ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §55.119

The Office of the Attorney General (OAG) Child Support Division adopts an amendment to 1 TAC §55.119(a) which updates the OMB form number for a Notice of Lien. The rule is adopted without changes to the proposed text as published for comment in the July 26, 2024, issue of the *Texas Register* (49 TexReg 5455) and will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

This rule updates the OMB form number for the federal Notice of Lien form from Form OMB 0970-0153 to Form OMB 0970-152.

SECTION SUMMARY

Section 55.119(a) is amended to change the OMB form number referenced in the code from Form OMB 0970-0153 to Form OMB 0970-0152.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Ruth Anne Thornton, Director of Child Support (IV-D Director), has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

PUBLIC BENEFIT AND COST

Ms. Thornton has also determined that for each year of the first five years the amendment is in effect, the public will benefit by having the correct form cited in the code. This code references the OAG website which provides a link to the Notice of Lien OMB# 0970-0152 and reference to 1 TAC §55.119(a). In addition, for each year of the first five-year period the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the adopted rule.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

Ms. Thornton has determined there will not be an effect on small businesses, micro-businesses, and rural communities required to comply with the amendment as adopted. Therefore, no regulatory flexibility analysis is required under Texas Government Code § 2006.002.

LOCAL EMPLOYMENT OR ECONOMY IMPACT

Ms. Thornton has determined that the adopted amendment does not have an impact on local employment or economies. Therefore, no local employment or economy impact statement is required under Texas Government Code § 2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with Texas Government Code § 2001.0221, the OAG has prepared the following government growth impact statement. During the first five years the adopted rule would be 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 not create new regulations;

- 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 this state's economy.

TAKINGS IMPACT ASSESSMENT

The OAG has determined that no private real property interests are affected by the adopted rule, and the proposed amendment does not restrict, limit, or impose a burden on an owner's rights to his or her private real property which would otherwise exist in the absence of government action. As a result, the adopted rule does not constitute a taking or require a takings impact assessment under Texas Government Code § 2007.043.

PUBLIC COMMENT

The rule proposal was published in the July 26, 2024, issue of the *Texas Register* (49 TexReg 5455). The OAG did not receive any comments from interested parties on the rule proposal during the 30-day public comment period.

STATUTORY AUTHORITY

The amendment is adopted under Texas Family Code §§ 231.001, 231.003. Section 231.001 designates the OAG as the state's Title IV-D agency. Section 231.003 authorizes the Title IV-D agency by rule to promulgate forms and procedures for the implementation of Title IV-D services. Texas Family Code §

157.313 provides the contents of child lien, except as provided by subsection (e) which states a notice of lien may be in the form authorized by federal law or regulation. This amendment correctly identifies the authorized federal form for a notice of lien.

CROSS-REFERENCE TO STATUTE

The amendment conforms to statutory requirements and supplements Texas Family Code § 157.313(e) as authorized by Texas Family Code §§ 231.001, 231.003.

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

Filed with the Office of the Secretary of State on October 16, 2024.

TRD-202404865
Justin Gordon
General Counsel
Office of the Attorney General
Effective date: November 5, 2024
Proposal publication date: July 26, 2024
For further information, please call: (800) 252-8014

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

SUBCHAPTER B. ADVISORY COMMITTEES

DIVISION 1. COMMITTEES

1 TAC §351.815

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §351.815, concerning the Policy Council for Children and Families.

Section 351.815 is adopted with changes to the proposal text as published in the July 19, 2024, issue of the *Texas Register* (49 TexReg 5218). This rule will be republished.

BACKGROUND AND JUSTIFICATION

The Policy Council for Children and Families (PCCF) was established by the HHSC Executive Commissioner under the authority of Texas Government Code §531.012. This statute requires the HHSC Executive Commissioner to establish and maintain advisory committees, establish rules for the operation of advisory committees, and for advisory committees to provide recommendations to the HHSC Executive Commissioner and the Texas Legislature.

The PCCF advises the HHSC Executive Commissioner and Health and Human Services system agencies (HHS agencies) to improve the coordination, quality, efficiency, and outcomes of services provided to children and the families of children with disabilities and special health care needs, including mental health needs, through the state's health, education, and human services systems. Members meet approximately four times a year in Austin.

Section 351.815 is set to expire on December 31, 2024, which will abolish the PCCF. The amendment extends the committee by four years to December 31, 2028, and update existing membership categories for one voting and one ex-officio member. Other edits align the rule with current HHSC advisory committee rulemaking guidelines.

COMMENTS

The 31-day comment period ended August 19, 2024.

During this period, HHSC received a comment regarding the proposed rule from one commenter. A summary of the comment relating to §351.815 and HHSC's response follow.

Comment: One commenter requested that HHSC: (1) add an entirely new PCCF membership category to represent an educator working with pre-kindergarten to senior year in high school (PK-12) children to ensure that educational challenges and the needs of children with disabilities are fully considered in policy development; (2) integrate School Health and Related Services (SHARS) policy and policy discussions as one of the highest priorities for PCCF, including creating a new SHARS subgroup or subcommittee within PCCF; and (3) ensure that the specific voices of a SHARS vendor, an association with SHARS expertise, a SHARS provider from each approved SHARS service and a parent of a child that participates in SHARS, as well as a small, midsize and large school district are included in PCCF.

Response: HHSC declines to make the requested changes. The PCCF is already at its statutory maximum membership under Texas Government Code Chapter 2110, and cannot include additional members at this time. Other proposed actions are outside the scope of this limited rule project. The PCCF regularly considers SHARS and other programs, activities, and services for children with disabilities provided through the education system.

HHSC revised §351.815 to update a Texas Government Code citation from Section 531.012 to §523.0201 to implement H.B. 4611, 88th Legislature, Regular Session, 2023, which makes non-substantive revisions to the Texas Government Code that make the statute more accessible, understandable, and usable.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.012, which authorizes the Executive Commissioner to establish advisory committees by rule.

§351.815. Policy Council for Children and Families.

(a) Statutory authority. The Policy Council for Children and Families (PCCF) is established in accordance with Texas Government Code §523.0201 and is subject to §351.801 of this division (relating to Authority and General Provisions).

(b) Purpose. The PCCF works to improve the coordination, quality, efficiency, and outcomes of services provided to children with disabilities and their families through the state's health, education, and human services systems.

(c) Tasks. The PCCF performs the following tasks:

(1) studies and makes recommendations to improve coordination between the state's health, education, and human services sys-

tems to ensure that children with disabilities and their families have access to high quality services;

(2) studies and makes recommendations to improve long-term services and supports, including community-based supports for children with special health and mental health care needs, as well as children with disabilities and their families receiving protective services from the state;

(3) studies and makes recommendations regarding emerging issues affecting the quality and availability of services available to children with disabilities and their families;

(4) studies and makes recommendations to better align resources with the service needs of children with disabilities and their families;

(5) studies and makes recommendations to ensure that the needs of children with autism spectrum disorder and their families are addressed, and that all available resources are coordinated to meet those needs;

(6) makes recommendations regarding the implementation and improvement of the STAR Kids managed care program;

(7) performs other tasks consistent with its purpose as requested by the HHSC Executive Commissioner; and

(8) adopts bylaws to guide the operation of the committee.

(d) Reporting requirements.

(1) Not later than December 31 of each year, the PCCF files a written report with the HHSC Executive Commissioner covering the meetings and activities in the immediately preceding fiscal year. The report includes:

(A) a list of the meeting dates;

(B) the members' attendance records;

(C) a brief description of actions taken by the PCCF;

(D) a description of how the PCCF accomplished its tasks;

(E) a summary of the status of any PCCF recommendations to HHSC;

(F) a description of activities the PCCF anticipates undertaking in the next fiscal year;

(G) recommended amendments to this section; and

(H) the costs related to the PCCF, including the cost of HHSC staff time spent supporting the PCCF's activities and the source of funds used to support the PCCF's activities.

(2) Not later than November 1 of each even-numbered year, the PCCF submits a written report to the HHSC Executive Commissioner and Texas Legislature that:

(A) describes current gaps and barriers to the provision of services to children with disabilities and their families through the state's health and human services system; and

(B) provides recommendations consistent with the PCCF's purposes.

(e) Meetings.

(1) Open Meetings. The PCCF complies with the requirements for open meetings under Texas Government Code Chapter 551, as if it were a governmental body.

(2) Frequency. The PCCF will meet at least twice each year.

(3) Quorum. Thirteen members constitutes a quorum.

(f) Membership.

(1) The PCCF is composed of 24 members, with 19 voting members and five ex officio members appointed by the HHSC Executive Commissioner. In selecting the voting members, the HHSC Executive Commissioner considers the applicants' qualifications, background, and interest in serving. The membership comprises:

(A) eleven voting members from families with a child under the age of 26 with a disability, including:

(i) at least one adolescent or young adult under the age of 26 with a disability receiving services from the health and human services system;

(ii) at least one member of a family of a child with mental health care needs; and

(iii) at least one member of a family of a child with autism spectrum disorder;

(B) eight professional voting members, one each to represent the following types of organizations or areas of expertise:

(i) a faith-based organization;

(ii) an organization that is an advocate for children with disabilities;

(iii) a physician providing services to children with complex needs;

(iv) an individual with expertise providing mental health services to children with disabilities;

(v) an organization providing services to children with disabilities and their families;

(vi) an organization providing community services;

(vii) an organization or professional that advocates for or provides services or resources to children and the families of children with autism spectrum disorder; and

(viii) one individual with expertise or experience providing cross-system, holistic support for children and the families of children with disabilities;

(C) five non-voting, ex officio members, one from each of the following state programs and agencies or their successors, as nominated by the represented agency, and appointed by the HHSC Executive Commissioner:

(i) HHSC Medicaid and CHIP Services;

(ii) HHSC Community Services Division;

(iii) Texas Council for Developmental Disabilities;

(iv) Texas Department of Family and Protective Services; and

(v) Texas Department of State Health Services.

(2) Members appointed under paragraphs (1)(A) and (1)(B) of this subsection serve staggered terms so that the terms of approximately one-quarter of these members' terms expire on December 31 of each year. Regardless of the term limit, a member serves until his or her replacement has been appointed. This ensures sufficient, appropriate representation.

(3) If a vacancy occurs, the HHSC Executive Commissioner will appoint a person to serve the unexpired portion of that term.

(4) Except as may be necessary to stagger terms, the term of each member is four years. A member may apply to serve one additional term. This paragraph does not apply to members serving under paragraph (1)(C).

(g) Officers. The PCCF selects a chair and vice chair of the PCCF from among its members.

(1) The chair and vice chair of the PCCF will serve a term of two years, with the chair serving until December 31 of each odd-numbered year and the vice chair serving until December 31 of each even-numbered year.

(2) A member may serve up to two consecutive terms as chair or vice chair.

(h) Required Training. Each member must complete all training on relevant statutes and rules, including this section and §351.801 of this division (relating to Authority and General Provisions); Texas Government Code §523.0201; Texas Government Code Chapters 551, 552, and 2110; the HHS Ethics Policy; the Advisory Committee Member Code of Conduct; and other relevant HHS policies. HHSC will provide the training.

(i) Travel Reimbursement. To the extent permitted by the current General Appropriations Act, a member of the committee who receives services from HHSC or is a family member of a client may be reimbursed for their travel to and from meetings if funds are appropriated and available and in accordance with the HHSC Travel Policy. Other committee members are not reimbursed for travel to and from committee meetings.

(j) Date of abolition. The PCCF is abolished, and this section expires on December 31, 2028.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404890
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (512) 438-5046

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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER L. LOCAL FUNDS MONITORING

1 TAC §§355.8701 - 355.8705, 355.8707

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8701, concerning Purpose; §355.8702, concerning Definitions; §355.8703, concerning Applicability; §355.8704, concerning Reporting and Monitoring; §355.8705, concerning Post-Determination Review; and §355.8707, concerning Notification Requirements for the Creation of a Local Provider Participation Fund (LPPF).

Sections 355.8701 - 355.8705 and §355.8707 are adopted without changes to the proposed text as published in the August 9, 2024, issue of the *Texas Register* (49 TexReg 5858). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments are necessary to add and modify definitions and enhance clarity, consistency, and specificity of the rules. The amendments also reflect best practices learned after the completion of two Local Funding reporting periods and is based on an internal review of Local Funding's current processes.

COMMENTS

The 31-day comment period ended September 9, 2024. During this period, HHSC did not receive any comments regarding these rules.

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Human Resources Code §32.031(d), which authorizes the Executive Commissioner to pursue the use of local funds as part of the state share under the Medicaid program as provided by federal law and regulation; and Texas Health and Safety Code §300.0154 and §300A.0154, which require the Executive Commissioner of HHSC to adopt rules relating to LPPF reporting.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404896
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: August 9, 2024
For further information, please call: (737) 867-7877

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CHAPTER 375. REFUGEE CASH ASSISTANCE AND MEDICAL ASSISTANCE PROGRAMS

The Texas Health and Human Services Commission (HHSC) adopts the repeal of Subchapter A, concerning Program Purpose and Scope, comprising of §§375.101 - §375.103; Subchapter B, concerning Contractor Requirements for the Refugee Cash Assistance Program (RCA), comprising of §§375.201, 375.203, 375.205, 375.207, 375.209, 375.211, 375.213, 375.215, 375.217, 375.219, 375.221; Subchapter C, concerning Program Administration for the Refugee Cash Assistance Program (RCA), comprising of §§375.301, 375.303, 375.305, 375.307, 375.309, 375.311, 375.313, 375.315, 375.317, 375.319, 375.321, 375.323, 375.325, 375.327, 375.329, 375.331, 375.333, 375.335, 375.337, 375.339, 375.341, 375.343, 375.345, 375.347, 375.349, 375.351, 375.353; Subchapter

D, concerning Refugee Cash Assistance Participant Requirements, comprising of §§375.401, 375.403, 375.405, 375.407, 375.409, 375.411, 375.413, 375.415, 375.417, 375.419; Subchapter E, concerning Refugee Medical Assistance, comprising of §§375.501, 375.503, 375.505, 375.507, 375.509, 375.511, 375.513, 375.515, 375.517, 375.519, 375.521, 375.523, 375.525, 375.527, 375.529, 375.531; Subchapter F, concerning Modified Adjusted Gross Income Methodology, comprising of §§375.601, 375.603, 375.605, 375.607, 375.609, 375.611, 375.613, 375.615, and an amendment to §375.701 in Subchapter G, concerning Local Resettlement Agency Requirements, in Title 1, Part 15, Chapter 375, concerning Refugee Cash Assistance and Medical Assistance Programs.

