers must be Credentialed to provide the Short-Term Assessment Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.504. What is the Mental & Behavioral Health Support Services Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, has enhanced training and skill in providing and coordinating services to children, youth, and young adults that may present with a DSM diagnosis for emotional, conduct, or behavioral disorder(s), and for whom routine clinical intervention (therapy, education, and/or medication) is needed to support and manage day-to-day activities.

(b) This Service Package is designed to offer community-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Mental & Behavioral Health Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.505. What is the Sexual Aggression/Sex Offender Support Services Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, has enhanced training and skill in providing and coordinating services to treat and support children, youth, and young adults who require routine clinical intervention and skilled caregiver support to manage day-to-day activities, who may present with one or more of the following:

(1) Ongoing, socially, and developmentally inappropriate displays of sexualized behavior; or

(2) Sexually aggressive behavior; or

(3) DSM diagnosis of a sexual behavior disorder; or

(4) Adjudication as a sexual offender.

(b) This Service Package is designed to offer community-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Sexual Aggression/Sex Offender Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.506. What is the Complex Medical Needs or Medically Fragile Support Services Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, has enhanced training and skill in providing and coordinating services to care for and support children, youth, and young adults who may present with a medical diagnosis that requires constant monitoring, access to skilled nursing and other care up to 24 hours a day/7 days a week (based on eligibility), or who may present with a complex medical need such as uncontrolled diabetes, and for whom the individual's well-being depends on the support, direction, or service of others.

(b) This Service Package is designed to offer community-based care, medical, and other therapy/rehabilitation services to support recovery (if applicable), well-being, and improve the quality of life for children, youth, and young adults, based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Complex Medical Needs or Medically Fragile Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.507. What is Human Trafficking Victim/Survivor Support Service Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, has enhanced training and skill in providing and coordinating services to support children, youth, and young adults who present as suspected-unconfirmed or confirmed victims/survivors of sex and/or labor trafficking and who require routine clinical intervention to support and manage day-to-day activities.

(b) This Service Package is designed to offer community-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Human Trafficking Victim/Survivor Support Service in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.508. What is Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Support Service Package?

(a) A trauma-informed foster home that in addition to providing a child's basic living needs, has enhanced training and skill in providing and coordinating services to care for and support children, youth, and young adults who may present with or who are pending a DSM diagnosis for Intellectual or Developmental Disability and/or Autism Spectrum Disorder, and who require routine clinical intervention and structure to support and manage day-to-day activities.

(b) This Service Package is designed to offer community-based care, therapy, and other rehabilitation services that promote

development, independence, and improve life skills for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Support Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.509. What is T3C Treatment Foster Family Care Support Service Package?

(a) A trauma-informed, highly-structured foster home that in addition to providing a child's basic living needs, has highly-trained Foster Family Home Caregivers with skill in providing time-limited, strength-based therapeutic services to children, youth, and young adults who may present with a DSM diagnosis for an emotional, conduct, or behavioral disorder and for whom structured and frequent clinical intervention and complex case management is needed to support and manage day-to-day activities.

(b) In addition to the DSM diagnosis for an emotional disorder, the child may demonstrate two or more of the following:

(1) Major self-injurious actions, including a suicide attempt within the last 12 months;

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; or

(3) An additional DSM diagnosis of substance-related and/or addictive disorder with severe impairment.

(c) The T3C Treatment Foster Family Care Support Services Package require the highest level of clinical intervention offered in a family setting to perform day-to-day activities.

(d) This Service Package is designed to offer community-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(e) Child Placing Agencies and Foster Family Home Caregivers must be Credentialed to provide T3C Treatment Foster Family Care Support Service in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.510. What is the Transition Support Services for Youth and Young Adults Add-On?

In addition to the youth or young adult's primary Service Package, this is a trauma-informed foster home with enhanced training and skill in caring for, coordinating services, assisting in completion of forms/referrals, and supporting experiential learning opportunities for youth and young adults ages 14-22 years old. The Transitional Support Services for Youth & Young Adults Add-On Service is intended to support the youth and young adult's transition to independence and adulthood.

§700.511. What is the Kinship Caregiver Support Services Add-On?

In addition to the child, youth, or young adult's primary Service Package, the Child Placing Agency provides enhanced support services to the Kinship Foster Family Home Caregivers. These support services should be customized to the needs of the Kinship Caregivers and the child, youth, or young adult living in the Kinship Foster Family Home. A portion of the funding to support this Add-On Service is intended to reimburse the Child Placing Agency for costs incurred to support the Kinship Caregivers through the foster home verification process.

§700.512. What is the Pregnant & Parenting Youth or Young Adult Support Services Add-On?

In addition to the youth or young adult's primary Service Package being offered through the Child Placing Agency, this Add-On Service is offered in a trauma-informed foster home that has enhanced training and skill in caring for, mentoring/coaching, and offering support services for youth who are pregnant or actively parenting their biological child(ren). Pregnant & Parenting Youth or Young Adult Support Services may be offered to the mother or the father, so long as the youth or young adult receiving the Add-On Service has their biological child placed with them and are residing in a Credentialed foster home.

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

Filed with the Office of the Secretary of State on September 23, 2024.

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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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DIVISION 2. GENERAL RESIDENITIAL OPERATION TIER I AND TIER II SUPPORT SERVICE PACKAGES

40 TAC §§700.513 - 700.528

STATUTORY AUTHORITY

The proposed new rules implement the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.513. General Residential Operations - Tier T3C Treatment/Transition Service Packages.

Information contained in the rules in this Division 2, GENERAL RESIDENITIAL OPERATION TIER I AND TIER II SUPPORT SERVICE PACKAGES, outline the parameters/requirements associated with the Tier I Service Packages. The incorporation of these parameters and or requirements are consistent with or may exceed the state's Minimum Licensing Standards for a General Residential Operation and are not intended to change the existing character of the childcare operation. Providers may elect to become Credentialed to provide more than one T3C Service Package in a General Residential Operation Tier I or a Tier II setting.

§700.514. What is Tier I: T3C Basic Child Care Operation Package?

(a) A trauma-informed facility or cottage home that provides a child's basic living needs, including food, shelter, education, vocation, transportation, recreation, and extracurricular activities which may vary based on age and developmental level.

(b) This Service Package is designed to offer temporary facility-based, or cottage-home care for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) The Operation and Direct Care Staff must be Credentialed to provide Tier I: T3C Basic Child Care Operation Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.515. What is Tier I: Services to Support Community Transition for Youth & Young Adults who are Pregnant or Parenting Package?

(a) A trauma-informed facility, that in addition to providing for a youth, young adult, and their child's (if applicable) basic living needs, has enhanced training and expertise in caring for, mentoring/coaching, and providing/coordinating time-limited services to support the needs of youth and young adults who are pregnant or actively parenting their own biological child(ren). This Service Package may be offered to the mother and/or the father.

(b) This Service Package is designed to offer temporary, facility-based care, complex care coordination and case management, and therapeutic/skill-building services for youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Services to Support Community Transition for Youth & Young Adults who are Pregnant or Parenting in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.516. What is Tier I: Sexual Aggression/Sex Offender Treatment Services to Support Community Transition Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment program that specializes in providing and coordinating time-limited services to support the custom needs of children, youth, and young adults who requires structured and frequent on-site, clinical intervention by professionals with experience in serving this population, complex case management, and skilled and well-trained Caregivers to manage day-to-day activities, who present with one or more of the following:

(1) Ongoing, socially, and developmentally inappropriate displays of sexualized behavior; or

(2) Sexually aggressive behavior; or

(3) DSM diagnosis of a sexual behavior disorder; or

(4) Adjudication as a sex offender.

(b) In addition to the criteria listed above, children, youth, and young adults requiring Tier I: Sexual Aggression/Sex Offender Treatment Services to Support Community Transition Service Package, often present with a DSM diagnosis for an emotional disorder, and two or more of the following (which, if applicable, the General Residential Operation must be equipped to treat based on the custom needs of the child, youth, or young adult):

(1) Major self-injurious actions, including a suicide attempt within the last 12 months;

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; or

(3) An additional DSM diagnosis of substance-related and/or addictive disorder with severe impairment.

(c) This Service Package is designed to offer temporary, facility-based care, complex care coordination and case management, and therapeutic/skill-building services for youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Sexual Aggression/Sex Offender Treatment Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.517. What is Tier I: Substance Use Treatment Services to Support Community Transition Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment program that specializes in providing and coordinating time-limited services to support the custom needs of children, youth, and young adults who may present with or who are pending a DSM diagnosis for a substance related and/or addictive disorder causing severe impairment, and who require structured and frequent, on-site, clinical intervention, and complex care coordination and case management to support and manage day-to-day activities.