The sections are adopted without changes to the proposed text as published in the July 19, 2024, issue of the *Texas Register* (49 TexReg 5226). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the adoption is to remove rules which are no longer necessary and to update a rule that is required by statute. On September 30, 2016, the State of Texas withdrew from the administration of federally funded refugee services and benefits program effective January 31, 2017, following refusal by the federal Office of Refugee Resettlement to unconditionally approve Texas' amended state refugee plan. Texas Government Code §531.0411 requires rules regarding refugee resettlement program; therefore, §375.701 will be retained and updated.

COMMENTS

The 31-day comment period ended August 19, 2024.

During this period, HHSC did not receive any comments regarding the proposed rules.

SUBCHAPTER A. PROGRAM PURPOSE AND SCOPE

1 TAC §§375.101 - 375.103

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404873
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER B. CONTRACTOR REQUIREMENTS FOR THE REFUGEE CASH ASSISTANCE PROGRAM (RCA)

1 TAC §§375.201, 375.203, 375.205, 375.207, 375.209, 375.211, 375.213, 375.215, 375.217, 375.219, 375.221

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404874
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER C. PROGRAM ADMINISTRATION FOR THE REFUGEE CASH ASSISTANCE PROGRAM (RCA)

1 TAC §§375.301, 375.303, 375.305, 375.307, 375.309, 375.311, 375.313, 375.315, 375.317, 375.319, 375.321, 375.323, 375.325, 375.327, 375.329, 375.331, 375.333, 375.335, 375.337, 375.339, 375.341, 375.343, 375.345, 375.347, 375.349, 375.351, 375.353

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404875

Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER D. REFUGEE CASH ASSISTANCE PARTICIPANT REQUIREMENTS

1 TAC §§375.401, 375.403, 375.405, 375.407, 375.409, 375.411, 375.413, 375.415, 375.417, 375.419

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404876
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER E. REFUGEE MEDICAL ASSISTANCE

1 TAC §§375.501, 375.503, 375.505, 375.507, 375.509, 375.511, 375.513, 375.515, 375.517, 375.519, 375.521, 375.523, 375.525, 375.527, 375.529, 375.531

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404877
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER F. MODIFIED ADJUSTED GROSS INCOME METHODOLOGY

1 TAC §§375.601, 375.603, 375.605, 375.607, 375.609, 375.611, 375.613, 375.615

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404878
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER G. LOCAL RESETTLEMENT AGENCY REQUIREMENTS

1 TAC §375.701

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404879

Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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CHAPTER 376. REFUGEE SOCIAL SERVICES

The Texas Health and Human Services Commission (HHSC) adopts the repeal of Subchapter A, concerning Purpose and Scope, comprising of §§376.101 - 376.104; Subchapter B, concerning Contractor Requirements, comprising of §§376.201, 376.203, 376.205, 376.207, 376.209, 376.211, 376.213, 376.215, 376.217, §376.219, 376.221, 376.223, 376.225, 376.227, 376.229, 376.231, 376.233, 376.235, 376.237; Subchapter C, concerning General Program Administration, comprising of §§376.301, 376.303, 376.305, 376.307, 376.309, 376.311, 376.313, 376.315, 376.317, 376.319, 376.321, 376.323, 376.325, 376.327, 376.329, 376.331, 376.333; Subchapter D, concerning Employment Services: Refugee Social Services (RSS), comprising of §§376.401, 376.403, 376.405, 376.407, 376.409, 376.411, 376.413, 376.415, 376.417, 376.419, 376.421, 376.423, §376.425, 376.427; Subchapter E, concerning Employment Services: Refugee Cash Assistance (RCA), comprising of §§376.501, 376.503, 376.505, 376.507, 376.509, 376.511, 376.513, 376.515, 376.517, 376.519; Subchapter F, concerning English as a Second Language (ESL) Services, comprising of §§376.601 and 376.602; Subchapter G, concerning Other Employability Services, comprising of §§376.701, 376.703, 376.705, 376.707, 376.709, 376.711, 376.713, 376.715, 376.717, 376.719, 376.721; Subchapter H, concerning Targeted Assistance Grant (TAG) Services, comprising of §§376.801 - 376.806; Subchapter I, concerning Unaccompanied Refugee Minor (URM) Program, comprising of §§376.901 - 376.907; and an amendment to §376.1001 in Subchapter J, concerning Local Resettlement Agency Requirements, in Title 1, Chapter 376, concerning Refugee Social Services.

The sections are adopted without changes to the proposed text as published in the July 19, 2024, issue of the *Texas Register* (49 TexReg 5231). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the adoption is to remove rules which are no longer necessary and to update a rule that is required by statute. On September 30, 2016, the State of Texas withdrew from the administration of federally funded refugee services and benefits program effective January 31, 2017, following refusal by the federal Office of Refugee Resettlement to unconditionally approve Texas' amended state refugee plan. Texas Government Code §531.0411 requires rules regarding refugee resettlement program; therefore, §376.1001 will be retained and updated.

COMMENTS

The 31-day comment period ended August 19, 2024.

During this period, HHSC did not receive any comments regarding the proposed rules.

SUBCHAPTER A. PURPOSE AND SCOPE

1 TAC §§376.101 - 376.104

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404880
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 6, 2024
Proposal publication date: July 19, 2024
For further information, please call: (737) 867-7585

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SUBCHAPTER B. CONTRACTOR REQUIREMENTS

1 TAC §§376.201, 376.203, 376.205, 376.207, 376.209, 376.211, 376.213, 376.215, 376.217, 376.219, 376.221, 376.223, 376.225, 376.227, 376.229, 376.231, 376.233, 376.235, 376.237

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

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Karen Ray
Chief Counsel
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For further information, please call: (737) 867-7585

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SUBCHAPTER C. GENERAL PROGRAM ADMINISTRATION

1 TAC §§376.301, 376.303, 376.305, 376.307, 376.309, 376.311, 376.313, 376.315, 376.317, 376.319, 376.321, 376.323, 376.325, 376.327, 376.329, 376.331, 376.333

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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SUBCHAPTER D. EMPLOYMENT SERVICES: REFUGEE SOCIAL SERVICES (RSS)

1 TAC §§376.401, 376.403, 376.405, 376.407, 376.409, 376.411, 376.413, 376.415, 376.417, 376.419, 376.421, 376.423, 376.425, 376.427

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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SUBCHAPTER E. EMPLOYMENT SERVICES: REFUGEE CASH ASSISTANCE (RCA)

1 TAC §§376.501, 376.503, 376.505, 376.507, 376.509, 376.511, 376.513, 376.515, 376.517, 376.519

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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SUBCHAPTER F. ENGLISH AS A SECOND LANGUAGE (ESL) SERVICES

1 TAC §376.601, §376.602

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

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SUBCHAPTER G. OTHER EMPLOYABILITY SERVICES

1 TAC §§376.701, 376.703, 376.705, 376.707, 376.709, 376.711, 376.713, 376.715, 376.717, 376.719, 376.721

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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SUBCHAPTER H. TARGETED ASSISTANCE GRANT (TAG) SERVICES

1 TAC §§376.801 - 376.806

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

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SUBCHAPTER I. UNACCOMPANIED REFUGEE MINOR (URM) PROGRAM

1 TAC §§376.901 - 376.907

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

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SUBCHAPTER J. LOCAL RESETTLEMENT AGENCY REQUIREMENTS

1 TAC §376.1001

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0411, which requires the Executive Commissioner of HHSC to adopt rules regarding refugee resettlement.

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

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 67. STATE REVIEW AND APPROVAL OF INSTRUCTIONAL MATERIALS
SUBCHAPTER B. STATE REVIEW AND APPROVAL
19 TAC §67.43

The State Board of Education (SBOE) adopts new §67.43, concerning state review and approval of instructional materials. The new section is adopted with changes to the proposed text as published in the August 2, 2024 issue of the *Texas Register* (49 TexReg 5616) and will be republished. The new section addresses the removal of a set of instructional materials from the lists of approved and rejected instructional materials outlined in Texas Education Code (TEC), §31.022.

REASONED JUSTIFICATION: 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. HB 1605 also added a new provision to TEC, Chapter 48, to provide additional funding to school districts and charter schools that adopt and implement SBOE-approved materials. In addition, the bill added requirements related to adoption of essential knowledge and skills in TEC, Chapter 28.

At the January-February meeting, the SBOE approved 19 TAC Chapter 67, State Review and Approval of Instructional Materials, Subchapter B, State Review and Approval, §67.21, Proclamations, Public Notice, and Requests for Instructional Materials for Review; §67.23, Requirements for Publisher Participation in Instructional Materials Review and Approval (IMRA); and §67.25, Consideration and Approval of Instructional Materials by the State Board of Education, and Subchapter D, Duties of Publishers and Manufacturers, §67.81, Instructional Materials Contracts, and §67.83, Publisher Parent Portal, for second reading and final adoption. At that time, the board expressed a desire to clarify the rules related to the list of approved instructional materials outlined in TEC, §31.022.

Adopted new §67.43 clarifies the conditions under which the SBOE could remove instructional materials from the list of approved instructional materials as well as the list of rejected instructional materials. The new section also outlines the timeline for these decisions and their impact on school district procurement.

The SBOE approved the new section for first reading and filing authorization at its June 28, 2024 meeting and for second reading and final adoption at its September 13, 2024 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the new section for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2025-2026 school year. The earlier effective date will allow for clarification to districts and publishers regarding the conditions under which the SBOE could remove instructional materials from the list of approved instructional materials and the use of the entitlements outlined in TEC, §48.307 or §48.308, related to materials removed from the approved instructional materials list. The effective date is 20 days after filing as adopted with the *Texas Register.*

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began August 2, 2024, and ended at 5:00 p.m. on September 3, 2024. The SBOE also provided an opportunity for registered oral and written comments at its September 2024 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and corresponding responses.

Comment. A Texas parent commented in support of new 19 TAC Chapter 67.

Response. The SBOE agrees.

Comment. A Texas parent asked that the SBOE approve the curriculum being reviewed related to IMRA without amendments.

Response. This comment is outside the scope of the proposed rulemaking.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §31.003(a), which permits the State Board of Education (SBOE) to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials; and TEC, §31.022, as amended by House Bill 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 under TEC, §31.023.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §31.003(a) and §31.022, as amended by House Bill 1605, 88th Texas Legislature, Regular Session, 2023.

§67.43. Lists of Approved and Rejected Instructional Materials.

(a) The list of approved instructional materials shall be maintained by the State Board of Education (SBOE).

(b) The SBOE may remove instructional materials from the list of approved instructional materials if:

(1) the Texas Essential Knowledge and Skills (TEKS), Texas Prekindergarten Guidelines (TPG), or applicable English Language Proficiency Standards (ELPS) intended to be covered by the material are revised or a publisher revises the material without the approval of the SBOE in accordance with Texas Education Code (TEC), §31.022(c);

(2) the instructional materials, through a finding of the SBOE, are not compliant with the parent portal standards in §67.83 of this title (relating to Publisher Parent Portal); or

(3) the instructional materials violate any provisions of TEC, Chapter 31.

(c) A publisher of the specific instructional material shall be provided a minimum of 30 days' notice of the proposed removal. A representative of the publisher of the specific instructional material shall be given the opportunity to address the SBOE at the meeting where the SBOE is considering removing that publisher's product from the list of approved materials.

(d) If instructional materials are removed from the list of approved instructional materials, school districts and open-enrollment charter schools may not apply the entitlements outlined in TEC, §48.307 or §48.308, to future purchases or subscriptions of the removed instructional materials.

(e) A school district or an open-enrollment charter school that selects subscription-based instructional materials from the list of approved instructional materials approved under TEC, §31.022 and §31.023, may cancel the subscription and subscribe to a new

instructional material on the list of approved instructional materials before the end of the state contract period under TEC, §31.026, if:

(1) the district or charter school has used the instructional material for at least one school year and the Texas Education Agency (TEA) approves the change based on a written request to TEA by the district or charter school that specifies the reasons for changing the instructional material used by the district or charter school; or

(2) the SBOE removes the instructional material to which the district or charter school is subscribed from the list of approved instructional materials.

(f) The SBOE shall maintain the list of rejected instructional materials.

(g) Instructional materials shall be removed from the list of rejected instructional materials if a publisher submits a revised set of instructional materials for review through the process required by TEC, §31.022 and §31.023, and the SBOE places the revised instructional materials on the list of approved instructional materials.

(h) The SBOE may remove instructional materials from the list of rejected instructional materials if a publisher submits a revised set of instructional materials for review through the process required by TEC, §31.023 and §31.022, and the SBOE takes no action before the end of the calendar year.

(i) This section applies to instructional materials approved by the SBOE after January 1, 2024.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.27

The State Board of Education (SBOE) adopts an amendment to §74.27, concerning innovative courses and programs. The amendment is adopted without changes to the proposed text as published in the August 2, 2024 issue of the *Texas Register* (49 TexReg 5618) and will not be republished. The adopted amendment corrects the criteria for innovative courses to be considered for sunset to align with the language approved by the SBOE in November 2023.

REASONED JUSTIFICATION: After the SBOE adopted new rules concerning graduation requirements, the previously approved experimental courses were phased out as of August 31, 1998. Following the adoption of the Texas Essential Knowledge and Skills (TEKS), school districts now submit requests for innovative course approval for courses that do not have TEKS. The process outlined in §74.27 provides authority for the SBOE to approve innovative courses. Each year, Texas Education Agency (TEA) provides the opportunity for school districts and other entities to submit applications for proposed innovative courses. TEA staff works with applicants to fine tune their applications, which are then submitted to the Committee on Instruction for consideration.

At the June 2023 meeting, the Committee on Instruction discussed an amendment to §74.27 to add a provision for the sunset of innovative courses that meet certain criteria. The board approved for first reading and filing authorization the proposed amendment to §74.27 at its August-September 2023 meeting. At the November 2023 SBOE meeting, the board approved for second reading and final adoption the proposed amendment to §74.27, which included as a criterion for consideration for sunset a provision that a course must have been approved for at least three years and meet at least one additional criterion. When TEA staff filed the rule as adopted with the *Texas Register*, the filing did not include the provision that a course must have been approved for at least three years and meet at least one additional criterion to be considered for sunset. The amendment became effective February 18, 2024.

In order to correct the error made by TEA, the adopted amendment corrects the criteria for innovative courses to be considered for sunset to align with the language approved by the SBOE in November 2023.

The SBOE approved the amendment for first reading and filing authorization at its June 28, 2024 meeting and for second reading and final adoption at its September 13, 2024 meeting.

In accordance with Texas Education Code, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2025-2026 school year. The earlier effective date will correct an error prior to the 2025-2026 school year. The effective date is 20 days after filing as adopted with the *Texas Register.*

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began August 2, 2024, and ended at 5:00 p.m. on September 3, 2024. The SBOE also provided an opportunity for registered oral and written comments at its September 2024 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and corresponding responses.

Comment. One administrator requested that the State of Texas Assessments of Academic Readiness (STAAR®) and Texas English Language Proficiency Assessment System (TELPAS) requirements be removed from 19 TAC §74.14(b) for emergent bilingual students to earn a performance acknowledgement in bilingualism and biliteracy.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One administrator expressed support for the proposed amendment to §74.27(a)(9) because it is consistent with criteria for the sunset of innovative courses that the SBOE approved at the November 2023 SBOE meeting.

Response. The SBOE agrees and took action to adopt the amendment to §74.27(a)(9) as proposed.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §28.002(f), which authorizes local school

districts to offer courses in addition to those in the required curriculum for local credit and requires the State Board of Education to be flexible in approving a course for credit for high school graduation.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §28.002(f).

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS

19 TAC §§89.1035, 89.1053, 89.1070

The Texas Education Agency (TEA) adopts amendments to §§89.1035, 89.1053, and 89.1070, concerning clarification of provisions in federal regulations and state law. Section 89.1035 is adopted without changes to the proposed text as published in the July 19, 2024 issue of the *Texas Register* (49 TexReg 5242) and will not be republished. Sections 89.1053 and 89.1070 are adopted with changes to the proposed text as published in the July 19, 2024 issue of the *Texas Register* (49 TexReg 5242) and will be republished. The adopted amendment to §89.1053 implement Senate Bill (SB) 133, 88th Texas Legislature, Regular Session, 2023. The adopted amendments to §89.1035 and §89.1070 clarify graduation requirements for students receiving special education and related services as well as remove outdated language.

REASONED JUSTIFICATION: Section 89.1035 addresses age ranges for student eligibility for special education and related services. The adopted amendment updates cross references and terminology to align with changes adopted in §89.1070.

Section 89.1053 addresses procedures for the use of restraint and time-out for students receiving special education and related services. SB 133, 88th Texas Legislature, Regular Session, 2023, modified Texas Education Code (TEC), §37.0021, to prohibit a peace officer or school security personnel from restraining or using a chemical irritant spray or Taser on a student enrolled in Grade 5 or below unless the student poses a serious risk of harm to the student or another person. The adopted amendment adds new §89.1053(l) to address the requirements of SB 133.

Based on public comment, §89.1053(m) was modified at adoption for clarity to remove the exception clause that was initially proposed, as the exception of subsection (k) is already addressed in subsection (m), and the inclusion of subsection (l) may extend the applicability of the rule farther than what TEC, §37.0021, intended.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 19, 2024, and ended August 19, 2024, and included public hearings on July 30 and 31, 2024. Following is a summary of the public comments received and agency responses.

§89.1035, Age Ranges for Student Eligibility

Comment: The Texas School for the Blind and Visually Impaired (TSBVI) requested an amendment to §89.1035(b) to add that transition services and instruction in any remaining areas of the expanded core curriculum (ECC) be provided to students with visual impairments prior to termination of eligibility.

Response: This comment is outside the scope of rulemaking. The commenter mentions that part of the rationale behind this requested change is that sometimes students need more time in special education to work on certain ECC areas even though they have met all other graduation requirements and that adult services are not always equipped to provide the intensity of the services that are necessary. While TEA can assist with technical assistance around the issue, the requested change itself is outside the scope of rulemaking and will not be made at this time.

§89.1053, Procedures for Use of Restraint and Time-Out

Comment: The Texas Council of Administrators of Special Education (TCASE) requested an amendment to §89.1053(m) to include "school security personnel" in addition to "peace officers" for alignment.

Response: The agency disagrees. TEA does not have authority to add this category of personnel to the rule since it is based on a very specific statutory requirement.

Comment: Disability Rights Texas (DRTx), the Autism Society of Texas (AST), the Arc of Texas, and Coalition of Texans with Disabilities (CTD) commented in support of new §89.1053(l) for incorporating statutory provisions of SB 133, 88th Texas Legislature, Regular Session, 2023, into the rule.

Response: The agency agrees.

Comment: DRTx, AST, CTD, and the Arc of Texas requested an amendment to §89.1053(b)(2) to remove a reference to mechanical devices in the definition of restraint for alignment.

Response: The agency disagrees with making this amendment at this time but will gather a group of stakeholders to discuss any changes in this area made by the legislature during the next legislative session.

Comment: DRTx, AST, CTD, and the Arc of Texas requested changes to §89.1053(d) to clarify provisions for training with a goal to prevent and mitigate the utilization rate of restraints against students with disabilities.

Response: The agency disagrees with making this amendment at this time but will gather a group of stakeholders to discuss any changes in this area made by the legislature during the next legislative session.

Comment: An individual commented that the proposed amendment to §89.1053 is not consistent with Texas Education Code, § 37.0021, in that the proposed rule amendment seems to imply that subsection (l) applies to all peace officers, not just those employed by a school district or who are not school resource officers.

Response: The agency agrees and has modified §89.1053(m) at adoption to remove the exception clause that was initially proposed, as the inclusion of that exception may extend the applicability of the rule farther than what TEC, §37.0021, intended.

Comment: An individual requested guidance from TEA on whether a peace officer may, pursuant to department policy, handcuff a student who is at least 10 years old (and in Grade 5 or below) and has been arrested for a criminal offense.

Response: This comment is outside the scope of the proposed rulemaking, but the agency will consider whether technical assistance such as this is authorized by statute.

Comment: An individual requested an amendment to TEC, §37.0021, for clarification and alignment.

Response: This comment is outside the scope of the proposed rulemaking because, as the commenter noted, amendments to the TEC require action by the Texas Legislature.

§89.1070, Graduation Requirements

Comment: TSBVI requested an amendment to §89.1070 to add that an admission, review, and dismissal (ARD) committee would need to determine if a student with a visual impairment has received sufficient instruction in the ECC areas or that an adult service agency is able to meet the individual's needs prior to terminating a student's eligibility based on graduation. TSBVI mentioned that sometimes students need more time in special education to work on certain ECC areas, even though they have met all other graduation requirements, and that adult services are not always equipped to provide the intensity of the services that are necessary.

Response: While TEA can assist with technical assistance around this issue, the requested change is outside the scope of the proposed rulemaking.

Comment: An individual commented that the intent of the requirement for an evaluation under proposed §89.1070(f)(2) needs to be clarified. The commenter further inquired about what is expected if an evaluation is less than three years old.

Response: The agency provides the following clarification. This is not a new requirement, as it has been part of the rule previously in §89.1070(g). The text closely mirrors the requirement listed in 34 Code of Federal Regulations (CFR) §300.305(e) regarding evaluations before a change in eligibility. The text from 34 CFR §300.305(e) first states that a local education agency must evaluate a child with a disability before determining the child is no longer a child with a disability, with the exception that if a student is graduating under a regular diploma (in the rule text, this is described under subsection (b)(1)), or if the student is exceeding age eligibility, an evaluation is not required. Thus, the rule text in proposed §89.1070(f) mirrors this same concept. In terms of what the expectation is if an evaluation is less than three years old, the agency notes that 34 CFR §300.305(e) refers to an evaluation in accordance with 34 CFR §§300.304-300.311. The provisions under 34 CFR §§300.304-300.306 include evaluation procedures, additional requirements for evaluations and reevaluations, and determination of eligibility, and §§300.307-300.311 refer to specific learning disability procedures. Note that 34 CFR §300.305 specifically references the review of existing evaluation data (REED) process that is involved in an initial or a re-evaluation.

Comment: An individual requested an amendment to §89.1070(h) and (j) to remove the reference to subsection (b)(2) and an amendment to subsection (b)(2) to restrict a student from being able to return to high school.

Response: The agency disagrees. The agency notes that the commenter stated that graduation under §89.1070(b)(2) would be the same as a general education student utilizing an individual graduation committee to graduate. This is not accurate, as the standards under §89.1070(b)(1) would include that situation. Subsection (b)(2) refers to the circumstance in which an ARD committee is determining that satisfactory performance on end-of-course assessments, beyond what is required for general education students, is not necessary.

Comment: TCASE requested an amendment to §89.1070(c)(3) to replace "necessary" with "required" for alignment.

Response: The agency agrees that a change is warranted for consistency and has revised §89.1070(c)(3) to replace the word "necessary" with "required."

Comment: An individual questioned why references to the Texas Administrative Code (TAC) chapters addressing the Texas Essential Knowledge and Skills (TEKS) were proposed for deletion from §89.1070(b)(3) and stated that we should have the same expectations for all students.

Response: The agency disagrees that this text was deleted. The text was moved to reference the authority to modify content and curriculum expectations in this circumstance, but those modifications must still be in alignment with the TAC chapters related to the TEKS.

Comment: TCASE requested an amendment to §89.1070(b)(3)(C) to add "paid or unpaid" in front of employment.

Response: The agency disagrees that a change is necessary. The ARD committee will determine this in accordance with a student's transition plan, and the agency will abide by the references described by the Office of Special Education Programs when answering postsecondary outcomes for the State Performance Plan/Annual Performance Report.

Comment: An individual requested clarification on the proposed amendment to repeal §89.1070(b)(3)(D) and whether proposed §89.1070(e) is taking the place of that former subsection.

Response: The agency provides the following clarification. If a student is unable to reach the credit, curriculum, and assessment requirements (even with the allowed modifications and authority to not require passage on state end-of-course assessments) and the student has reached maximum age eligibility, §89.1070(e) will apply, regardless of whether the student meets one of the criteria in §89.1070(b)(3)(A), (B), or (C). Changes to data collection instructions will be addressed by the agency.

Comment: TCASE requested an amendment to §89.1070(g) to clarify the requirement for school districts to include written recommendations from adult service agencies in the summary to the child "if available."

Response: The agency disagrees. The text has been in the rule for several years, and the text already states "if available," thereby meeting the same intent as TCASE is requesting.

Comment: An individual commented that proposed §89.1070(f)(1) and (2) will require a significant amount of paperwork.

Response: The agency disagrees, as the requirements in §89.1070(f)(1) and (2) have been in rule for many years and were relocated from subsection (g). Subsections (f)(1) and (2) are requirements of the Individuals with Disabilities Education Act.

Commented: An individual commented that all students who achieve progress through their individualized education program and are assessed by state of Texas assessments should be provided the opportunity to graduate even if it takes them longer.

Response: This comment is outside the scope of rulemaking; however, the agency provides the following clarification. Students are allowed to attend school through age 21 in certain circumstances, in accordance with §89.1070 and §89.1035.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code, §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which requires the agency to develop and modify as necessary a statewide plan for the delivery of services to children with disabilities that ensures the availability of a free appropriate public education to children between the ages of 3-21; TEC, §29.003, which requires the agency to develop eligibility criteria for students receiving special education services; TEC, §29.004, which establishes criteria for conducting a full individual and initial evaluation for a student for purposes of special education services; TEC, §29.005, which establishes criteria for developing a student's individualized education program prior to a student enrolling in a special education program; TEC, §30.081, which establishes the legislative intent concerning regional day schools for the deaf; TEC, §37.0021, which establishes criteria for the use of confinement, restraint, seclusion, and time-out; TEC, §37.0023, which establishes criteria for prohibited aversive behavior techniques; TEC, §39.023, which establishes criteria for the agency to develop criterion-referenced assessment instruments designed to assess essential knowledge and skills in reading, writing, mathematics, social studies, and science; TEC, §48.003, which establishes criteria for student eligibility to the benefits of the Foundation School Program; TEC, §48.102, which establishes criteria for school districts to receive an annual allotment for students in a special education program; Texas Government Code, §392.002, which establishes the use of person first respectful language required by the legislature and the Texas Legislative Council; 34 Code of Federal Regulations (CFR), §300.8, which defines terms regarding a child with a disability; 34 CFR, §300.100, which establishes eligibility criteria for a state to receive assistance; 34 CFR, §300.101, which defines the requirement for all children residing in the state between the ages of 3-21 to have a free appropriate public education (FAPE) available; 34 CFR, §300.102, which establishes criteria for limitation-exception to FAPE for certain ages; 34 CFR, §300.149, which establishes the state education agency's responsibility for general supervision; 34 CFR, §300.305, which establishes criteria for additional requirements for evaluations and reevaluations; 34 CFR, §300.306, which establishes criteria for determination of eligibility; 34 CFR, §300.307, which establishes the criteria for determining specific learning disabilities; 34 CFR, §300.308, which establishes criteria for additional group members in determining whether a child is suspected of having a specific learning disability as defined in 34 CFR, §300.8; 34 CFR, §300.309, which establishes criteria for determining the existence of a specific learning disability; 34 CFR, §300.310, which establishes criteria for observation to document the child's academic performance and behavior in the areas of difficulty; 34 CFR, §300.311, which establishes criteria for specific documentation for the eligibility determination; 34 CFR, §300.320, which defines the requirements for an individualized education program (IEP); 34 CFR, §300.323, which establishes the timeframe for when IEPs must be in effect; and 34 CFR, §300.600, which establishes criteria for state monitoring and enforcement.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§28.025, 29.001, 29.003, 29.004, 29.005, 30.081, 37.0021, 37.0023, 39.023, 48.003, and 48.102; Texas Government Code, §392.002; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.101, 300.102, 300.149, 300.305, 300.306, 300.307, 300.308, 300.309, 300.310, 300.311, 300.320, 300.323, and 300.600.

§89.1053. Procedures for Use of Restraint and Time-Out.

(a) Requirement to implement. In addition to the requirements of 34 Code of Federal Regulations (CFR), §300.324(a)(2)(i), school districts and charter schools must implement the provisions of this section regarding the use of restraint and time-out. In accordance with the provisions of Texas Education Code (TEC), §37.0021 (Use of Confinement, Restraint, Seclusion, and Time-Out), it is the policy of the state to treat with dignity and respect all students, including students with disabilities who receive special education services under TEC, Chapter 29, Subchapter A.

(b) Definitions.

(1) Emergency means a situation in which a student's behavior poses a threat of:

(A) imminent, serious physical harm to the student or others; or

(B) imminent, serious property destruction.

(2) Restraint means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student's body.

(3) Time-out means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting:

(A) that is not locked; and

(B) from which the exit is not physically blocked by furniture, a closed door held shut from the outside, or another inanimate object.

(c) Use of restraint. A school employee, volunteer, or independent contractor may use restraint only in an emergency as defined in subsection (b) of this section and with the following limitations.

(1) Restraint must be limited to the use of such reasonable force as is necessary to address the emergency.

(2) Restraint must be discontinued at the point at which the emergency no longer exists.

(3) Restraint must be implemented in such a way as to protect the health and safety of the student and others.