(b) This Service Package is designed to offer temporary, facility-based care, complex care coordination and case management, and therapeutic/skill-building services for youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Substance Use Treatment Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.518. What is Tier I: Emergency Emotional Support & Assessment Center Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal emotional support and assessment program that specializes in providing time-limited services to support the custom needs of children, youth, and young adults who are in need of further assessment(s) and evaluation(s) to identify an appropriate Service Package and subsequent placement, who present as:

(1) New to care, or transitioning from an unpaid placement, with suspected but unconfirmed, or confirmed behavioral health need(s); or

(2) Transitioning after a stay in a psychiatric hospital; or

(3) Returning to foster care after an unauthorized absence, or unauthorized placement, with a suspected but unconfirmed, or confirmed behavioral health need(s); or

(4) Transitioning based on a recent, un-planned disruption in placement, where a suspected but unconfirmed, or confirmed behavioral health need(s) was a factor contributing to the disruption.

(b) This Service Package is designed to offer temporary, facility-based care, complex care coordination and case management, and therapeutic/skill-building services for youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(c) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Emergency Emotional Support & Assessment Center Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.519. What is Tier I: Complex Medical Needs Treatment to Support Community Transition Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment/therapeutic program that specializes in providing a holistic, comprehensive array of medical and therapeutic supports, services, and enhanced care coordination, complex case management, and on-site access to care.

(b) This time-limited service is designed for children, youth, and young adults that present with complex medical conditions, which may include uncontrolled diabetes with a documented history of noncompliance with medication management, or who may present with a medical diagnosis and who may not be able to live without mechanical supports or the services of others because of life threatening conditions, including:

(1) The inability to maintain an open airway without assistance;

(2) The inability to be fed except through a feeding tube, gastric tube, or a parenteral route;

(3) The use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross-infection or contamination, or prevent tissue breakdown; or

(4) Multiple physical disabilities including sensory impairments.

(c) This Service Package is designed to offer temporary, facility-based care, medical, and other therapy/rehabilitation services to support recovery (if applicable) and well-being and improve the quality of life for youth and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Complex Medical Needs Treatment Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.520. What is Tier I: Mental & Behavioral Health Treatment Services to Support Community Transition Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment program that specializes in providing and coordinating time-limited services to support the custom needs of children, youth, and young adults who may present with or who are pending a DSM diagnosis for an emotional, conduct, or behavioral disorder, and require structured and frequent, on-site, clinical intervention require structured and frequent, on-site therapy and clinical intervention, and complex care coordination and case management services to support and manage day-to-day activities.

(b) In addition to the DSM diagnosis, the child may demonstrate two or more of the following:

(1) Major self-injurious actions, including a suicide attempt within the last 12 months;

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; or

(3) An additional DSM diagnosis of substance-related and/or addictive disorder with severe impairment.

(c) This Service Package is designed to offer temporary, facility-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Mental & Behavioral Health Treatment Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.521. What is Tier I: Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Treatment Services to Support Community Transition Package?

(a) Trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment/therapeutic program that specializes in providing and coordinating time-limited services to support the custom needs of children, youth, and young adults who may present with or who are pending a DSM diagnosis of Intellectual or Developmental Disability (IDD) and/or Autism Spectrum Disorder, and who require structured and frequent, on-site therapy and clinical intervention, and complex care coordination and case management services to support and manage day-to-day activities.

(b) In addition, for children with a DSM diagnosis for Intellectual or Developmental Disability, and/or a DSM diagnosis for Autism Spectrum Disorder, the child's behavior may be characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas:

(1) Conceptual, social, and practical adaptive skills to include daily living and self-care;

(2) Communication, cognition, or expressions of affect;

(3) Self-care activities or participation in social activities;

(4) Responding appropriately to an emergency; or

(5) Multiple physical disabilities, including sensory impairments.

(c) This Service Package is designed to offer temporary, facility-based care, therapy, and other services that promote development, independence, and improved life skills for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Intellectual or Developmental Disability (IDD)/Autism Spectrum Disorder Treatment Services in accordance with the guidelines and requirements as defined by the Texas Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.522. What is Tier I: Human Trafficking Victim/Survivor Treatment Services to Support Community Transition Package?

(a) A trauma-informed facility, that in addition to providing a child's basic living needs, has a formal treatment program that specializes in providing and coordinating time-limited services to support the custom needs of children, youth, and young adults who have been determined to be a victim/survivor of sex and/or labor trafficking, and require structured and frequent, on-site, clinical intervention require structured and frequent, on-site therapy and clinical intervention, and complex care coordination and case management services to support and manage day-to-day activities.

(b) Children, youth, and young adults qualifying for this service may be determined to be a victim/survivor of trafficking based on one or more of the following criteria:

(1) As a result of a criminal prosecution or who is currently alleged to be a victim/survivor of trafficking in a pending criminal investigation or prosecution.

(2) Identified by the parent or agency that placed the child, youth, or young adult in the operation as a victim/survivor of trafficking; or

(3) Determined by the operation to be a victim/survivor of trafficking based on reasonably reliable criteria, including one or more of the following:

(A) The child's own disclosure as a victim/survivor of trafficking;

(B) The assessment of a counselor or other professional; or

(C) Evidence that the child was recruited, harbored, transported, provided to another person, or obtained for the purpose of forced labor or commercial sexual activity.

(c) This Service Package is designed to offer temporary, facility-based care and treatment/recovery services for children, youth, and young adults based on their individual strengths and needs, and in accordance with their customized Service Plan and permanency goal.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier I: Human Trafficking Victim/Survivor Treatment Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.523. What is Tier II: Sexual Aggression/Sex Offender Services to Support Stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, has an intensive treatment program that specializes in providing and coordinating time-limited services to support the emotional stability, well-being, and therapeutic needs of children, youth, and young adults, for whom other forms of specialized treatment have been tried and rendered unsuccessful, and/or treatment in a less-restrictive setting such as in a Foster Family Home or General Residential Operation- Tier I facility is not safe and appropriate based on individualized need(s) and absent the Tier II intervention, the child, youth, or young adult's well-being, or that of others they interact with, may be at risk and who are experiencing challenges with a lack of impulse control, and may present with one or more of the following:

(1) Ongoing, socially, and developmentally inappropriate displays of sexualized behavior; or

(2) Sexually aggressive behavior; or

(3) DSM diagnosis of a sexual behavior disorder; or

(4) Adjudication as a sex offender.

(b) In addition to the criteria listed above, children, youth, and young adults requiring Tier II: Sexual Aggression/Sexual Offender Services to Support Stabilization Service Package may present with a DSM-5 diagnosis for an emotional, conduct, or behavioral disorder, and two or more of the following (which, if applicable, the General Residential Operation offering this Service Package must be equipped to treat based on the custom needs of the child, youth, or young adult):

(1) Major self-injurious actions, including a suicide attempt within the last 12 months;

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; or

(3) An additional DSM- diagnosis of substance-related and/or addictive disorder with severe impairment.

(c) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving emotional and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Sexual Aggression/Sex Offender Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.524. What is Tier II: Substance Use Services to Support stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, including food, clothing, shelter, education, vocation, transportation, recreation, and extracurricular needs, has an intensive treatment program that specializes in providing and coordinating time-limited services to support the emotional stability, well-being, and therapeutic needs of children, youth, and young adults, for whom other forms of specialized substance use and addictive disorder treatment have been tried and rendered unsuccessful, and/or treatment in a less-restrictive setting such as a Foster Family Home or General Residential Operation- Tier I facility is not safe and appropriate based on individualized needs and absent the Tier II intervention, the child, youth, or young adult's well-being, or that of others they interact with, may be at risk and who are experiencing challenges with a lack of impulse control, and have or are pending a DSM diagnosis for a substance related and/or addictive disorder with severe impairment.

(b) In addition to the DSM diagnoses for a substance related and/or addictive disorder with severe impairment, the child, youth, or young adult may demonstrate one of the following:

(1) Major self-injurious actions, including a suicide attempt within the last 12 months; or

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression.