(4) Restraint must not deprive the student of basic human necessities.

(d) Training on use of restraint. Training for school employees, volunteers, or independent contractors must be provided according to the following requirements.

(1) A core team of personnel on each campus must be trained in the use of restraint, and the team must include a campus administrator or designee and any general or special education personnel likely to use restraint.

(2) Personnel called upon to use restraint in an emergency and who have not received prior training must receive training within 30 school days following the use of restraint.

(3) Training on use of restraint must include prevention and de-escalation techniques and provide alternatives to the use of restraint.

(4) All trained personnel must receive instruction in current professionally accepted practices and standards regarding behavior management and the use of restraint.

(e) Documentation and notification on use of restraint. In a case in which restraint is used, school employees, volunteers, or independent contractors must implement the following documentation requirements.

(1) On the day restraint is utilized, the campus administrator or designee must be notified verbally or in writing regarding the use of restraint.

(2) On the day restraint is utilized, a good faith effort must be made to verbally notify the parent(s) regarding the use of restraint.

(3) Written notification of the use of restraint must be placed in the mail or otherwise provided to the parent within one school day of the use of restraint.

(4) Written documentation regarding the use of restraint must be placed in the student's special education eligibility folder in a timely manner so the information is available to the admission, review, and dismissal (ARD) committee when it considers the impact of the student's behavior on the student's learning and/or the creation or revision of a behavior improvement plan or a behavioral intervention plan.

(5) Written notification must be provided to the student's parent(s) or person standing in parental relation to the student for each use of restraint, and documentation of each restraint must be placed in the student's special education eligibility folder. The written notification of each restraint must include the following:

(A) name of the student;

(B) name of the individual administering the restraint;

(C) date of the restraint and the time the restraint began and ended;

(D) location of the restraint;

(E) nature of the restraint;

(F) a description of the activity in which the student was engaged immediately preceding the use of restraint;

(G) the behavior of the student that prompted the restraint;

(H) the efforts made to de-escalate the situation and any alternatives to restraint that were attempted;

(I) observation of the student at the end of the restraint;

(J) information documenting parent contact and notification; and

(K) one of the following:

(i) if the student has a behavior improvement plan or behavioral intervention plan, whether the behavior improvement plan or behavioral intervention plan may need to be revised as a result of the behavior that led to the restraint and, if so, identification of the staff member responsible for scheduling an ARD committee meeting to discuss any potential revisions; or

(ii) if the student does not have a behavior improvement plan or a behavioral intervention plan, information on the procedure for the student's parent or person standing in parental relation to the student to request an ARD committee meeting to discuss the possibility of conducting a functional behavioral assessment of the student and developing a plan for the student.

(f) Clarification regarding restraint. The provisions adopted under this section do not apply to the use of physical force or a mechanical device that does not significantly restrict the free movement of all or a portion of the student's body. Restraint that involves significant restriction as referenced in subsection (b)(2) of this section does not include:

(1) physical contact or appropriately prescribed adaptive equipment to promote normative body positioning and/or physical functioning;

(2) limited physical contact with a student to promote safety (e.g., holding a student's hand), prevent a potentially harmful action (e.g., running into the street), teach a skill, redirect attention, provide guidance to a location, or provide comfort;

(3) limited physical contact or appropriately prescribed adaptive equipment to prevent a student from engaging in ongoing, repetitive self-injurious behaviors, with the expectation that instruction will be reflected in the individualized education program (IEP) as required by 34 CFR, §300.324(a)(2)(i), to promote student learning and reduce and/or prevent the need for ongoing intervention; or

(4) seat belts and other safety equipment used to secure students during transportation.

(g) Use of time-out. A school employee, volunteer, or independent contractor may use time-out in accordance with subsection (b)(3) of this section with the following limitations.

(1) Physical force or threat of physical force must not be used to place a student in time-out.

(2) Time-out may only be used in conjunction with an array of positive behavior intervention strategies and techniques and must be included in the student's IEP and/or behavior improvement plan or behavioral intervention plan if it is utilized on a recurrent basis to increase or decrease a targeted behavior.

(3) Use of time-out must not be implemented in a fashion that precludes the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.

(h) Training on use of time-out. Training for school employees, volunteers, or independent contractors must be provided according to the following requirements.

(1) General or special education personnel who implement time-out based on requirements established in a student's IEP and/or behavior improvement plan or behavioral intervention plan must be trained in the use of time-out.

(2) Newly-identified personnel called upon to implement time-out based on requirements established in a student's IEP and/or

behavior improvement plan or behavioral intervention plan must receive training in the use of time-out within 30 school days of being assigned the responsibility for implementing time-out.

(3) Training on the use of time-out must be provided as part of a program which addresses a full continuum of positive behavioral intervention strategies and must address the impact of time-out on the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.

(4) All trained personnel must receive instruction in current professionally accepted practices and standards regarding behavior management and the use of time-out.

(i) Documentation on use of time-out. Necessary documentation or data collection regarding the use of time-out, if any, must be addressed in the IEP and/or behavior improvement plan or behavioral intervention plan. If a student has a behavior improvement plan or behavioral intervention plan, the school district must document each use of time-out prompted by a behavior of the student specified in the student's behavior improvement plan or behavioral intervention plan, including a description of the behavior that prompted the time-out. The ARD committee must use any collected data to judge the effectiveness of the intervention and provide a basis for making determinations regarding its continued use.

(j) Student safety. Any behavior management technique and/or discipline management practice must be implemented in such a way as to protect the health and safety of the student and others. No discipline management practice may be calculated to inflict injury, cause harm, demean, or deprive the student of basic human necessities.

(k) Data reporting. With the exception of actions covered by subsection (f) of this section, data regarding the use of restraint must be electronically reported to the Texas Education Agency (TEA) in accordance with reporting standards specified by TEA.

(l) Restrictions on peace officers and security personnel. In accordance with TEC, §37.0021(j), a peace officer performing law enforcement duties or school security personnel performing security-related duties on school property or at a school-sponsored or school-related activity must not restrain or use a chemical irritant spray or Taser on a student enrolled in Grade 5 or below, unless the student poses a serious risk of harm to the student or another person.

(m) Provisions applicable to peace officers. The provisions adopted under this section apply to a peace officer only if the peace officer is employed or commissioned by the school district or provides, as a school resource officer, a regular police presence on a school district campus under a memorandum of understanding between the school district and a local law enforcement agency, except that the data reporting requirements in subsection (k) of this section apply to the use of restraint by any peace officer performing law enforcement duties on school property or during a school-sponsored or school-related activity.

(n) The provisions adopted under this section do not apply to:

(1) juvenile probation, detention, or corrections personnel; or

(2) an educational services provider with whom a student is placed by a judicial authority, unless the services are provided in an educational program of a school district.

§89.1070. Graduation Requirements.

(a) Graduation under subsection (b)(1) of this section or reaching maximum age eligibility described by §89.1035 of this title (relating to Age Ranges for Student Eligibility) terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act and entitlement to the benefits of the Foundation School Program, as provided in Texas Education Code (TEC), §48.003(a).

(b) A student who receives special education services may graduate and be awarded a diploma if the student meets one of the following conditions.

(1) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title; satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title (relating to Foundation High School Program) applicable to students in general education; and demonstrated satisfactory performance as established for students in general education in TEC, Chapters 28 and 39, on the required end-of-course assessment instruments, which could include meeting the requirements of subsection (d) of this section.

(2) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title; the student has satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title applicable to students in general education; and the student's admission, review, and dismissal (ARD) committee has determined that satisfactory performance, beyond what would otherwise be required in subsections (b)(1) and (d) of this section, on the required end-of-course assessment instruments is not required for graduation.

(3) The student has satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title through courses, one or more of which contain modified curriculum that is aligned to the standards applicable to students in general education; demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title in accordance with modified content and curriculum expectations established in the student's individualized education program (IEP); and demonstrated satisfactory performance on the required end-of-course assessment instruments, unless the student's ARD committee has determined that satisfactory performance on the required end-of-course assessment instruments is not required for graduation. The student must also successfully complete the student's IEP and meet one of the following conditions:

(A) consistent with the IEP, the student has obtained full-time employment, based on the student's abilities and local employment opportunities, in addition to mastering sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district;

(B) consistent with the IEP, the student has demonstrated mastery of specific employability skills and self-help skills that do not require direct ongoing educational support of the local school district; or

(C) the student has access to services or other supports that are not within the legal responsibility of public education, including employment or postsecondary education established through transition planning.

(c) A student receiving special education services may earn an endorsement under §74.13 of this title (relating to Endorsements) if the student:

(1) satisfactorily completes the requirements for graduation under the Foundation High School Program specified in §74.12 of this title as well as the additional credit requirements in mathemat-

ics, science, and elective courses as specified in §74.13(e) of this title with or without modified curriculum;

(2) satisfactorily completes the courses required for the endorsement under §74.13(f) of this title without any modified curriculum or with modification of the curriculum, provided that the curriculum, as modified, is sufficiently rigorous as determined by the student's ARD committee; and

(3) performs satisfactorily as established in TEC, Chapter 39, on the required end-of-course assessment instruments unless the student's ARD committee determines that satisfactory performance is not required.

(d) A student receiving special education services classified in Grade 11 or 12 who has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments is eligible to receive a diploma under subsection (b)(1) of this section.

(e) A student who has reached maximum age eligibility in accordance with §89.1035 of this title without meeting the credit, curriculum, and assessment requirements specified in subsection (b) of this section is not eligible to receive a diploma but may receive a certificate of attendance as described in TEC, §28.025(f).

(f) A summary of academic achievement and functional performance must be provided prior to exit from public school for students who meet one of the following conditions:

(1) a student who has met requirements for graduation specified by subsection (b)(1) of this section or who has exceeded the maximum age eligibility as described by §89.1035 of this title; or

(2) a student who has met requirements for graduation specified in subsection (b)(2) or (b)(3)(A), (B), or (C) of this section. Additionally, a student meeting this condition is entitled to an evaluation as described in 34 Code of Federal Regulations (CFR), §300.305(e)(1).

(g) The summary of performance described by subsection (f) of this section must include recommendations on how to assist the student in meeting the student's postsecondary goals, as required by 34 CFR, §300.305(e)(3). This summary must also consider, as appropriate, the views of the parent and student and written recommendations from adult service agencies on how to assist the student in meeting postsecondary goals.

(h) Students who meet graduation requirements under subsection (b)(2) or (b)(3)(A), (B), or (C) of this section and who will continue enrollment in public school to receive special education services aligned to their transition plan will be provided the summary of performance described in subsections (f) and (g) of this section upon exit from the public school system. These students are entitled to participate in commencement ceremonies and receive a certificate of attendance after completing four years of high school, as specified by TEC, §28.025(f).

(i) Employability and self-help skills referenced under subsection (b)(3) of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.

(j) For students who graduate and receive a diploma according to subsections (b)(2) or (b)(3)(A), (B), or (C) of this section, the ARD committee must determine needed special education services upon the request of the student or parent to resume services, as long as the student meets the age eligibility requirements.

(k) For purposes of this section, modified curriculum and modified content refer to any reduction of the amount or complexity of the required knowledge and skills in Chapters 110-117, 126-128, and 130 of this title. Substitutions that are specifically authorized in statute or rule must not be considered modified curriculum or modified content.

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

Filed with the Office of the Secretary of State on October 18, 2024.

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Director, Rulemaking
Texas Education Agency
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DIVISION 7. DISPUTE RESOLUTION

19 TAC §89.1196, §89.1197

The Texas Education Agency (TEA) adopts amendments to §89.1196 and §89.1197, concerning special education services dispute resolution. The amendments are adopted with changes to the proposed text as published in the July 26, 2024, issue of the *Texas Register* (49 TexReg 5482) and will be republished. The adopted amendments clarify procedures for individualized education program (IEP) facilitation and add language allowing TEA to delegate certain duties and responsibilities.

REASONED JUSTIFICATION: Section 89.1196 addresses the requirement in Texas Education Code, §29.019, to develop rules associated with IEP facilitation that public education agencies may choose to use as an alternative dispute resolution method. The amendment to subsection (a) describes the purpose of IEP facilitation and changes the term "trained" to "qualified" in the description of facilitators who assist admission, review, and dismissal (ARD) committees.

Based on public comment, the agency has clarified in subsection (c) that the subsection is referring to qualified facilitators.

Section 89.1197 addresses procedures for state IEP facilitation when the ARD committee is in dispute with a parent of a student with a disability. New subsection (b) clarifies that TEA may delegate duties and responsibilities to an education service center (ESC) to maximize efficiency. Subsections are re-lettered throughout the rule as a result of this addition. Deletion of subsection (e)(6), re-lettered as subsection (f)(6), removes language prohibiting the use of IEP facilitation if the issue in dispute is part of a special education complaint, as the agency has determined that facilitation may actually be helpful in resolving these situations.

Based on public comment, the agency has modified subsection (f)(3) to reference that the request for facilitation must be *received* by TEA within 10 calendar days of the ARD committee meeting that ended in disagreement, rather than be *filed* within 10 calendar days.

Based on public comment, the agency has deleted provisions that would have prohibited the use of the state IEP facilitation when the dispute was related to a manifestation determination or determination of alternative educational setting, or when the parties were involved in mediation.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 26, 2024, and ended August 26, 2024, and included public hearings on August 21 and 22, 2024. Following is a summary of the public comments received and agency responses.

§89.1196, Individualized Education Program Facilitation

Comment: An individual requested clarification on the application process and the legal criteria for being an IEP facilitator.

Response: This comment is outside the scope of rulemaking, as §89.1196 is about districts providing IEP facilitation, not TEA.

Comment: An individual commented in support of the role of a facilitator but asked that it be mandatory for a school district to honor the request for IEP facilitation from a parent.

Response: The agency disagrees; this would require a statutory change.

Comment: The Texas Council of Administrators of Special Education (TCASE) requested an amendment to subsection (c) to add "qualified" in front of facilitator before describing the minimum requirements.

Response: The agency agrees that clarification may be helpful and has updated §89.1196(c) at adoption to use the phrase "qualified facilitator."

§89.1197, State Individualized Education Program Facilitation

Comment: An individual requested an amendment to subsection (f) to state that the request for IEP facilitation must be received by TEA within 10 calendar days.

Response: The agency agrees that the clarification would be helpful and has modified §89.1197(f) at adoption to state that that the request for facilitation must be *received* by TEA within 10 calendar days of the ARD committee meeting that ended in disagreement, rather than be *filed* within 10 calendar days.

Comment: Five individuals and TCASE disagreed and/or requested clarification on the proposed amendment to subsection (b) allowing ESCs as designated IEP facilitators. The commenters stated concerns with limited staffing, rapport with school districts, and ESCs being non-regulatory educational facilities.

Response: The agency disagrees and provides the following clarification. The amendment in §89.1197(b) does not allow ESC staff to serve as facilitators. It specifically refers to the TEA's duties and specifies that TEA may delegate its duties to an ESC. Subsection (b) specifically states that, where TEA is listed in subsections §89.1197(c)-(p), TEA could delegate that duty to an ESC where not otherwise prohibited by law.

Comment: An individual commented that subsections (f)(4) and (5), which state that IEP facilitation would not being available if a dispute is related to a manifestation determination or interim alternative educational setting, or when the parties are involved in mediation, should be deleted, as these are not mandatory prohibitions by law and hinder accessibility of the program.

Response: The agency agrees and has deleted §89.1197(f)(4) and (5) at adoption.

Comment: TCASE commented in support of the proposed amendment to subsection (f)(6).

Response: The agency agrees.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §29.001, which requires the agency to develop and modify as necessary a statewide plan for the delivery of services to children with disabilities that ensures the availability of a free appropriate public education to children between the ages of 3-21; TEC, §29.019, which establishes IEP facilitation as an alternative dispute resolution method that districts may choose to use; and TEC, §29.020, which establishes the state's IEP facilitation project.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§29.001, 29.019, and 29.020.

§89.1196. Individualized Education Program Facilitation.

(a) For the purpose of this section and Texas Education Code, §29.019, individualized education program (IEP) facilitation refers to a method of alternative dispute resolution that may be used to avoid a potential dispute between a public education agency and a parent of a student with a disability. IEP facilitation involves the use of a qualified facilitator to assist an admission, review, and dismissal (ARD) committee in developing an IEP for a student with a disability. The facilitator uses facilitation techniques to help the committee members communicate and collaborate effectively. While public education agencies are not required to offer IEP facilitation as an alternative dispute resolution method, the Texas Education Agency (TEA) encourages the use of IEP facilitation as described in this section.

(b) A public education agency is not prohibited from incorporating elements of IEP facilitation into ARD committee meetings that are conducted without the assistance of a facilitator as described in this section. For example, a public education agency may provide training on communication skills, conflict management, or meeting effectiveness to individuals who participate in ARD committee meetings to enhance collaboration and efficiency in those meetings.

(c) A public education agency that chooses to offer IEP facilitation under this section may determine whether to use independent contractors, employees, or other qualified individuals as facilitators. At a minimum, an individual who serves as a qualified facilitator must:

(1) have demonstrated knowledge of federal and state requirements relating to the provision of special education and related services to students with disabilities;

(2) have demonstrated knowledge of and experience with the ARD committee meeting process;

(3) have completed 18 hours of training in IEP facilitation, consensus building, and/or conflict resolution; and

(4) complete continuing education as determined by the public education agency.

(d) A public education agency that chooses to offer IEP facilitation under this section must ensure that:

(1) participation is voluntary on the part of the parties;

(2) the facilitation is provided at no cost to parents; and

(3) the process is not used to deny or delay the right to pursue a special education complaint, mediation, or a due process hearing in accordance with Part B of the Individuals with Disabilities Education Act (IDEA) and this division.

(e) A public education agency that chooses to offer IEP facilitation under this section must develop written policies and procedures that include:

(1) the procedures for requesting facilitation;

(2) facilitator qualifications, including whether facilitators are independent contractors, employees, or other qualified individuals;

(3) the process for assigning a facilitator;

(4) the continuing education requirements for facilitators; and

(5) a method for evaluating the effectiveness of the facilitation services and the individual facilitators.

(f) A public education agency that chooses to offer IEP facilitation under this section must provide parents with information about the process, including a description of the procedures for requesting IEP facilitation and information related to facilitator qualifications. This information must be included when a copy of the procedural safeguards notice under 34 Code of Federal Regulations (CFR), §300.504 is provided to parents, although this information may be provided as a separate document and may be provided in a written or electronic format.

(g) A facilitator under this section must not be a member of the student's ARD committee, must not have any decision-making authority over the committee, and must remain impartial to the topics under discussion. The facilitator must assist with the overall organization and conduct of the ARD committee meeting by:

(1) assisting the committee in establishing an agenda and setting the time allotted for the meeting;

(2) assisting the committee in establishing a set of guidelines for the meeting;

(3) guiding the discussion and keeping the focus on developing a mutually agreed upon IEP for the student;

(4) ensuring that each committee member has an opportunity to participate;

(5) helping to resolve disagreements that arise; and

(6) helping to keep the ARD committee on task so that the meeting purposes can be accomplished within the time allotted for the meeting.

(h) Promptly after being assigned to facilitate an ARD committee meeting, or within a timeline established under the public education agency's procedures, the facilitator must contact the parents and public education agency representative to clarify the issues, gather necessary information, and explain the IEP facilitation process.

(i) A public education agency that chooses to offer IEP facilitation under this section must ensure that facilitators protect the confidentiality of personally identifiable information about the student and comply with the requirements in the Family Educational Rights and Privacy Act regulations, 34 CFR, Part 99, relating to the disclosure and redisclosure of personally identifiable information from a student's education record.

(j) TEA will develop information regarding IEP facilitation as an alternative dispute resolution method, and such information will be available upon request from TEA and on the TEA website.

§89.1197. State Individualized Education Program Facilitation.

(a) In accordance with Texas Education Code, §29.020, the Texas Education Agency (TEA) will establish a program that provides independent individualized education program (IEP) facilitators.

(b) For purposes of this section, where TEA is referenced in subsections (c)-(p) of this section and where not otherwise prohibited by law, TEA may delegate duties and responsibilities to an education service center (ESC) when it is determined to be the most efficient way to implement the program.

(c) For the purpose of this section, IEP facilitation has the same general meaning as described in §89.1196(a) of this title (relating to Individualized Education Program Facilitation), except that state IEP facilitation is used when the admission, review, and dismissal (ARD) committee is in dispute about decisions relating to the provision of a free and appropriate public education to a student with a disability and the facilitator is an independent facilitator provided by TEA.

(d) A request for IEP facilitation under this section must be filed by completing a form developed by TEA that is available upon request from TEA and on the TEA website. The form must be filed with TEA by one of the parties by electronic mail, mail, hand-delivery, or facsimile.

(e) IEP facilitation under this section must be voluntary on the part of the parties and provided at no cost to the parties.

(f) In order for TEA to provide an independent facilitator, the following conditions must be met.

(1) The required form must be completed and signed by both parties.

(2) The dispute must relate to an ARD committee meeting in which mutual agreement about one or more of the required elements of the IEP was not reached and the parties have agreed to recess and reconvene the meeting in accordance with §89.1055(o) of this title (relating to Individualized Education Program).

(3) The request for IEP facilitation must be received by TEA within 10 calendar days of the ARD committee meeting that ended in disagreement, and a facilitator must be available on the date set for reconvening the meeting.

(4) The same parties must not have participated in IEP facilitation concerning the same student under this section within the same school year of the filing of the current request for IEP facilitation.

(g) Within five business days of receipt of a request for an IEP facilitation under this section, TEA will determine whether the conditions in subsections (d)-(f) of this section have been met and will notify the parties of its determination and the assignment of the independent facilitator, if applicable.

(h) Notwithstanding subsections (c)-(f) of this section, if a special education due process hearing or complaint decision requires a public education agency to provide an independent facilitator to assist with an ARD committee meeting, the public education agency may request that TEA assign an independent facilitator. Within five business days of receipt of a written request for IEP facilitation under this subsection, TEA will notify the parties of its decision to assign or not assign an independent facilitator. If TEA declines the request to assign an independent facilitator, the public education agency must provide an independent facilitator at its own expense.

(i) TEA's decision not to provide an independent facilitator is final and not subject to review or appeal.

(j) The independent facilitator assignment may be made based on a combination of factors, including, but not limited to, geographic location and availability. Once assigned, the independent facilitator must promptly contact the parties to clarify the issues, gather necessary information, and explain the IEP facilitation process.

(k) TEA will use a competitive solicitation method to seek independent facilitation services, and the contracts with independent facilitators will be developed and managed in accordance with TEA's contracting practices and procedures.

(l) At a minimum, an individual who serves as an independent facilitator under this section:

(1) must have demonstrated knowledge of federal and state requirements relating to the provision of special education and related services to students with disabilities;

(2) must have demonstrated knowledge of and experience with the ARD committee meeting process;

(3) must have completed 18 hours or more of training in IEP facilitation, consensus building, and/or conflict resolution as specified in TEA's competitive solicitation;

(4) must complete continuing education as determined by TEA;

(5) may not be an employee of TEA or the public education agency that the student attends; and

(6) may not have a personal or professional interest that conflicts with his or her impartiality.

(m) An individual is not an employee of TEA solely because the individual is paid by TEA to serve as an independent facilitator.

(n) An independent facilitator must not be a member of the student's ARD committee, must not have any decision-making authority, and must remain impartial to the topics under discussion. The independent facilitator must assist with the overall organization and conduct of the ARD committee meeting by:

(1) assisting the committee in establishing an agenda and setting the time allotted for the meeting;

(2) assisting the committee in establishing a set of guidelines for the meeting;

(3) guiding the discussion and keeping the focus on developing a mutually agreed upon IEP for the student;

(4) ensuring that each committee member has an opportunity to participate;

(5) helping to resolve disagreements that arise; and

(6) helping to keep the ARD committee on task so that the meeting purposes can be accomplished within the time allotted for the meeting.

(o) An independent facilitator must protect the confidentiality of personally identifiable information about the student and comply with the requirements in the Family Educational Rights and Privacy Act regulations, 34 CFR, Part 99, relating to the disclosure and redisclosure of personally identifiable information from a student's education record.

(p) TEA will develop surveys to evaluate the IEP facilitation program and the independent facilitators and will request that parties who participate in the program complete the surveys.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 103. HEALTH AND SAFETY
SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING GENERAL PROVISIONS FOR HEALTH AND SAFETY

19 TAC §103.1103

The Texas Education Agency adopts new §103.1103, concerning opioid antagonist medication requirements in schools. The new section is adopted without changes to the proposed text as published in the April 19, 2024 issue of the *Texas Register* (49 TexReg 2380) and will not be republished. The new section implements Senate Bill (SB) 629, 88th Texas Legislature, Regular Session, 2023, and adopts by reference the rules of the executive commissioner of the Texas Health and Human Services Commission.

REASONED JUSTIFICATION: SB 629, 88th Texas Legislature, Regular Session, 2023, established that each school district adopt and implement a policy regarding the maintenance, administration, and disposal of opioid antagonists at each campus in the district that serves students in Grades 6-12. Districts may adopt and implement such a policy at each campus in the district, including campuses serving students in a grade level below Grade 6. An open-enrollment charter school or private school may adopt and implement a policy regarding the maintenance, administration, and disposal of opioid antagonists. If a school adopts a policy, the school is permitted to apply the policy only at campuses serving students in Grades 6-12 or at each campus, including campuses serving students in a grade level below Grade 6.

The executive commissioner of the Health and Human Services Commission must, in consultation with the commissioner of education, adopt rules regarding the maintenance, administration, and disposal of opioid antagonists at a school campus subject to a policy. The rules must establish the process for checking the inventory of opioid antagonists at regular intervals for expiration and replacement and include the amount of training required for school personnel and school volunteers to administer an opioid antagonist.

Schools with a policy on the administration of opioid antagonists must be required to report certain information no later than the tenth business day after the date a school personnel member or a school volunteer administers an opioid antagonist.

Each school district, open-enrollment charter school, and private school that adopts a policy regarding the maintenance, administration, and disposal of opioid antagonists is responsible for training school personnel and school volunteers in the administration of an opioid antagonist. Training must include information on recognizing the signs and symptoms of an opioid-related drug overdose; administering an opioid antagonist; implementing emergency procedures, if necessary, after administering an

opioid antagonist; and properly disposing of used or expired opioid antagonists. Training must be provided in a formal training session or through online education. Each school district, open-enrollment charter school, or private school that adopts a policy must maintain records on the required training.

The commissioner of education and the executive commissioner of the Health and Human Services Commission must jointly adopt rules necessary to implement Texas Education Code (TEC), Chapter 38, Subchapter E-1. The new rule, therefore, adopts by reference the rules of the executive commissioner of the Texas Health and Human Services Commission implementing the provisions of TEC, §38.222.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began April 19, 2024, and ended May 20, 2024. No public comments were received.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §38.222, as added by Senate Bill (SB) 629, 88th Texas Legislature, Regular Session, 2023, which requires each school district to adopt and implement a policy regarding the maintenance, administration, and disposal of opioid antagonists at each campus that serves students in Grades 6-12 and allows each school district to adopt and implement the policy at each campus in the district that serves students in a grade level below Grade 6. The statute also allows each open-enrollment charter school or private school to adopt and implement a policy regarding the maintenance, administration, and disposal of opioid antagonists at each campus; and TEC, §38.228, as added by SB 629, 88th Texas Legislature, Regular Session, 2023, requires the commissioner of education and the executive commissioner of the Health and Human Services Commission to jointly adopt rules regarding the maintenance, administration, and disposal of opioid antagonists.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §38.222 and §38.228, as added by Senate Bill 629, 88th Texas Legislature, Regular Session, 2023.

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

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

The commissioner of insurance adopts amendments to 28 TAC §§7.1901, 7.1902, and 7.1904 - 7.1915. The commissioner also adopts new §7.1916 and §7.1917. The new and amended sections concern licensing requirements for multiple employer welfare arrangements (MEWAs). The commissioner also adopts the repeal of §7.1903.

Sections 7.1901, 7.1908, 7.1909, 7.1911, and 7.1913 - 7.1916 and the repeal of 7.1903 are adopted without changes to the proposed text published in the May 3, 2024, issue of the *Texas Register* (49 TexReg 2968). These sections will not be republished. Sections 7.1902, 7.1904 - 7.1907, 7.1910, and 7.1912 are adopted with changes to the proposed text. These sections were revised in response to public comments. TDI revised §7.1917 to clarify that the entire section applies only to a MEWA that offers or seeks to offer a comprehensive health benefit plan. These sections will be republished.

REASONED JUSTIFICATION. Amendments to §§7.1901, 7.1902, and 7.1904 - 7.1915, and new §7.1916 and §7.1917 are necessary to implement House Bill 290, 88th Legislature, 2023, and Insurance Code Chapter 846. Insurance Code §846.0035 as added by HB 290 creates a new path for MEWAs. The path treats a MEWA, under certain conditions and as determined by the commissioner, as though it were an insurer, the individuals covered as though they were insured, and the benefits provided as though through an insurance policy.