(c) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving emotional and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Substance Use Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.525. What is Tier II: Aggression/Defiance Disorder Services to Support Stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, has an intensive treatment program that specializes in providing and coordinating time-limited services to support the emotional stability, well-being, and therapeutic needs of children, youth, and young adults, for whom other forms of specialized treatment have been tried and rendered unsuccessful, and/or treatment in a less-restrictive setting such as in a Foster Family Home or General Residential Operation- Tier I facility is not safe and appropriate based on individualized needs and absent the Tier II intervention, the child, youth, or young adult's well-being, or that of others

they interact with, may be at risk, and who are experiencing challenges with a lack of impulse control, and may present with or are pending a DSM diagnosis of Oppositional Defiant Disorder or other Conduct Disorder, and may present with two or more of the following:

(1) Severe and chronic challenges in school, with peers, and/or in other social settings; or

(2) Severe and chronic challenges with authority and following rules (beyond what would be considered age-appropriate behavior); or

(3) Recurring delinquent behaviors which may have resulted in juvenile justice or law enforcement involvement; or

(4) Major self-injurious actions, including a suicide attempt within the last 12 months; or

(5) Difficulties that present a significant risk of harm to others, including frequent or unpredictable violence or physical aggression; or

(6) An additional DSM diagnosis of substance-related and/or addictive disorder with severe impairment.

(b) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving emotional and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(c) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Aggression/Defiance Disorder Services in accordance with the guidelines and requirements as defined by the Texas Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.526. What is Tier II: Complex Mental Health Services to Support Stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, has an intensive treatment program that specializes in providing and coordinating time-limited services to support the emotional stability, well-being, and therapeutic needs of children, youth, and young adults, for whom other forms of specialized treatment have been tried and rendered unsuccessful, and/or treatment in a less-restrictive setting such as a Foster Family Home or General Residential Operation- Tier I facility is not safe and appropriate based on individualized needs and absent the Tier II intervention, the child, youth, or young adult's well-being, or that of others they interact with, may be at risk, and who are experiencing challenges with a lack of impulse control, and present with or are pending multiple, co-occurring DSM diagnoses for emotional, behavioral, neurological, and/or developmental disorder(s).

(b) In addition to the co-occurring DSM diagnoses, the child, youth, or young adult may demonstrate two or more of the following:

(1) Major self-injurious actions, including a suicide attempt within the last 12 months; or

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; or

(3) An additional DSM diagnosis of substance-related and/or addictive disorder with severe impairment; and

(4) If one of the co-occurring DSM diagnoses is for Intellectual or Developmental Disability or Autism Spectrum Disorder, the child's behavior is characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas (of development if diagnosis is Autism Spectrum Disorder):

(A) Conceptual, social, and practical adaptive skills to include daily living and self-care;

(B) Communication, cognition, or expressions of affect;

(C) Self-care activities or participation in social activities;

(D) Responding appropriately to an emergency; or

(E) Multiple physical disabilities, including sensory impairments.

(c) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving emotional and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(d) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Complex Mental Health Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.527. What is Tier II: Complex Medical Services to Support Stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, has an intensive treatment program that specializes in providing a holistic and comprehensive array of medical and behavioral health services and therapeutic supports for children, youth, and young adults that may present with a complex medical diagnosis that is defined as either one or more diagnoses that affect multiple organ systems, or one long-term health condition that results in functional limitations, high health care needs or utilization, and often the need for medical technology, and that may have a dual DSM diagnosis for an emotional, behavioral, neurological, and/or developmental disorder(s), that may include one or more of the following:

(1) Major self-injurious actions, including a suicide attempt within the last 12 months; or

(2) Difficulties that present a significant risk of harm to others, including frequent or unpredictable physical aggression; and

(3) If the one of the DSM diagnoses is for Intellectual or Developmental Disability or Autism Spectrum Disorder, the child's behavior is characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas (of development if diagnosis is Autism Spectrum Disorder):

(A) Conceptual, social, and practical adaptive skills to include daily living and self-care;

(B) Communication, cognition, or expressions of affect;

(C) Self-care activities or participation in social activities;

(D) Responding appropriately to an emergency; or

(E) Multiple physical disabilities, including sensory impairments.

(b) In addition to the DSM diagnosis, children, youth, and young adults requiring the Tier II: Complex Medical Services to Support Stabilization may present with a medical diagnosis that requires

the use of mechanical supports or services of others because of life threatening conditions, including:

(1) The inability to maintain an open airway without assistance;

(2) The inability to be fed except through a feeding tube, gastric tube, or a parenteral route;

(3) The use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross-infection or contamination, or prevent tissue breakdown; or

(4) Multiple disabilities including sensory impairments.

(c) To qualify for Tier II: Complex Medical Services to Support Stabilization, the child must have a medical diagnosis as determined by a Physician, and have a qualifying DSM diagnosis, and present with needs that cannot be met in a less-restrictive setting such as a Foster Family Home or General Residential Operation- Tier I facility because it is not safe and appropriate based on individualized needs.

(d) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving medical, emotional, and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(e) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Complex Medical Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

§700.528. What is Tier II: Human Trafficking Victim/Survivor Services to Support Stabilization Package?

(a) A highly structured, trauma-informed facility that, in addition to providing a child's basic living needs, has an intensive treatment program that specializes in providing and coordinating time-limited services to support the emotional stability, well-being, and therapeutic needs of children, youth, and young adults who are experiencing challenges with a lack of impulse control, and has been determined to be a victim/survivor of sex and/or labor trafficking, and has or is pending a DSM diagnosis for an emotional, behavioral, neurological, and/or developmental disorder.

(b) Children, youth, and young adults qualifying for this service may be determined to be a victim/survivor of trafficking based on one or more of the following criteria:

(1) As a result of a criminal prosecution or who is currently alleged to be a victim/survivor of trafficking in a pending criminal investigation or prosecution;

(2) Identified by the parent or agency that placed the child, youth, or young adult in the operation as a victim/survivor of trafficking; or

(3) Determined by the operation to be a victim/survivor of trafficking based on reasonably reliable criteria, including one or more of the following:

(A) The child's own disclosure as a victim/survivor of trafficking;

(B) The assessment of a counselor or other professional; or

(C) Evidence that the child was recruited, harbored, transported, provided to another person, or obtained for the purpose of forced labor or commercial sexual activity.

(c) In addition to the determination of status as a victim/survivor of trafficking, and having a qualifying DSM diagnosis, the child, youth, or young adult, for whom other forms of specialized treatment have been tried and rendered unsuccessful, and/or treatment in a less-restrictive setting such as a Foster Family Home or General Residential Operation- Tier I facility is not safe and appropriate based on individualized needs and absent the Tier II intervention, the child, youth, or young adult's well-being, or that of others they interact with, may be at risk, and may demonstrate two or more of the following:

(1) Severe and chronic challenges in school, with peers, and/or in other social settings; or

(2) Severe and chronic challenges with authority and following rules (beyond what would be considered age-appropriate behavior); or

(3) Recurring delinquent behaviors which may have resulted in juvenile justice or law enforcement involvement; or

(4) Major self-injurious actions, including a suicide attempt within the last 12 months; or

(5) Difficulties that present a significant risk of harm to others, including frequent or unpredictable violence or physical aggression; or

(6) Substance-related issues or a pending diagnosis for an addictive disorder; or

(7) If DSM diagnosis is for an Intellectual or Developmental Disability or Autism Spectrum Disorder, the child's behavior is characterized by prominent, severe deficits and pervasive impairment in one or more of the following areas (of development if diagnosis is Autism Spectrum Disorder):

(A) Conceptual, social, and practical adaptive skills to include daily living and self-care;

(B) Communication, cognition, or expressions of affect;

(C) Self-care activities or participation in social activities;

(D) Responding appropriately to an emergency; or

(E) Multiple physical disabilities, including sensory impairments.

(d) This Service Package is designed to offer temporary, facility-based care, for children, youth, and young adults based on their individual strengths and needs, with the overall goal of achieving emotional and behavioral stability to the level that successful transition to a less restrictive placement offering treatment and recovery services can be achieved.

(e) The Operation and Direct Care Staff must be Credentialed to provide Tier II: Human Trafficking Victim/Survivor Services in accordance with the guidelines and requirements as defined by the Department of Family and Protective Services pursuant to Chapter 40 of the Texas Human Resources Code.

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

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TRD-202404577
Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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SUBCHAPTER H. ADOPTION ASSISTANCE PROGRAM
DIVISION 3. APPLICATION PROCESS, AGREEMENTS, AND BENEFITS

40 TAC §700.844

STATUTORY AUTHORITY

The proposed amended rule implements the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.844. How are monthly payment amounts determined?

(a) The following factors are considered and discussed in negotiating and determining benefits:

(1) We evaluate your child's present need for services in relation to your family's income, expenses, circumstances, and plans for the future.

(2) Benefits are intended only to assist in meeting your child's needs and your parental responsibilities.

(3) Any and all sources of income and support that are specifically designated for the child (such as Retirement, Survivors, Disability Insurance (RSDI) or Veterans Administration (VA) benefits) must be applied toward meeting the child's needs.

(4) We do not consider costs associated with your choice to meet the child's needs through private sources when those needs can be met through other publicly funded sources.

(5) If the child needs special services not covered by your private insurance or Texas Medicaid, we must determine the actual cost of services available to meet those needs. If actual costs are not available, we determine a reasonable estimate of projected costs.

(b) There is a limit to the amount of a monthly payment that you can negotiate. You are informed of the maximum monthly payment amount that you can negotiate at the time of your application for adoption assistance.

(c) Whenever you are offered, or are receiving, the maximum monthly payment amount, you cannot request:

(1) an increase in your adoption assistance payment amount; or

(2) an appeal regarding the payment amount.

(d) The maximum monthly payment amount depends upon the child's authorized service level (or level of care) at the beginning of the adoptive placement. The payment ceiling for Basic care is $400 per month; the payment ceiling for Moderate, Specialized, and Intense care is $545 per month.

(e) Under the Texas Child-Centered Care (T3C) System, the maximum monthly payment depends on the child's recommended service package at the beginning of the adoptive placement. The payment ceiling for a child who is placed in the T3C Basic Foster Family Support Services is $400 per month; the payment ceiling for a child placed in any other Service Package is $545 per month.

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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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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SUBCHAPTER J. ASSISTANCE PROGRAMS FOR RELATIVES AND OTHER CAREGIVERS
DIVISION 2. PERMANENCY CARE ASSISTANCE PROGRAM

40 TAC §700.1039

STATUTORY AUTHORITY

The proposed amended rule implements the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.1039. What is the amount of monthly payments that a permanent kinship conservator may receive under a permanency care assistance agreement?

(a) The amount of monthly payments that will be paid to a permanent kinship conservator will be negotiated between DFPS and the prospective permanent kinship conservator prior to the signing of the permanency care assistance agreement, based on the criteria specified in subsection (b) of this section, subject to the maximum monthly payment amounts specified in subsection (c) of this section. These amounts may be periodically re-negotiated as circumstances change.

(b) The following factors are considered when negotiating the amount of monthly permanency care assistance payments to be made:

(1) the child's present need for services will be assessed in relation to the permanent kinship conservator's income, expenses, circumstances, and plans for the future;

(2) benefits are intended only to assist the permanent kinship conservator in meeting the child's needs and the permanent kinship conservator's responsibilities for meeting those needs;

(3) any and all sources of income and support that are specifically designated for the child (such as Retirement, Survivors, Disability Insurance (RSDI) or Veterans Administration (VA) benefits) must be applied toward meeting the child's needs;

(4) whether a publicly funded source may be used to meet the child's needs, even if the permanent kinship conservator does not choose to take advantage of the publicly funded source; and

(5) a determination of the actual or estimated costs of meeting the child's medical needs that cannot be met through private insurance or Texas Medicaid.

(c) The maximum monthly payment amount depends upon the child's authorized service level (ASL) at the time the permanency care assistance agreement is negotiated. The payment ceiling for a child whose ASL is Basic Care is $400 per month; the payment ceiling for a child whose ASL is Moderate, Specialized or Intense is $545 per month.

(d) Under the Texas Child-Centered Care (T3C) System, the maximum monthly payment depends on the child's recommended service package, at the time the permanency care assistance agreement is negotiated. The payment ceiling for a child who is placed in the T3C Basic Foster Family Support Services is $400 per month; the payment ceiling for a child placed in any other Service Package is $545 per month.

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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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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SUBCHAPTER Q. PURCHASED PROTECTIVE SERVCES

DIVISION 2. POST-PERMANENCY SERVICES

40 TAC §700.1733

STATUTORY AUTHORITY

The proposed amended rule implements the General Appropriations Act, Senate Bill 1, Regular Session 2021 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 26).

The modification is proposed under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§700.1733. Who is eligible for residential treatment services?

(a) Client eligibility. Only adopted children are eligible for residential treatment services through the post-permanency services program. To qualify, an adopted child:

(1) must be expected to return home and function in the adoptive family within 12 months;

(2) must not be eligible for treatment in a state hospital or state school; and

(3) must have an initial service level determination of Specialized or Intense or if under the Texas Child-Centered Care (T3C) System, must be placed and receiving a T3C Service Package other than the T3C Basic Family Foster Family Home Service Package.

(b) Family treatment and progress towards reunification.

(1) The child's adoptive family must participate in family treatment over the course of the child's stay in residential treatment.

(2) Every three-month review of the child's service plan must address the progress made towards reunifying the child with the adoptive family.

(3) The contractor must begin planning for a child's discharge from residential treatment services, and must carry out the discharge within 60 days, if either of the following conditions arises:

(A) the adoptive parents do not:

(i) maintain regular contact with the child;

(ii) participate in treatment; or

(iii) intend to let the child return home; or

(B) the child's functioning does not improve.

(c) Minimum service level or T3C Service Package.

(1) If the service level of an adopted child in residential treatment services is reduced below the Specialized Service Level or the child no longer meets the criteria for the Service Package under which they were originally placed [~~at the end of a service level review~~], the contractor must immediately begin planning to:

(A) support the child's return to the adoptive home;

(B) refer the child and family to another facility that can meet the child's needs; or

(C) help the family find other ways to pay for the contractor's continuing care.

(2) The child's eligibility for DFPS-paid residential treatment services ends 60 days after the effective date of the reduced service level.

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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Quyona Gregg
Senior Policy Attorney
Department of Family and Protective Services
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 929-6633

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

The Texas Department of Transportation (department) proposes the amendments to §§9.2, 9.15, 9.17, 9.23, and 9.24, relating to Contracts and Grant Management.

EXPLANATION OF PROPOSED AMENDMENTS

The purpose of this rulemaking is to clarify the rules of the Texas Transportation Commission (commission) concerning the requirements for submitting certain claims for contracts entered into and administered by the Texas Department of Transportation (department).

Amendments to §9.2, Contract Claim Procedure, in subsection (g)(2)(B), prohibit the use of any type of total cost method when making a claim for additional compensation. This prohibition ensures that claims for additional compensation are based on verifiable direct costs attributable to specific changes and impacts. Additional amendments allow the committee chair to waive the meeting requirement if the department does not dispute the contractor's claim because such a meeting is unnecessary and to specify that rescheduling of meetings is at the committee chair's discretion, which will prevent unnecessary delay. The term "chairman" is also replaced with "chair" to align with the language used in 43 TAC §1.1, Texas Transportation Commission. The amendments also correct the reference in subsection (a)(1)(C) to the title of Transportation Code, Chapter 223.

Amendments to §9.15, Acceptance of Bids, clarify in subsection (e) that the department evaluates only the apparent low bid to determine whether the bid is unbalanced and provide that the department may determine that the apparent low bid is nonresponsive if the evaluation shows that the apparent low bid is both mathematically and materially unbalanced. This change provides for efficiency in the selection of bids for awarding contracts.

Amendments to §9.17, Award of Contract, delete the requirement of subsection (a)(2) that the commission reject all bids for a project if the lowest bid is determined to be both mathematically and materially unbalanced. This requirement is unnecessary because under language added to §9.15, a determination that a low bid is mathematically and materially unbalanced may result in the bid being considered nonresponsive.

Amendments to §9.23, Evaluation and Monitoring of Contract Performance, clarify that an interim evaluation must be completed as needed and on each anniversary date of when work began under the contract, if the project extends for longer than one year. These changes will assist in clearing ambiguity that could potentially result in inconsistent application of this requirement.

Amendments to §9.24, Performance Review Committee and Actions, replace the term "chairman" with "chair" to align with the language used in 43 TAC §1.1, Texas Transportation Commission.

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

Mr. Duane Milligan, P.E., 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

Mr. Duane Milligan, P.E. 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 streamlining the contract claim process, increasing efficiency in award of contracts for highway projects, and improving clarity and readability of the rules.