Under new Insurance Code §846.0035, all new MEWAs that apply for an initial certificate of authority on or after January 1, 2024, and existing MEWAs that elect to comply with the new section are subject to the new provisions.

New Insurance Code §846.0035(b) and (c) outline the Insurance Code provisions a MEWA is subject to when it:

- provides a comprehensive health benefit plan, as determined by the commissioner; or

- provides a comprehensive health benefit plan that is structured in the manner of a preferred provider benefit plan (PPO) or an exclusive provider benefit plan (EPO) as defined in Insurance Code §1301.001, as determined by the commissioner.

The new and amended sections clarify which plans or coverages constitute a "comprehensive health benefit plan" for the purposes of Insurance Code §846.0035(b) and what information a MEWA must provide to TDI to demonstrate compliance when the MEWA will provide a comprehensive health benefit plan under Insurance Code §846.0035. A MEWA that provides a comprehensive health benefit plan that is structured in the manner of a PPO or EPO must comply with the requirements in Insurance Code Chapters 1301 and 1467, and the rules that implement those provisions.

HB 290 also requires a MEWA that applies for a certificate of authority to demonstrate, as determined by the commissioner, that the arrangement is in compliance with all applicable federal and state laws. HB 290 expands who may organize and participate in a MEWA under Insurance Code Chapter 846, including permitting the MEWA to be organized on the basis of employer location rather than industry, permitting a MEWA under certain circumstances when it has been in existence for at least two years, and permitting working owner members in the MEWA. These HB 290 provisions providing flexibility are somewhat similar to a federal rule on association health plans (AHPs) that was adopted in 2018 at 29 CFR §2510.3-5 but was repealed soon after the TDI rule was proposed. *See* 89 Federal Register

34127 (April 30, 2024). Because of that repeal, it will be more difficult for a MEWA licensed under the HB 290 flexibility provisions to be able to demonstrate federal compliance.

Under current federal law, following the repeal of the 2018 federal AHP rule, a MEWA that does not qualify as a bona fide employer association plan is not considered a single group employee welfare benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) (29 United States Code §1001 et seq.). If the MEWA is not considered a single group employee welfare benefit plan under ERISA, each participating employer will be seen as sponsoring its own employee welfare benefit plan. The MEWA must demonstrate that each plan meets federal requirements for individual, small, or large group health benefit plans, as applicable. The previous requirement in §7.1904 allowed a statement by the applicant certifying compliance. The adopted sections clarify the minimum information required when a MEWA seeks to demonstrate compliance with federal law. TDI will review the submitted information to determine whether the MEWA has sufficiently demonstrated compliance with state and federal law.

In addition to the new and amended sections that implement HB 290, the rule also removes the requirement that MEWAs file the specific forms adopted by reference in §7.1903. Section 7.1903 is repealed because the elements of the forms are integrated into amendments to §§7.1904, 7.1906, and 7.1912. The previously adopted forms will remain on TDI's website at www.tdi.texas.gov/forms for use as a reference and resource for compliance. MEWAs must provide the required information under Insurance Code Chapter 846 and 28 TAC Chapter 7, Subchapter S, and may continue--but are not required--to use the TDI forms for compliance.

Nonsubstantive amendments are adopted to reflect current agency drafting style and plain language preferences, including (1) updating statutory references to reflect Insurance Code recodification; (2) adding or amending Insurance Code section titles and citations; (3) updating TDI contact information, including website addresses; and (4) correcting and revising punctuation, capitalization, and grammar.

Specifically, amendments to multiple sections include the replacement of "which" with "that," "prior to" with "before," "shall" with "must" or another context-appropriate word, and "multiple-employer welfare arrangement" with "multiple employer welfare arrangement" or "MEWA" for consistency with usage in the Insurance Code. These amendments, along with other nonsubstantive amendments discussed in the following paragraphs, reflect current agency drafting style, adhere to plain-language practices, and promote consistency in TDI rule text.

The repeal of §7.1903 is necessary to implement Insurance Code Chapter 846, Subchapters B and D. The repeal removes the forms that were previously adopted by reference for use in the regulation of MEWAs and integrates the required information into rule text, as discussed in a previous paragraph.

TDI received comments on an informal working draft that requested input on specific implementation questions. TDI posted the draft on its website on August 22, 2023, and considered those comments when drafting the proposal.

Descriptions of the sections' adopted amendments and repeal follow.

Section 7.1901. The amendments to §7.1901 replace "these sections apply" with "this subchapter applies," "these sections do" with "this subchapter does," and "Chapter 3, Subchapter I, concerning the licensing and regulation of such arrangements" with "Chapter 846, concerning Multiple Employer Welfare Arrangements." Other amendments to punctuation and grammar are adopted for consistency with agency drafting style and plain language preferences.

Nonsubstantive amendments also restructure subsection (b) and amend punctuation to create two separate paragraphs for plain language and ease of reading.

Section 7.1902. The amendments to §7.1902 reflect the enactment of HB 290 by adding a definition of "comprehensive health benefit plan." A comprehensive health benefit plan is defined as any health benefit plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness. The definition specifies which plans or coverage do not constitute comprehensive health benefit plans for the purposes of HB 290 and is based on exclusions in Insurance Code §846.001(3).

The amendments also define "department" as the "Texas Department of Insurance" and redesignate the paragraphs throughout the section to reflect the addition of new definitions.

As proposed, former §7.1902(2), now redesignated as §7.1902(4), expanded the definition of "employee welfare benefit plan" to include a MEWA on the basis of the location of the employers' principal places of business as permitted under Insurance Code §846.0035 and §846.053(b)(2). As adopted, the definition of "employee welfare benefit plan" cites to the definition in Insurance Code §846.001(2), which assigns the meaning in Section 3(1) of ERISA (29 United States Code §1002(1)) to the term. This change ensures that the rule is consistent with both Insurance Code Chapter 846 and federal law following the repeal of the federal AHP rule and provides flexibility should federal law change in the future.

The amendments to redesignated paragraph (5) remove "describes an entity which" and "the" before "Insurance Code," and replace "Article 3.95-4" with "§846.201," and "§7.1908" with "§7.1909."

Section 7.1903. Section 7.1903 is repealed because the requirements in the forms have been added to the text of §§7.1904, 7.1906, and 7.1912. The forms will remain accessible as a reference and resource on TDI's website at www.tdi.texas.gov/forms. Companies and MEWAs must provide the required information under Insurance Code Chapter 846 and 28 TAC Chapter 7, Subchapter S, and may continue--but are not required--to use the TDI forms for compliance.

Section 7.1904. The amendments to §7.1904 remove former subsection (a) regarding which entities must file an application for initial certificate of authority because it is no longer necessary and redesignate part of former subsection (b) as a new subsection (a). New (a) requires a MEWA to submit a complete application for an initial certificate of authority to the commissioner and authorizes the MEWA to use forms available on TDI's website at www.tdi.texas.gov/forms as a resource to comply.

Amendments to new subsection (b) clarify the information needed for an application for an initial certificate of authority to be considered complete and add new paragraphs (1) - (4) to incorporate information previously contained in the forms listed in §7.1903.

New subsection (b)(1) includes the information from TDI Form FIN300, concerning the application for and reservation of a

MEWA's name. As adopted, paragraphs (1)(C) and (1)(D) are changed in response to comment to specify that the MEWA must list every state where the MEWA is licensed to do business, "whether the MEWA is fully insured or not," and paragraph (1)(D) is changed to add "or license" for consistency with paragraph (1)(C).

New subsection (b)(2) includes the information from TDI Forms FIN374, FIN375, and FIN376, including MEWA-specific information and information about the officers, directors, and trustees. Under subsection (b)(2), a MEWA applicant must submit a notarized affidavit signed by the president, secretary, and treasurer, or the trustees, and must include a declaration that the affiant knows of no reason under the Texas Insurance Code as to why the MEWA is not entitled to an initial certificate of authority. To correct an error made in the proposal, paragraph (2)(C) as adopted removes an errant "the" from the notation of "{MEWA Name}" in a required form so it matches other form requirements in the section.

New subsection (b)(3) requires a MEWA to submit a biographical affidavit for each trustee, officer, director, or administrator of the MEWA and include certain identifying information and contact information contained in TDI Form FIN311. As adopted, subsection (b)(3)(F) is modified in response to comment to clarify that the affiant must provide "any previous or current" ownership or control of entities involved in the business of insurance.

New subsection (b)(4) requires the affiant to designate the commissioner of insurance as the MEWA's resident agent for purposes of service of process. A MEWA may use TDI Form FIN377 to comply with this requirement but is not required to do so. The remaining paragraphs in subsection (b) are redesignated to reflect the addition of subsection (b)(1) - (4). As adopted, subsection (b)(11) is changed in response to comment to replace the word "employer" with the word "employee" and to clarify that fidelity bonds issued in the name of the MEWA must also protect against acts of fraud and dishonesty by those with access to funds held on behalf of individual employer plans, for MEWAs that are not bona fide associations or groups under ERISA.

The amendments to new subsection (b) also add to or amend redesignated paragraphs (13), (16), (18), and (19) to implement HB 290.

Redesignated subsection (b)(13) is revised to clarify that, subject to Insurance Code §846.157(b), an actuarial opinion must be provided and prepared according to the specified requirements. In response to comment, the rule text is changed to clarify that an actuary preparing an opinion must not have a relationship with the MEWA or its affiliates because such relationships may create a conflict of interest. As adopted, subsection (b)(13) now states that the actuary preparing the opinion must not be "an employee of the MEWA's employer-members, an affiliate of the MEWA, or an affiliate of the MEWA's employer-members, or an employee of an affiliate of the MEWA."

The adopted language is an expansion of redesignated subsection (b)(13), which prohibited only the MEWA employment relationship. The actuarial opinion must include the recommended amount of cash reserves the MEWA should maintain, among other things. To implement HB 290, an amendment to subsection (b)(13) clarifies that a MEWA that provides a comprehensive health benefit plan under Insurance Code §846.0035 must also comply with reserve requirements in Insurance Code Chapter 421. As adopted, subsection (b)(13) is changed in response to comment to clarify that a MEWA that provides a comprehensive health benefit plan must comply with reserve requirements in both Insurance Code Chapter 421 and §846.154. A clarifying change is also made to state that all MEWAs must comply with the recommended amount of reserves under Insurance Code §846.154. Former subsection (b)(13), which addressed the certification that an applicant could provide to attest to compliance with all applicable provisions of ERISA, is removed.

New subsection (b)(16) states that a MEWA that is formed under Insurance Code §846.053(b)(2) must provide documentation to TDI to demonstrate compliance.

Under new subsection (b)(18), an applicant must provide documentation, as determined by the commissioner, that demonstrates that the MEWA is in compliance with all applicable federal and state laws. The documents that will demonstrate compliance include:

- a list of and access to all ERISA reports for the last five years filed with the United States Department of Labor;

- if the MEWA is an employee welfare benefit plan, an advisory opinion from the United States Department of Labor that is not more than 3 years old for certain MEWA structures or an opinion from an attorney attesting to the structure of the MEWA; and

- for each plan sponsored by the applicant, an opinion from an attorney attesting that the plan is in compliance with federal and state laws.

New subsection (b)(19) implements HB 290 by requiring a MEWA that will provide a comprehensive health benefit plan under Insurance Code §846.0035 to provide additional information in accordance with proposed new §7.1917.

The amendments remove unnecessary introductory text before lists throughout the section. For example, the words "described in paragraphs (1) - (13) of this subsection" are removed so the statement is simplified to "In order to be considered complete, the application must contain the following items." Similar changes, made throughout the section, are intended to increase readability of the requirements.

The amendments revise the statement "any such licenses held should be specified by type" in subsection (b)(8)(E) to say "the applicant must specify any such licenses by type" to increase readability; remove "which provides," "the summary plan description shall," and "or"; and add "proposed" throughout for consistency with drafting in the section, "and" after subsection (b)(9)(A) to reflect that it is part of a list, and "the" at the beginning of clauses in subsection (b)(9)(B), as appropriate.

Amendments also replace "should" with "must," "with components and characteristics" with "that is," "non-renewal" with "nonrenewal," "non-participation" with "nonparticipation," "in conformity with" with "according to," "third party" with "third-party," "company's" with "third-party administrator's," and "management's" with "MEWA's."

Section 7.1905. The amendments to §7.1905 clarify that employers in a MEWA may either be members of an association or group of five or more businesses within the same trade or industry or be formed under Insurance Code §846.053(b)(2), which requires the employers to each have a principal place of business in the same region that does not exceed the boundaries of the state or metropolitan statistical area designated by the United States Office of Management and Budget.

The amendments also clarify that the requirement that an association be in existence for at least two years before engaging

in any activities related to the provision of employer health benefits does not apply to MEWAs formed under Insurance Code §846.0035. The amendments also clarify which reserve requirements a MEWA must comply with, depending on whether the MEWA is formed under Insurance Code §846.0035.

As adopted, subsections (a)(10) and (a)(11) are changed in response to comment to replace the term "or" with "and" to clarify that all MEWAs are required to comply with the reserve requirements in Insurance Code §846.154 and that MEWAs that provide comprehensive health benefit plans must also comply with Insurance Code Chapter 421.

The amendments also add subsection (a)(16) to clarify that a MEWA that will provide a comprehensive health benefit plan must submit documentation as specified in §7.1917 that adequately demonstrates compliance with applicable requirements before the commissioner will issue an initial certificate of authority.

The amendments remove the safe harbor provision in subsection (a) that provided that a MEWA that timely filed notice for an initial and final certificate of authority would not be denied a certificate based on the fact that it engaged in the business of insurance in Texas on an unauthorized basis prior to September 1, 1993, because this provision is no longer necessary.

Nonsubstantive amendments restructure multiple paragraphs in the section and redesignate paragraphs and subparagraphs throughout to reflect the amendments. The bulk of paragraph (1) is broken into two subparagraphs for ease in reading and to include the second pathway created by HB 290. In addition, introductory text before lists throughout the section is amended. For example, the introductory text in redesignated subsection (a)(15) that reads "set out in subparagraphs (A) - (D) of this paragraph, as follows" now reads "in the following."

Amendments to redesignated subsection (a)(15)(D) clarify that a MEWA must provide TDI's website in addition to the toll-free telephone number for consistency with 28 TAC §1.601 and remove the reference to the "Texas Department of Insurance consumer services division." The requirements in 28 TAC §1.601 implement provisions of the Insurance Code, including Insurance Code §521.005, which a MEWA must comply with under Insurance Code §846.003(b)(12).

Additional nonsubstantive amendments remove "to"; add "in"; and replace "transact" with "engage in," "shall have the power to" with "may," "shall be" with "is," "which may be necessary" with "necessary," "third party" with "third-party," "providing not less than," with "that provides," "days" with "days'," "non-renewal" with "nonrenewal," "current" with "preceding," "Texas Department of Insurance consumer services division" with "department," and, in the section title, "Temporary" with "Initial."