COSTS ON REGULATED PERSONS

Mr. Duane Milligan, P.E. 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

Mr. Duane Milligan, P.E. 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

Mr. Duane Milligan, P.E. 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

Mr. Duane Milligan, P.E. 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 §§9.2, 9.15, 9.17, 9.23, and 9.24, 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 "Contract Claims" or "Contracts for Highway Projects." The deadline for receipt of comments is 5:00 p.m. on November 11, 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.

SUBCHAPTER A. GENERAL

43 TAC §9.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section, and Transportation Code, §223.004, which authorizes the commission to adopt rules to prescribe conditions under which a bid may be rejected by the department.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, §§22.018 and 391.091, and Chapter 223 and Government Code, Chapter 2254, Subchapters A and B.

§9.2. Contract Claim Procedure.

(a) Applicability. A claim shall satisfy the requirements in paragraphs (1) - (3) of this subsection.

(1) The claim is under a contract entered into and administered by the department, acting in its own capacity or as an agent of a local government, under one of the following statutes:

(A) Transportation Code, §22.018 (concerning the designation of the department as agent in contracting and supervising for aviation projects);

(B) Transportation Code, §391.091 (concerning erection and maintenance of specific information logo, major area shopping guide, and major agricultural interest signs);

(C) Transportation Code, Chapter 223 (concerning bids and contracts for highway [~~improvement~~] projects), subject to the provisions of subsection (c) of this section; or

(D) Government Code, Chapter 2254, Subchapters A and B (concerning professional or consulting services).

(2) The claim is for compensation, or for a time extension, or any other remedy.

(3) The claim is brought by a prime contractor.

(b) Pass-through claim; claim and counter claim.

(1) A prime contractor may make a claim on behalf of a subcontractor only if the prime contractor is liable to the subcontractor on the claim.

(2) Only a prime contractor may submit a claim to begin a claim proceeding under this section. After a claim proceeding has begun the department may make a counter claim.

(3) This section does not abrogate the department's authority to file a claim in a court of competent jurisdiction. The procedure for the department to file a claim in a court of competent jurisdiction, including the deadline to file a claim, is set by other law.

(c) Claim concerning comprehensive development agreement or certain design-build contracts. A claim under a comprehensive development agreement (CDA) entered into under Transportation Code, Chapter 223, Subchapter E, or under a design-build contract, as defined in §9.6 of this subchapter (relating to Contract Claim Procedure for Comprehensive Development Agreements and Certain Design-Build Contracts), may be processed under this section if the parties agree to do so in the CDA or design-build contract, or if the CDA or design-build contract does not specify otherwise. However, if the CDA or design-build contract specifies that a claim procedure authorized by §9.6 of this subchapter applies, then any claim arising under the CDA or design-build contract shall be processed and resolved in accordance with the claim procedure authorized by §9.6 of this subchapter and not by this section.

(d) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise, except that when used in subsection (c) of this section, the terms claim, comprehensive development agreement, CDA, and design-build contract shall have the meanings given such terms stated in §9.6 of this subchapter.

(1) Claim--A claim for compensation, for a time extension, or for any other remedy arising from a dispute, disagreement, or controversy concerning respective rights and obligations under the contract.

(2) Commission--The Texas Transportation Commission.

(3) Committee--The Contract Claim Committee.

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

(5) Department office--The department district, division, or office responsible for the administration of the contract.

(6) Department office director--The chief administrative officer of the responsible department office; the officer shall be a district engineer, division director, or office director.

(7) District--One of the 25 districts of the department.

(8) Executive director--The executive director of the Texas Department of Transportation.

(9) Prime contractor--An individual, partnership, corporation, or other business entity that is a party to a written contract with the state of Texas which is entered into and administered by the department under Transportation Code, §22.018, §391.091, Chapter 223, or Government Code, Chapter 2254, Subchapters A and B.

(10) Project--The portion of a contract that can be separated into a distinct facility or work unit from the other work in the contract.

(e) Contract claim committee. The executive director or the director's designee shall name the members and chair [~~chairman~~] of a committee or committees to serve at the executive director's or designee's pleasure. The chair [~~chairman~~] may add members to the committee, including one or more district engineers who will be assigned

to the committee on a rotating basis, with a preference, if possible, for district engineers of districts that do not have a current contractual relationship with the prime contractor involved in a contract claim.

(f) Negotiated resolution. To every extent possible, disputes between a prime contractor and the department's project engineer should be resolved during the course of the contract.

(g) Procedure.

(1) Exclusive procedure. Except as provided in subsection (c) of this section, a prime contractor shall file a claim under the procedure in this subsection. A claim filed by the prime contractor must be considered first by the committee before the claim is considered in a contested case hearing.

(2) Filing claim.

(A) The prime contractor shall file a claim after completion of the contract or when required for orderly performance of the contract. For a claim resulting from the enforcement of a warranty, a prime contractor shall file the claim no later than one year after expiration of the warranty period. For all other types of claims, a prime contractor shall file the claim no later than one year after the earlier of the date that the department sends to the contractor notice:

(i) that the contractor is in default;

(ii) that the department terminates the contract; or

(iii) notice of final acceptance of the project that is the subject of the contract.

(B) To file a claim, a prime contractor shall file a contract claim request and a detailed report that provides the basis for the claim. The detailed report shall include relevant facts of the claim, cost or other data supporting the claim, a description of any additional compensation requested, and documents supporting the claim. For a request for additional compensation, the prime contractor may not use a method, however denominated, by which the amount requested is determined by subtracting the contractor's bid prices from the contractor's actual performance costs. The prime contractor shall file the claim with the department's construction division, the department engineer under whose administration the contract was or is being performed, or the committee.

(C) A claim filed by a prime contractor shall include a certification as follows: I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the department is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(D) A defective certification shall not deprive the department of jurisdiction over the claim. Prior to the entry by the department of a final decision on the claim the department shall require a defective certification to be corrected.

(E) The construction division or department engineer shall forward the contract claim request and detailed report to the committee.

(F) The deadline for the department to file a counter claim is 45 days before the committee holds an informal meeting under paragraph (3) of this subsection.

(3) Evaluation of claim by the committee.

(A) The committee's responsibility is to gather information, study the relevant issues, and meet informally with the prime contractor if requested. The committee shall attempt to resolve the claim.

(B) The committee shall secure detailed reports and recommendations from the responsible department office, and may confer with any other department office deemed appropriate by the committee. The committee shall give the prime contractor the opportunity to submit a responsive report and recommendation concerning a counter claim filed by the department.

(C) If the department disputes the prime contractor's claim, the [~~The~~] committee shall afford the prime contractor an opportunity for a meeting to informally discuss the disputed matters and to provide the prime contractor an opportunity to present relevant information and respond to information the committee has received from the department office. The committee chair, in the chair's sole discretion, may reschedule a meeting. Proceedings before the committee are an attempt to mutually resolve a claim without litigation and are not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph. All oral communications, reports, or other written documentation prepared by department staff in connection with the analysis of a claim are part of the attempt to mutually resolve a claim without litigation, and are also not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph.

(D) The committee chair [~~chairman~~] shall give written notice of the committee's decision on the claim to the department and prime contractor. The department and prime contractor are presumed to receive the decision three days after it is sent by United States mail.

(i) If the prime contractor does not object to the committee's decision, the prime contractor shall file a written statement with the committee's chair [~~chairman~~] stating that the prime contractor does not object. The prime contractor shall file the statement no later than 20 days after receipt of the committee's decision. The chair [~~chairman~~] shall then prepare a document showing the settlement of the claim including, when required, payment to the prime contractor, and the prime contractor's release of all claims under the contract. The prime contractor shall sign it. The executive director may approve the settlement, or may request the commission to approve the settlement by issuance of an order. The executive director shall then implement the resolution of the claim. If contemplated in the committee's decision, the executive director shall expend funds as specified in the decision. If contemplated in the committee's decision, the executive director shall order the prime contractor to make payment to the department.

(ii) If the prime contractor objects to the committee's decision the prime contractor shall file a petition with the executive director no later than 20 days after receipt of the committee's decision requesting an administrative hearing to litigate the claim under the provisions of §§1.21 et seq. of this title (relating to Procedures in Contested Cases).

(iii) If the prime contractor fails to file a written petition under clause (ii) of this subparagraph within 20 days of receipt of the committee's decision, the prime contractor waives his right to a contested case hearing. All further litigation of claims on the project or contract by the prime contractor shall be barred by the doctrines of issue and claim preclusion. The chair [~~chairman~~] shall then prepare an order implementing the resolution of the claim under the committee's decision, and stating that further litigation on the claim is prohibited. The executive director shall then issue the order and implement the resolution of the claim. If contemplated in the committee's decision, the executive director shall expend funds as specified in the decision. If contemplated in the committee's decision, the executive director shall order the prime contractor to make payment to the department.