Section 7.1906. An amendment to §7.1906(a) provides that applicants for a final certificate of authority may use MEWA forms on TDI's website at www.tdi.texas.gov/forms as a resource when complying with the section requirements. An amendment also designates part of subsection (a) as new subsection (b) and redesignates former subsection (b) as subsection (c).

An amendment also adds new paragraph (5) to the text that makes up new subsection (b), inserting a requirement currently found in forms required in §7.1903. This amendment requires that the application for a final certificate of authority include a notarized statement that affirms that the affiant knows of no reason under the Texas Insurance Code as to why the MEWA is not entitled to a final certificate of authority.

As adopted, redesignated subsection (c) is changed in response to comment to clarify that the MEWA must demonstrate compliance with the requirements in Insurance Code Chapter 846, the requirements in these rules, and "other applicable Insurance Code provisions" before the commissioner will issue a final certificate of authority.

Other amendments replace "which sets forth a description of" with "that describes," "Article 3.95-8" and "Chapter 3, Subchapter I" with "Chapter 846," and "which" with "whose."

Section 7.1907. Amendments to §7.1907 provide additional information about requesting an extension of an initial certificate of authority and the timelines for TDI's review of filed applications for a final certificate of authority. Existing subsection (b) is removed, and existing subsection (c) is redesignated as new subsection (b). The contents of existing subsection (b) are incorporated into new subsection (f), as discussed in a later paragraph.

The text of redesignated subsection (b) is clarified to provide that if an applicant submits a written request for a hearing within 30 days after the notice of refusal to grant a final certificate of authority is sent, revocation of the initial certificate of authority will be temporarily stayed.

New subsection (c) clarifies that a MEWA's initial certificate of authority will not expire during TDI's review of a timely filed application for a final certificate of authority.

New subsection (d) provides that when a timely filed application is incomplete and a MEWA fails to respond to a notice of deficiency within the timelines in new subsection (e), a MEWA's initial certificate of authority will expire five days after the date the response was due or on the one-year anniversary following the issuance of the initial certificate of authority, whichever is later.

New subsection (e) establishes the timeframe for a timely response to a notice of deficiency. A response to a notice of deficiency is timely if it provides all the information requested by TDI in writing within the timeframes listed. As proposed, subsection (e)(3) classified a response to a notice of deficiency as timely if it was received "as otherwise agreed to by the department." As adopted, subsection (e)(3) is changed in response to comment to state that a response to a notice of deficiency will be considered timely if the response provides all information requested by TDI in writing "within a reasonable time period as agreed to by the department based on the MEWA's circumstances."

New subsection (f) incorporates requirements removed with the deletion of existing subsection (b) and additional new text provides that the request to extend the initial certificate of authority must occur before the end of the one-year term, must be in writing, and must explain in detail the basis for an extension. Subsection (f) also clarifies that only one extension will be granted under the subsection. As adopted, subsection (f) is changed in response to comment to clarify that the initial certificate of authority may be extended on a determination that the MEWA is likely to meet the requirements of the subchapter "within the granted extension period."

Section 7.1908. Amendments to §7.1908 reduce the fee for filing an annual audited financial statement and actuarial opinion to $0. The filing fees for the initial and final certificate of authority are retained to cover the administrative cost to review the filings. The fee for an appointment of the commissioner of insurance as the

agent for service of process remains $50 because this amount is statutorily required under Insurance Code §846.059(c).

Section 7.1909. Amendments to §7.1909 remove "in paragraphs (1) - (3) of this subsection" in subsection (a) and replace "pursuant to the provisions of" with "under" and "optical" with "vision." A citation to the United States Code is also revised to remove italicized formatting.

Section 7.1910. Amendments to §7.1910 clarify in subsection (a)(4) that a MEWA must provide TDI's website in addition to the toll-free telephone number for consistency with 28 TAC §1.601 and remove the reference to the "Texas Department of Insurance consumer services division." The requirements in §1.601 implement provisions of the Insurance Code, including Insurance Code §521.005, which a MEWA must comply with under Insurance Code §846.003(b)(12). As adopted, subsection (a) is changed in response to comment to clarify that the required notice is "in addition to any other notices required by law." Several nonsubstantive amendments for consistency with current agency drafting style and plain language preferences are also made.

Section 7.1911. Amendments to §7.1911 clarify that a MEWA must complete a name application form, as described in §7.1904(b)(1), to transact business in Texas. The amendments also remove "no" at the beginning of subsection (a) and replace "shall" with "may not" to reflect the removal of "no," which is consistent with current agency drafting style and plain language preferences to remove "shall."

In addition, amendments include replacing "any other" with "another."

Section 7.1912. Amendments to §7.1912 clarify that a MEWA that provides a comprehensive health benefit plan under Insurance Code §846.0035 must comply with reserve requirements in Insurance Code Chapter 421. In response to comment, the rule text is changed to clarify that an actuary preparing an opinion must not have a relationship with the MEWA or its affiliates because such relationships may create a conflict of interest. Subsection (a)(2) is changed from the proposal to state that the actuary preparing the opinion must not be "an employee of the MEWA's employer-members, an affiliate of the MEWA, or an affiliate of the MEWA's employer-member, or an employee of an affiliate of the MEWA." As proposed, subsection (a)(2)(B) outlined the reserve requirements for MEWAs that provide a comprehensive health benefit plan and MEWAs that do not provide a comprehensive health benefit plan. As adopted, subsection (a)(2)(B) is changed in response to comment to clarify that all MEWAs must comply with the reserve requirements in Insurance Code §846.154, and that a MEWA that provides a comprehensive health benefit plan must also comply with Insurance Code Chapter 421.

New subsection (e) requires a MEWA to file updated information when a material change occurs to documents previously provided in the application for the initial or final certificate of authority, which includes information previously listed in TDI Form FIN378. Form FIN378 requires a MEWA to file updated plan documents when changes occur. To ensure that TDI has the most accurate information, a MEWA must provide updated information within 30 days of the material change. MEWAs may continue to use Form FIN378, which is available on TDI's website at www.tdi.texas.gov/forms, as a resource to comply.

Amendments also replace "these sections" with "this subchapter." Several nonsubstantive changes for consistency with current agency drafting style and plain language preferences are also made.

Section 7.1913. Amendments to §7.1913 clarify that a MEWA that will provide a comprehensive health benefit plan that is structured in the manner of a preferred provider benefit plan or exclusive provider benefit plan under Insurance Code §1301.001 must comply with the examination requirements in Insurance Code §1301.0056.

The amendments also replace the citation to Insurance Code Article 1.16 with recodified citations in Insurance Code Chapter 401, Subchapter D, and the corresponding titles and add a citation to Insurance Code §1301.0056.

Section 7.1914. Amendments to §7.1914 add "required" and replace "shall respectively have such" with "may exercise the" and "such" with "the."

Section 7.1915. Amendments to §7.1915 replace citations to Insurance Code Article 3.95-13 and Chapter 3, Subchapter I, with the recodified citations to Insurance Code §846.003 and Insurance Code Chapter 846, respectively. Amendments also add the section titles to both updated citations.

Section 7.1916. New §7.1916 states how a MEWA that was issued a certificate of authority before January 1, 2024, may elect to be subject to certain Insurance Code provisions under Insurance Code §846.0035. To make the election, a MEWA must complete and submit a statement signed and dated by an authorized officer, director, or trustee electing to be bound by additional provisions under Insurance Code §846.0035. The MEWA may use the forms accessible on TDI's website at www.tdi.texas.gov/forms as a resource to comply with the filing requirements.

In addition to the statement electing to be bound by additional provisions under Insurance Code §846.0035, the MEWA must submit documentation demonstrating that it is in compliance with all applicable federal and state laws including, at a minimum:

- a list of and access to all ERISA reports for the last five years filed with the United States Department of Labor;

- a copy of its Federal Form 5500 for the past five years, or since the MEWA's inception, whichever is shorter;

- if the MEWA is an employee welfare benefit plan, an advisory opinion from the United States Department of Labor that is not more than 3 years old, for certain MEWA structures, or an opinion from an attorney attesting to the structure of the MEWA; and

- for each plan sponsored by the MEWA, an opinion from an attorney attesting to the fact that the plan is in compliance with federal and state laws.

A MEWA that will provide a comprehensive health benefit plan under Insurance Code §846.0035 must also comply with new §7.1917.

Section 7.1917. New §7.1917 applies only to a MEWA that intends to provide a comprehensive health benefit plan under Insurance Code §846.0035. If a MEWA intends to provide a comprehensive health benefit plan, the MEWA must submit a form to TDI that includes a statement declaring the MEWA's intention to provide a comprehensive health benefit plan as defined in §7.1902.

In addition, a MEWA must submit a detailed compliance plan to address the additional requirements under Insurance Code §846.0035(b). If a MEWA provides a comprehensive health ben-

efit plan that is structured in the manner of a preferred provider benefit plan or an exclusive provider benefit plan under Insurance Code §1301.001, then the MEWA must submit a detailed compliance plan to address the requirements under Insurance Code §846.0035(c), in addition to those requirements in Insurance Code §846.0035(b). A MEWA may use forms accessible on TDI's website at www.tdi.texas.gov/forms as a resource to comply with the requirements of the section.

New §7.1917 also requires an opinion from an attorney attesting that each comprehensive health benefit plan sponsored by the applicant is in compliance with all applicable federal and state laws. Specifically, the opinion must adequately explain how each plan complies with the Employee Retirement Income Security Act of 1974 (29 United States Code §1001 et seq.) and the Patient Protection and Affordable Care Act (42 United States Code §18001 et seq.). The opinion must explain how each plan will comply with federal requirements applicable to large group, small group, or individual markets.

As adopted, subsection (a) is changed to clarify that the section only applies to a MEWA that offers or seeks to offer a comprehensive health benefit plan. Because this change is made, the text of subsection (b) as proposed is changed to remove the introductory phrase "If a MEWA will provide a comprehensive health benefit plan."

SUMMARY OF COMMENTS AND AGENCY RESPONSE. TDI provided an opportunity for public comment on the rule proposal for a period that ended on June 3, 2024.

Commenters: TDI received written comments from three commenters. Commenters in support of the proposal were the Texas Dental Association. Commenters in support of the proposal with changes were the Texas Medical Association and the Texas Professional Service Providers Benefits Trust. No commenters spoke on the proposal at a public hearing held on May 23, 2024.

General Comments.

Comment. A commenter expresses support of the proposal and the passage of HB 290. The commenter states that HB 290 authorizes TDI to approve a MEWA that offers a comprehensive health benefit plan, which will allow Texas small businesses and self-employed individuals to obtain affordable comprehensive health benefit coverage.

Agency Response. TDI appreciates the commenter's support.

Comment. A commenter asks TDI to explain its rationale for allowing a person applying for an initial certificate of authority on or after January 1, 2024, to be considered a "MEWA to which Insurance Code §846.0035 applies" when Insurance Code §846.0035(a) states that it only applies to (1) a MEWA that "was issued" (i.e., already received) an initial certificate of authority on or after January 1, 2024, or (2) a MEWA that existed before 2024 and elects for it to apply.

Agency Response. TDI reads Insurance Code §846.0035 as applying to new MEWAs on or after January 1, 2024, and to pre-2024 MEWAs that make the election. This reading is supported by the House Research Organization's bill analysis, which states that "requirements in the bill would apply to MEWAs issued a certificate of authority on or after January 1, 2024, *or* to those that chose to comply with the requirements in the bill as prescribed by the insurance commissioner" (emphasis added; *see* www.hro.house.texas.gov/pdf/ba88r/hb0290.pdf). There is no evidence that the bill was intended to not apply to new MEWAs after January 1, 2024, or that those new MEWAs would need to elect to be bound to Insurance Code §846.0035. To the contrary, the legislation was clearly attempting to increase the ability of MEWAs to obtain licensure and provide health coverage in Texas. Because of this, TDI disagrees with the commenter's interpretation and declines to make a change.

Comments on §7.1902. Definitions.

Comment. One commenter expresses concern about the definition for "comprehensive health benefit plan" proposed in §7.1902(2). The commenter notes that, from an operational standpoint, the definition as proposed departs from the underlying statutory directive and has a potential for unintended consequences. The commenter states that "comprehensive health benefit plans" are generally understood as major medical health insurance and can include a wide range of services and medical costs, such as preventative services and services to treat illnesses. The commenter also notes that there is not a clear distinction between "comprehensive health benefit plan" and other "health benefit plans" offered by MEWAs. The commenter requests clarification from TDI on what plans would fall outside the definition of "comprehensive health benefit plan" while still being a "health benefit plan" that a MEWA may provide under Insurance Code Chapter 846.

Agency Response. TDI declines to make a change to the definition of "comprehensive health benefit plan" as proposed. TDI agrees with the commenter that a comprehensive health benefit plan is generally understood to mean major medical health insurance and notes that other stakeholders indicated the same in response to TDI's informal request for information posted on TDI's website on August 22, 2023. The proposed definition of "comprehensive health benefit plan" was drafted by stating the exclusions, which is consistent with how the Insurance Code defines other health plans or insurance policies.

As the commenter notes, the definition incorporates the meaning of "health benefit plan" and the associated exclusions under Insurance Code §846.001. This incorporation aligns with both state and federal law. Because of this alignment with federal law, a plan that falls within the definition of health benefit plan will almost always be subject to federal essential health benefit and annual and lifetime limit restrictions under 45 CFR §147.126, forcing it to be somewhat comprehensive. To prevent unintended consequences and to reflect the variable nature of "major medical health insurance," TDI declines to create overly prescriptive requirements. A comprehensive health benefit plan may include a number of different benefit types, coverages, and levels or tiers. TDI anticipates reviewing a MEWA's health benefit plan filing like it does filings submitted by other Texas carriers to determine whether the proposed coverage is "comprehensive."

TDI will monitor this issue and encourages stakeholders to submit formal complaints if operational issues arise that can be addressed through future rulemaking or other agency action.

Comment. One commenter raises concern about §7.1902(4) as proposed, which broadens the definition of "employee welfare benefit plan" to include a MEWA when each of the employers have a principal place of business in the same region that does not exceed the boundaries of this state or the boundaries of a metropolitan statistical area designated by the United States Office of Management and Budget. The commenter notes that the recent United States Department of Labor (DOL) action that formally rescinded the rule titled "Definition of 'Employer' - Association Health Plans" reinstated the longstanding guidance that the

DOL uses to determine whether an employer group or association is a bona fide group or association. The commenter states that an employee welfare benefit plan must meet specific federal requirements in order to meet the federal definition of "employee welfare benefit plan" and that the proposed definition expanding the scope may result in confusion and noncompliance. The commenter suggests that, if TDI retains this definition, the term "in the same region" be specifically defined and reproposed so that stakeholders have an opportunity to provide comments on the definition.