(4) Decision after contested case hearing. This paragraph applies if a contested case hearing has been held on a claim. The ad-

ministrative law judge's proposal for decision shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(5) This section does not abrogate the department's authority to enforce in a court of competent jurisdiction a final department order issued under the section.

(h) Claim forfeiture. A claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department in the proof, statement, establishment, or allowance thereof. In such cases the department shall specifically find such fraud or attempt and render judgment of forfeiture. This subsection applies only if there is clear and convincing evidence that a person knowingly presented a false claim for the purpose of getting paid for the claim.

(i) Relation of contract claim proceeding and sanction proceeding.

(1) Except as provided in paragraphs (2) and (3) of this subsection, the processing of a contract claim under this section is a separate proceeding.

(2) If a contested issue arises that is relevant both to a contract claim proceeding and a sanction proceeding concerning the same contract, the issue shall be resolved in the proceeding that the executive director refers first for a contested case hearing under Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases). If the issue is decided in the first proceeding that decision shall apply to and be binding in all subsequent department proceedings.

(3) This paragraph applies to a contract under which the parties agreed to submit questions which may arise to the decision of a department engineer. If a dispute under the contract leads to a contract claim proceeding or sanction proceeding, the engineer's decision shall be upheld unless it was based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment.

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

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TRD-202404664
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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SUBCHAPTER B. CONTRACTS FOR HIGHWAY PROJECTS

43 TAC §§9.15, 9.17, 9.23, 9.24

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section, and Transportation Code, §223.004, which authorizes the commission to adopt rules to prescribe conditions under which a bid may be rejected by the department.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, §§22.018 and 391.091, and Chapter 223 and Government Code, Chapter 2254, Subchapters A and B.

§9.15. Acceptance of Bids.

(a) Public opening. Bids will be opened in accordance with Transportation Code, §223.004 and §223.005.

(1) Bids for contracts, other than building contracts[,] with an estimate of less than $1 million, 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 the 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 chapter 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 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 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 the Qualification of Bidders, the department will not accept 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 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 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 an apparent low [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. The department may consider an apparent low bid nonresponsive if [~~In the event that~~] the evaluation of the unit bid prices reveals that the apparent low bid is mathematically and materially unbalanced [~~, the bidder will not be considered in future bids for the same project~~].

§9.17. Award of Contract.

(a) The commission may reject any and all bids opened, read, and tabulated under §9.15 and §9.16 of this subchapter (relating to Acceptance 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;

(3) [~~(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

(4) [~~(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 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, the bid guaranty will be returned to the bidder but no compensation will be paid to the bidder as a result of the rescission.

(i) For a contract with a DBE goal, all bidders must submit the DBE information required by §9.227 of this chapter (relating [~~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.

§9.23. 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, on each anniversary of the date that work began under the contract. The district engineer for a highway improvement contract, other than a building contract, or the Director of the Support Services Division 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 a highway improvement contract, other than a building contract, the district engineer will submit the final evaluation scores performed under this section to the division of the department that is responsible for monitoring the contract.

(e) The division that monitors the final evaluation scores of a contractor periodically will review the final evaluation scores 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 reviewed 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 the 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 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 Committee 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 chair [~~chairman~~] of the Performance Review Committee. The members and chair [~~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) of this subchapter.

(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) If the Performance Review Committee determines that action under subsection (a), (b), or (c) of this section is appropriate, the committee, except as provided by subsection (g) 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) 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) A decision of the Deputy Executive Director under subsection (e) of this section may be appealed in accordance with §9.25 of this title [~~relating to Appeal of Remedial Action~~].

(g) 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.

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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Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 10, 2024
For further information, please call: (512) 463-8630

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SUBCHAPTER I. DESIGN-BUILD CONTRACTS

43 TAC §9.152, §9.153

The Texas Department of Transportation (department) proposes amendments to §9.152 and §9.153 concerning Design Build Contracts.

EXPLANATION OF PROPOSED AMENDMENTS

House Bill 2830, 86th Legislature, 2019, amended Transportation Code, Chapter 223, Subchapter F, which authorizes the department to enter into a design-build contract for a highway project, and prescribes the procurement process to be followed by the department for a design-build contract.

House Bill 2830 revised the limitation on the number of design-build contracts that may be entered into by the department to no more than six contracts each fiscal biennium, and amended Transportation Code, §223.246(a), to require a request for proposals for a design-build project to include a design, rather than a schematic design, that is approximately 30 percent complete.

Amendments to §9.152, General Rules for Design-Build Contracts, clarify that the department's reserved rights in administering a procurement for a design-build project includes the right

to suspend the procurement. Because of project delays or for other reasons, the department may need to suspend the procurement for a design-build project.

Transportation Code, §223.246(a)(5), previously required a request for proposals to include a schematic design that is approximately 30 percent complete. In general, a schematic design that is 100% complete is comparable to a design that is approximately 30 percent complete.

Amendments to §9.153, Solicitation of Proposals, implement the changes made by House Bill 2830 by providing that a request for proposals must include a design that is approximately 30 percent complete. This change provides the department with the flexibility to develop a project with enough detail to aid the procurement process, cost estimation, and understanding of contractor and department risk.

Transportation Code, §223.249, provides that in a request for proposals, the department shall provide for the payment of a partial stipend in the event that a procurement is terminated before the execution of a design-build contract. As the Texas Constitution generally prohibits grants of public funds, payment of stipends to proposers without receiving work product in exchange would raise constitutional issues. The amendments to §9.153(f) clarify that, if a procurement is terminated, a partial payment will be paid to an unsuccessful proposer that submits a proposal responsive to the requirements of the request for proposals. The partial payment would be made in exchange for the work product in the proposal. The amendments allow the department to request that a proposer submit to the department work product that was developed by the proposer for a project if the procurement for the project is terminated before receipt of proposals. A partial payment for that work product may be made if the department determines that the requested work product was developed in accordance with the requirements of the request for proposals and can be used by the department in the performance of its functions. In all cases, the amount of the payment to a proposer will not exceed the value of the work product to the department, as determined by the department.

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 enforcing or administering the amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Gregory Snider, P.E., Director, Alternative Delivery 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

Mr. Snider 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 to facilitate the implementation of an efficient procurement process for design-build contracts, thereby allowing the department to enhance competition in procurements and to obtain the best value for the department.

COSTS ON REGULATED PERSONS

Mr. Snider 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

Mr. Snider 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

Mr. Snider 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 §9.152 and §9.153 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 "Design-Build Procurements." The deadline for receipt of comments is 5:00 p.m. on November 11, 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.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Chapter 223, Subchapter F.

§9.152. General Rules for Design-Build Contracts.

(a) Applicability. The rules in this subchapter address the manner by which the department intends to evaluate submissions received from private entities in response to requests for qualifications and requests for proposals issued by the department.

(b) Reservation of rights. The department reserves all rights available to it by law in administering this subchapter, including without limitation the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request;

(2) reject any and all qualifications submittals or proposals at any time;

(3) terminate evaluation of any and all qualifications submittals or proposals at any time;

(4) suspend, discontinue, or terminate negotiations with any proposer at any time prior to the actual authorized execution of a design-build contract by all parties;

(5) negotiate with a proposer without being bound by any provision in its proposal;

(6) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the design-build contract;

(7) request or obtain additional information about any proposal from any source;

(8) suspend a procurement or modify, issue addenda to, or cancel any request for qualifications or request for proposals;

(9) waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal; or

(10) revise, supplement, or make substitutions for all or any part of this subchapter.

(c) Costs incurred by proposers. Except as provided in §9.153(f) of this subchapter (relating to Solicitation of Proposals), under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to reimburse, the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements.

(d) Department information. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral responses to inquiries.

(e) Procedure for communications. If a proposer has a question or request for clarification regarding this subchapter or any request for qualifications or request for proposals issued by the department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.

(f) Compliance with rules. In submitting any proposal, the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter.

(g) Proposer information submitted to department. All qualifications submittals or proposals submitted to the department become the property of the department and may be subject to the Public Information Act, Government Code, Chapter 552. Proposers should familiarize themselves with the provisions of the Public Information Act. In no event shall the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable to a proposer for the disclosure of all or a portion of a proposal submitted under this subchapter. Except as otherwise expressly specified in the request for qualifications or request for proposals, if the department receives a request for public disclosure of all or any portion of a qualifications submittal or proposal, the department will notify the applicable proposer of the request and inform that proposer that it has an opportunity to assert, in writing, a claimed exception under the Public Information Act or other applicable law within the time period specified in the department's notice and allowed under the Public Information Act. If a proposer has special concerns about information it desires to make available to the department, but which it believes constitutes a trade secret, proprietary information or other information excepted from disclosure, the proposer should specifically and conspicuously designate that information as such in its qualifications submittal or proposal. The proposer's designation shall not be dispositive of the trade secret, proprietary, or exempted nature of the information so designated.

(h) Sufficiency of proposal. All proposals, whether solicited or unsolicited, should be as thorough and detailed as possible so that the department may properly evaluate the potential feasibility of the proposed project as well as the capabilities of the proposer and its team members to provide the proposed services and complete the proposed project.

(i) Project studies. Studies that the department deems necessary as to route designation, civil engineering, environmental compliance, and any other matters will be assigned, conducted, and paid for as negotiated between the department and the successful proposer and set forth in the design-build contract.

(j) Proposer's additional responsibilities. The department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the department as specified in the design-build contract.

(k) Proposer's work on environmental review of eligible project. The department may solicit proposals in which the proposer is responsible for providing assistance in the environmental review and clearance of an eligible project, including the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) shall determine the scope of work to be performed by the private entity or its consultants or subcontractors;

(2) shall specify the level of design and other information to be provided by the private entity or its consultants or subcontractors; and

(3) shall independently review any studies and conclusions reached by the private entity or its consultants or subcontractors before their inclusion in an environmental document.

(l) Effect of environmental requirements on design-build contract. Completion of the environmental review, including obtaining approvals required under the National Environmental Policy Act, is required before the private entity may be authorized to conduct and complete the final design and start construction of a project. Additionally, all applicable state and federal environmental permits and approvals must be obtained before the private entity may start construction of the portion of a project requiring the permit or approval. Unless and until that occurs, the department is not bound to any further development of the project. The department, and any federal agency acting as a lead agency, may select an alternative other than the one in the proposed project, including the "no-build" alternative. A design-build contract shall provide that the agreement will be modified as necessary to address requirements in the final environmental documents and shall provide that the agreement may be terminated if the "no-build" alternative is selected or if another alternative is selected that is incompatible with the requirements of the agreement.

(m) Public meetings and hearings. All public meetings or hearings required to be held under applicable law or regulation will be directed and overseen by the department, with participation by such other parties as it deems appropriate.

(n) Additional matters. Any matter not specifically addressed in this subchapter that pertains to the construction, expansion, extension, related maintenance, rehabilitation, alteration, or repair of a highway project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of applicable law.

(o) Performance and payment security. The department shall require a private entity entering into a design-build contract to provide a performance and payment bond or an alternative form of security, or a combination of bonds and other forms of security, in an amount equal to the cost of constructing the project, unless the department determines that it is impracticable for a private entity to provide security in that amount, in which case the department will set the amount of security. The security will be in the amount that, in the department's sole determination, is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity or a subcontractor of the private entity. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the design-build contract, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) a cashier's check drawn on a federally insured financial institution, and drawn to the order of the department;

(2) United States bonds or notes, accompanied by a duly executed power of attorney and agreement authorizing the collection or sale of the bonds or notes in the event of the default of the private entity or a subcontractor of the private entity, or such other act or event that, under the terms of the design-build contract, would allow the department to draw upon or access that security;

(3) an irrevocable letter of credit issued or confirmed by a financial institution to the benefit of the department, meeting the credit rating and other requirements prescribed by the department, and providing coverage for a period of at least one year following final acceptance of the project or, if there is a warranty period, at least one year following completion of the warranty period;

(4) an irrevocable letter signed by a guarantor meeting the net worth or other financial requirements prescribed in the request for proposals or design-build contract, and which guarantees, to the extent required under the request for proposals or design-build contract, the full and prompt payment and performance when due of the private entity's obligations under the design-build contract; or

(5) any other form of security deemed suitable by the department.

(p) Performance evaluations. The department will evaluate the performance of a private entity that enters into a design-build contract and will evaluate the performance of the private entity's major team members, consultants, and subcontractors, in accordance with the requirements of this subsection. Evaluations will be conducted annually at twelve month intervals during the term of the design-build contract, upon termination of the design-build contract, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the design-build contract. Optional evaluations may be conducted as provided in the design-build contract. Acts or omissions that are the subject of a good faith dispute will not be considered. After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the design-build contract. The department will consider and take into account any submitted comments before the department finalizes the performance evaluation report. The results of performance evaluations will be provided to the entity that was evaluated and may be used in the evaluation of qualifications submittals and proposals submitted under §9.153 of this subchapter and §27.4 of this title (relating to Solicited Proposals) by proposers that include the major team members, consultants, and subcontractors evaluated.

§9.153. Solicitation of Proposals.

(a) Request for qualifications-notice. If authorized by the commission to issue a request for qualifications for a highway project, the department will set forth the basic criteria for qualifications, experience, technical competence and ability to develop the project, and such other information as the department considers relevant or necessary in the request for qualifications. The department will publish notice advertising the issuance of the request for qualifications in the *Texas Register* and will post the notice and the request for qualifications on the department's Internet website. The department may also elect to furnish the request for qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the project that is the subject of the request for qualifications.

(b) Request for qualifications-content. At its sole option, the department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the request for qualifications and may request conceptual approaches to bringing the project to fruition. A request for qualifications must include:

(1) information regarding the proposed project's location, scope, and limits;

(2) information regarding funding that may be available for the project;

(3) criteria that will be used to evaluate the qualifications submittals;

(4) the relative weight to be given to the criteria;

(5) the deadline by which qualifications submittals must be received by the department; and

(6) any other information the department considers relevant or necessary.

(c) Request for qualifications-evaluation. The department, after evaluating the qualification submittals received in response to a request for qualifications, will identify and approve a "short-list" that is composed of those entities that are considered most qualified to submit detailed proposals for a proposed project. In evaluating the qualification submittals, the department will consider the results of performance evaluations conducted by the department under §9.152 of this subchapter (relating to General Rules for Design-Build Contracts) and §27.3 of this title (relating to General Rules for Private Involvement) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria that the department considers relevant to the project, including a proposer's qualifications, experience, technical competence, and ability to develop the project, and that may include the private entity's financial condition, management stability, staffing, and organizational structure. The department may interview entities responding to a request for qualifications. The department shall short-list at least two private entities to submit proposals but may not short-list more private entities than the number of private entities designated in the request for qualifications if a maximum number is designated. The department shall advise each entity providing a qualifications submittal whether it is on the short-list of qualified entities.

(d) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all private entities qualified for the short-list, consisting of the submission of detailed documentation regarding the project. A request for proposals must include:

(1) information on the overall project goals;

(2) publicly available cost estimates for the design-build portion of the project;

(3) materials specifications;

(4) special material requirements;

(5) a [~~schematic~~] design approximately 30 percent complete;

(6) known utilities;

(7) quality assurance and quality control requirements;

(8) the location of relevant structures;

(9) notice of any rules or goals adopted by the department relating to awarding contracts to disadvantaged business enterprises or small business enterprises;

(10) available geotechnical or other information related to the project;

(11) the status of any environmental review of the project;

(12) detailed instructions for preparing the technical proposal, including a description of the form and level of completeness of drawings expected;

(13) the relative weighting of the technical and cost proposals and the formula by which the proposals will be evaluated and ranked, which must allocate at least 70 percent of weighting to the cost proposal;

(14) the criteria to be used in evaluating the technical proposals, and the relative weighting of those criteria;

(15) the proposed form of design-build contract; and

(16) any other information the department considers relevant or necessary.

(e) Request for proposals-submittal requirements. The request for proposals must require the submission of a sealed technical proposal and a separate sealed cost proposal no later than the 180th day after the issuance of the request for proposals, and that provide information relating to:

(1) the feasibility of developing the project as proposed;

(2) the proposed solutions to anticipated problems;

(3) the ability of the proposer to meet schedules;

(4) the engineering design proposed;

(5) the cost of delivering the project;

(6) if maintenance of the project is required, pricing for the maintenance work for each maintenance term;

(7) the estimated number of days required to complete the project; and

(8) any other information requested by the department.

(f) Requests for proposals-payment for work product. The request for proposals shall stipulate an amount of money, as authorized under Transportation Code, §223.249, that the department will pay to an unsuccessful proposer that submits a proposal that is responsive to the requirements of the request for proposals. The commission shall approve the amount of the payment to be stipulated in the request for proposals, which must be a minimum of twenty-five hundredths of one percent of the contract amount. The request for proposals shall provide for the payment of a partial amount in the event the procurement is terminated. A partial amount will be paid to an unsuccessful proposer that submits a proposal that is responsive to the requirements of the request for proposals. If the procurement is terminated prior to the receipt of proposals, the department may request that a proposer submit to the department work product that was developed by the proposer for the project for the purpose of paying a partial amount. If the department determines, in its discretion, that the requested work product was developed in accordance with the requirements of the request for proposals and can be used by the department in the performance of its functions, the department will pay the proposer a partial amount not exceeding the value of the work product to the department, as determined by the department. In determining the amount of a [~~the~~] payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(g) Request for proposals-evaluation. The proposals will be evaluated by the department based on the results of performance evaluations conducted by the department under §9.152 of this subchapter and §27.3 of this title determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria the department deems appropriate for the project, including those criteria deemed appropriate by the department to maximize the

overall performance of the project and the resulting benefits to the state. Specific evaluation criteria and requests for pertinent information will be set forth in the request for proposals. The department shall first open, evaluate, and score each responsive technical proposal, and shall subsequently open, evaluate, and score the cost proposals from proposers that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals.

(h) Apparent best value proposal. Based on the evaluation using the evaluation criteria described under subsection (g) of this section and set forth in the request for proposals, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter, in accordance with the formula provided in the request for proposals. The department may select the private entity whose proposal offers the apparent best value to the department.

(i) Selection of entity. The department shall submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the design-build contract to the apparent best value proposer. Award may be subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the design-build contract, and satisfaction of such other conditions that are identified in the request for proposals or by the commission. The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public.

(j) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a design-build contract with the apparent best value proposer. If a design-build contract satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally and in writing end negotiations with that proposer and, in its sole discretion, either:

(1) reject all proposals;

(2) modify the request for proposals and begin again the submission of proposals; or

(3) proceed to the next most highly ranked proposal and attempt to negotiate a design-build contract with that entity in accordance with this paragraph.

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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Becky Blewett
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: 512-463-8630

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CHAPTER 13. MATERIALS QUALITY
SUBCHAPTER A. GENERAL
43 TAC §13.8

The Texas Department of Transportation (department) proposes the repeal of §13.8, relating to Testing Asphalt.

EXPLANATION OF PROPOSED REPEAL

During the periodic rule review, the department determined that the procedure set out in §13.8 is obsolete. The rule was adopted in 1991 to encourage asphalt binder suppliers to provide products that consistently comply with the department's specifications. Over the years, the department's Asphalt Binder Quality Program has been continually strengthened to ensure that the quality of asphalt binder products used on the department's projects meets the department's specifications. The program preemptively ensures consistency by requiring suppliers to share their data and updates with the department, enforces compliance through suspension or disqualifications, and ensures transparency. This approach more effectively encourages suppliers to comply with department's specifications than the approach provided by §13.8.

Section §13.8, Testing Asphalt, is repealed.

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 rule is 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 rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Duane Milligan, P.E. 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 rule and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Duane Milligan, P.E. has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rule is in effect, the public benefit anticipated as a result of enforcing or administering the rule will be increased clarity by removing a procedure that is no longer used.

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 rule 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 rule and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

GOVERNMENT GROWTH IMPACT STATEMENT

Duane Milligan, P.E. has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed

rule 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 repeal of §13.8, 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 *"Testing Asphalt."* The deadline for receipt of comments is 5:00 p.m. on November 11, 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 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.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

§13.8. Testing Asphalt.

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

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CHAPTER 21. RIGHT OF WAY

SUBCHAPTER B. UTILITY ADJUSTMENT, RELOCATION, OR REMOVAL

43 TAC §21.25

The Texas Department of Transportation (department) proposes the amendments to §21.25 concerning state participation in the Relocation of Certain Publicly-Owned Utility Facilities.

EXPLANATION OF PROPOSED AMENDMENT

S.B. 2601, Texas Legislature, 88th Regular Session, 2023, amended Transportation Code, §203.092(a-4), to add water supply or sewer service corporations organized and operating under Water Code, Chapter 67, to the entities that are authorized to apply for financial assistance for the relocation of utility facilities if the relocation is required for improvements of the highway system.

Amendments to §21.25, State Participation in the Relocation of Certain Publicly-Owned Utility Facilities, add language to allow a water supply or sewer service corporation organized and operating under Water Code, Chapter 67, to qualify for the department's program for reimbursing certain costs of the relocation of utility facilities required for a state highway project.

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. Despite the expansion of the participants in the reimbursement program to include water supply or sewer service corporations, the fiscal year cap of $10 million dollars for this program remains in place.

LOCAL EMPLOYMENT IMPACT STATEMENT

Kyle Madsen, Director, Right of Way 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

Mr. Madsen 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 to allow water supply or sewer service corporations organized and operating under Chapter 67 of the Water Code to qualify for the program and reduce the department's construction delays related to utility facilities relocation.

COSTS ON REGULATED PERSONS

Mr. Madsen 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 Gov-

ernment 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

Mr. Madsen 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

Mr. Madsen 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 §21.25, 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 "*§21.25 State Participation*." The deadline for receipt of comments is 5:00 p.m. on November 11, 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, §203.095, which requires the commission to adopt rules relating the relocation of utility facilities.

The authority for the proposed amendments was provided by S.B. 2601, 88th Regular Session, 2023. The primary author and the primary sponsor of that bill are Sen. Juan Hinojosa and Rep. Terry Canales, respectively.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, §203.092.

§21.25. State Participation in the Relocation of Certain Publicly-Owned Utility Facilities.

(a) A utility that is a political subdivision, is [~~or~~] owned or operated by a political subdivision, or is a water supply or sewer service corporation that is organized and operating under Chapter 67, Water Code, may request that the relocation of its utility facilities required by a state highway improvement project be at the expense of the state under Transportation Code, Section 203.092(a-4).

(b) To request relocation under this section, the utility must make a written request to the department and submit:

(1) documentation that the utility, because of an existing financial condition, would be unable to pay the cost of relocation in full or in part at the time of relocation or that the utility's ability to operate or provide essential services to its customers would be adversely affected by such a payment made at that time; and

(2) documentation:

(A) on the utility's ability to obtain a state infrastructure bank loan under Chapter 6 of this title (relating to State Infrastructure Bank) and its ability to obtain other financing for the relocation, including relevant financial information described in §6.23 of this title (relating to Application Procedure); or

(B) that the utility is a political subdivision, or owned or operated by a political subdivision, that has a population of less than 5,000 and is located within a county that has been included in at least five disaster declarations made by the president of the United States of America in the six-year period preceding the proposed date of the relocation; and

(3) any other information or documentation requested by the department.

(c) As soon as practicable after review and analysis of the documentation and information provided under subsection (b) of this section, the department will submit findings and recommendations to the commission for consideration.

(d) The commission will find that all or a part of the utility facility relocation is an expense of the state if:

(1) payment for all or a part of the relocation of the utility facility would not cause the department to exceed $10 million for the relocation of utilities authorized under Section 203.092(a-4) in any fiscal year; and

(2) the commission determines that:

(A) the utility is a political subdivision, [~~or~~] is owned or operated by a political subdivision, or is a water supply or sewer service corporation that is organized and operating under Chapter 67, Water Code;

(B) a financial condition exists, as described in subsection (b)(1) of this section; and

(C) the utility:

(i) would not be able to receive a state infrastructure bank loan under Chapter 6 of this title to finance the cost of the relocation and is otherwise unable to finance that cost; or

(ii) meets the description provided in subsection (b)(2)(B) of this section.

(e) If the commission finds that all or a part of the utility facility relocation is an expense of the state, the department and the utility shall include the terms of the department's payment of relocation expenses in an agreement concerning the relocation.

(f) Because of the fiscal constraint provided under Transportation Code, Section 203.092(e), the department:

(1) may prioritize the utility requests based on the needs of the department, including the construction schedules of the projects requiring relocation of utility facilities;

(2) may delay until the next fiscal year the payment of all or part of a claim made by a utility if at the time the claim is received by the department, the payment is prohibited by Section 203.092(e); and

(3) will not pay a claim for payment that is received by the department later than one year after the date that the relocation of the utility facility is 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.

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