Agency Response. TDI agrees, in part, and has modified the definition of "employee welfare benefit plan" to remove the reference to principal place of business in the same region. As adopted, §7.1902(4) assigns the term the meaning under Section 3(1) of ERISA, which is consistent with Insurance Code §846.001(2). The definition of "employee welfare benefit plan" as adopted also removes the previous plan requirements because those specific plan requirements are addressed throughout §7.1904. Removing the plan requirements in the definition section is not intended to change the requirement that a plan be established for a particular purpose; clearly set out the rights, privileges, obligations, and duties of employers, employees, and beneficiaries; and plainly describe certain plan information required by federal law.

TDI declines to define "in the same region" at this time or to repropose this rulemaking. Given the recent changes in federal law, it is unclear how many MEWAs will be able to offer coverage compliant with federal law where the only commonality between employers is geographic. It is also unclear in what ways geography could be used by a MEWA to unfairly exclude employers. TDI will continue to monitor the issue to determine whether additional rulemaking may be necessary in the future.

Comment. One commenter states that HB 290 authorized working owners to participate in a MEWA as an employer and an employee. The commenter requests confirmation that, because TDI declined to address working owners in the proposed definition of MEWA in §7.1902(5), no additional clarification is needed under HB 290. Another commenter notes that, although HB 290 authorizes sole proprietors (i.e., working owners) without common law employees to qualify as an employer and as an employee, the proposed rule is broader than federal law, regulation, or guidance. This commenter states that a working owner may be considered an employer for purposes of the MEWA definition in Section 3(40) of ERISA (29 United States Code §1002(40)), but not for purposes of the definition of "employee welfare benefit plan" under Section 3(1) of ERISA (29 United States Code §1002(1)).

Agency Response. HB 290 authorizes working owners, also known as "sole proprietors," to qualify as both an employer and as an employee of the trade or industry for the purposes of MEWA formation and structure. One reason this was not addressed in the rule is because no clarification of the statute is needed, and it is not necessary to repeat the statute in rule. Additionally, HB 290 requires all MEWAs to comply with both state and federal law. The federal rules that broadened the definition of "employer" under ERISA were rescinded on April 30, 2024, and the Department of Labor signaled a return to pre-2018 AHP Rule guidance, which requires certain criteria to be met before the association is deemed a bona fide association. TDI agrees that current federal law does not authorize working owners to qualify as an employer and an employee for purposes of ERISA's definition of "employee welfare benefit plan" under Section 3(1) of ERISA (29 United States Code §1002(1)). Under current federal law, working owners as defined in Insurance Code §846.0035(d-1) are not eligible employers for purposes of creating or participating in a bona fide association or group under ERISA.

TDI recognizes that federal law may change to authorize expanded eligibility, similar to the 2018 AHP rules that were recently rescinded. TDI will continue to monitor federal law for amendments that broaden the employers that may participate in a bona fide association but will apply HB 290 as written by requiring MEWAs to comply with current federal law.

Comments on §7.1904. Application for Initial Certificate of Authority.

Comment. One commenter notes that the rule text in §7.1904(b)(1)(C) and (D) is incongruent because the rule text fails to include the term "license" in §7.1904(b)(1)(D). The commenter also suggests modifying the rule text in both subparagraphs to clarify that the MEWA must report the list of states where it "is otherwise authorized to do business in that state" whether it is fully insured or not.

Agency Response. TDI declines to add the statement "otherwise authorized to do business in that state" in §7.1904(b)(1)(C) or §7.1904(b)(1)(D), as it may inadvertently broaden the reporting requirements to include inapplicable businesses. However, TDI agrees to modify the rule text in those sections to add the requirement that a MEWA must report every state where the MEWA is licensed or has a certificate of authority, "whether the MEWA is fully insured or not." All plan- and non-plan MEWAs must complete and file the Federal Form M-1 annual report with the Employee Benefits Security Administration of the United States Department of Labor, including reporting all of the states where the MEWA is operating and whether the entity is fully insured in that state. Because MEWAs must already compile this information, the additional reporting requirement in Texas should not impose a cost to MEWAs to comply. In response to this comment, TDI has also modified the rule text in §7.1904(b)(1)(D) to add "license" to the list for consistency with §7.1904(b)(1)(C).

Comment. One commenter suggests clarifying §7.1904(b)(3)(F) by adding that each trustee, officer, director, or administrator must include "any previous or current" ownership or control of entities involved in the business of insurance when the person completes the biographical affidavit required in a MEWA application.

Agency Response. TDI agrees with the commenter's suggested changes and has modified the rule text to add the suggested language in §7.1904(b)(3)(F). To hasten application review time, MEWAs may continue to use TDI Form FIN311, available on TDI's forms website at www.tdi.texas.gov/forms to comply with §7.1904(b)(3).

Comment. One commenter recommends adding language in §7.1904(b)(11) that clarifies that, for MEWAs that are not bona fide associations or groups under ERISA, the fidelity bond issued in the name of the MEWA must also protect against acts of fraud or dishonesty by those "with access to funds held by the MEWA on behalf of separate employee welfare benefit plans established or maintained by the MEWA's employer-members." The commenter also notes a mistake in §7.1904(b)(11) where the term "employer" was used in error.

Agency Response. TDI agrees with the commenter's suggested changes and has modified the rule text to add similar language as recommended by the commenter and to fix the noted error.

Comment. One commenter recommends that TDI investigate whether the $500,000 cap on a fidelity bond is appropriate for MEWAs that fund multiple individual ERISA-covered employee welfare benefit plans.

Agency Response. TDI declines to make a change to the rule text as proposed, as it is outside the scope of this rulemaking. TDI, however, will monitor this issue to ensure that the $500,000 cap on the fidelity bond is appropriate for the types of MEWAs referenced by the commenter.

Comment. One commenter suggests broadening the employee-employer relationships listed in §7.1904(b)(13) that are prohibited between an actuary and the MEWA. The commenter proposes clarifying that an actuary may not prepare an actuarial opinion if the actuary is an employee of the MEWA's employer-members, an affiliate of the MEWA or its employer-members, or an employee of an affiliate of the MEWA.

Agency Response. TDI agrees to change the rule text in §7.1904(b)(13) and §7.1912(a)(2) to expand the employee-employer relationships that are prohibited. As adopted, the rule text adds the language as suggested by the commenter in §7.1904(b)(13) and §7.1912(a)(2).

Comment. One commenter states that Insurance Code §846.0035(b), which requires MEWAs that provide a comprehensive health benefit plan to comply with the Insurance Code Chapter 421, does not prohibit the application of Insurance Code §846.154 in addition to the requirements in Insurance Code Chapter 421. This commenter recommends that TDI modify §7.1904(b)(13)(B) to require MEWAs subject to Insurance Code §846.0035(b) to comply with reserve requirements in both Insurance Code §846.154 and Insurance Code Chapter 421.

Agency Response. TDI agrees that MEWAs that provide a comprehensive health benefit plan must comply with the reserve requirements in both Insurance Code Chapter 421 and §846.154. Insurance Code Chapter 421 requires an insurer in Texas to maintain reserves in an amount estimated in the aggregate based on certain loss or claims data for which the insurer may be liable. Under Insurance Code §846.154, the amount of cash reserves recommended under Insurance Code §846.153(c)(2) may not be less than the greater of (I) 20% of the total contributions in the preceding plan year or (II) 20% of the total estimated contributions for the current plan year. Section 846.154 also states the standards for calculating the cash reserves required under Insurance Code Chapter 846. Insurance Code Chapter 421 and §846.154 may be read consistently and, as a result, a MEWA must comply with both provisions.

In response to this comment, TDI has modified the rule text in multiple sections to clarify that both Insurance Code Chapter 421 and §846.154 apply to MEWAs under Insurance Code §846.0035. In §7.1904(b)(13)(B)(i) and (ii) and §7.1912(a)(2)(B)(i) and (ii), TDI has modified the rule text to state that all MEWAs must comply with the reserve requirements in Insurance Code §846.154 and that MEWAs that provide a comprehensive health benefit plan must also comply with Insurance Code Chapter 421, in addition to those requirements in Insurance Code §846.154. TDI has also modified §7.1905(a)(10) and (11) to replace "or" with "and" between Insurance Code §846.154 and Insurance Code Chapter 421 to clarify that these MEWAs must comply with both requirements.

Comment. One commenter requests clarification on whether MEWAs that provide comprehensive health benefit plans under HB 290 must comply with 28 TAC §7.402, which requires certain carriers to file electronic versions of risk-based capital (RBC) reports and supplemental RBC forms with the National Association of Insurance Commissioners (NAIC). The commenter states that the reporting requirements under §7.402 should not apply because a MEWA is not an insurance company and does not file those documents with the NAIC. The commenter suggests that a MEWA could instead file the documents required under §7.402 with TDI directly.

Agency Response. TDI understands that MEWAs generally do not file the RBC reports and forms required under 28 TAC §7.402 with the NAIC. At this time, TDI will not require a MEWA to file the documentation required under §7.402 with TDI. However, a MEWA may file this or similar documentation with TDI if it so chooses. TDI will continue to monitor this issue to determine whether this or similar information is needed and will take appropriate action as necessary.

Comments on §7.1906. Application for Final Certificate of Authority.

Comment. One commenter suggests adding language in §7.1906(c) to clarify that a MEWA must comply with "any Insurance Code chapter provisions that apply to a MEWA that provides a comprehensive health benefit plan under Insurance Code §846.0035" before the commissioner will issue a final certificate of authority.

Agency Response. TDI agrees with the commenter and has changed the rule text as proposed in §7.1906(c) to clarify that the commissioner will issue a final certificate of authority to a MEWA only after examination, investigation, and determination that the requirements of Insurance Code Chapter 846, other applicable Insurance Code provisions, and the rules in Chapter 7, Subchapter S have been met.

Comments on §7.1907. Denial of Final Certificate of Authority and Extension of Initial Certificate of Authority.

Comment. One commenter expresses concern about the proposed language in §7.1907(e) that authorizes TDI to extend the deadline to correct a deficiency "as otherwise agreed to by the department." The commenter states that TDI lacks statutory authority for such an open-ended extension of the deadline and recommends TDI either remove §7.1907(e)(3) from the adoption order or cap the potential extension at not more than 40 days after the date the notice of deficiency is received.

Agency Response. TDI disagrees with the commenter's statement that TDI lacks statutory authority to work with a MEWA to ensure filed applications are complete, but has modified the rule text to clarify that TDI will consider a response to a notice of deficiency timely if the MEWA responds with all the information requested "within a reasonable time period as agreed to by the department based on the MEWA's circumstances." Under Insurance Code §846.056, a MEWA must apply for a final certificate of authority before the one-year term of the initial certificate of authority ends. TDI has found that providing flexibility in the timeframes for MEWAs to submit requested information to TDI is sometimes useful and believes that it has the authority to agree to reasonable extensions of time.

Comment. One commenter states that §7.1907(f) as proposed improperly expands Insurance Code §846.055 by allowing the extension of the initial certificate of authority to be made "at

the discretion of the commissioner on a determination that the MEWA is likely to meet the requirements of this subchapter within one year." The commenter suggests modifications to §7.1907(f) to more closely reflect Insurance Code §846.055 by removing the reference to commissioner discretion and adding clarification that the MEWA compliance with the subchapter must be based on the commissioner's determination that compliance will occur within the granted extension period.

Agency Response. TDI disagrees that §7.1907(f) as proposed improperly expands Insurance Code §846.055 because it permits the commissioner to extend the term of an initial certificate of authority for a period not to exceed one year if the commissioner determines that the MEWA is likely to meet the requirements for a final certificate of authority within that period. For clarity and consistency with Insurance Code §846.055, TDI has modified §7.1907(f) by deleting the statement "within one year" as proposed, and replaced it with the phrase "within the granted extension period" as suggested by the commenter.

Comments on §7.1910. Required Notice to Participants.

Comment. One commenter states that §7.1910(a) as proposed lists notices that a MEWA must provide to any employee covered by an employee welfare benefit plan in connection with the MEWA. The commenter notes that these notices are only required to be provided to a participating employee or former employee covered by the plan, appearing to suggest that the notices should also go to all plan participants. The commenter also notes that the rule does not reference the provision of any other notices required by the Insurance Code.

Agency Response. TDI declines to extend the notice requirement to all plan participants as the scope currently tracks the notice requirement of Insurance Code §846.254. TDI agrees that the rule is not intended to imply that other notices may not also be required. Accordingly, language has been added to clarify that the notices required in §7.1910 are in addition to any other notices required by law. TDI will monitor this issue to determine whether additional agency action is warranted.

Comment. One commenter recommends requiring a MEWA to provide standardized consumer disclosures regarding the comprehensive or non-comprehensive nature of the plan to lessen the potential consumer confusion related to the differences in covered benefits. The commenter suggests including specific disclosures that notify the consumer about such issues as covered benefits, preexisting-condition exclusions, and cost-sharing provisions under the specific plan.

Agency Response. While drafting the proposal, TDI considered requiring a consumer disclosure that outlined the differences in comprehensive health benefit plans and non-comprehensive health benefit plans. TDI declined to propose this requirement and declines to make this change in the adoption order because staff concluded that the requirement would be redundant. A MEWA is already subject to federal disclosure requirements under 29 United States Code §1022, 29 CFR §2520, and 45 CFR §147.200, as applicable. For example, a MEWA offering a group health plan (as defined in 45 CFR §146.145) must provide a summary plan description to participants and beneficiaries that includes information about coverage for drugs and medical tests, devices, and procedures; cost-sharing provisions; and other information about the plan. TDI will enforce this under §7.1904(b)(9) and (b)(19). It must also provide a summary of benefits and coverage that includes a description of the coverage, including cost-sharing. MEWA group health plans may not exclude preexisting conditions under 45 CFR §147.108. A MEWA offering a product other than a group health plan will generally have to meet the definition of an excepted benefit under 45 CFR §146.145 and will be required to provide different disclosures. For example, fixed indemnity products must provide the disclosure required by 45 CFR §146.145. Other than fixed indemnity, excepted benefit product coverages are so limited that TDI believes they will rarely be confused with comprehensive health plans.

Comment on §7.1917. Comprehensive Health Benefit Plan.

Comment. One commenter states that HB 290 expressly requires the commissioner to determine whether a plan provided by a MEWA is a "comprehensive health benefit plan." The commenter states that §7.1917 as proposed is insufficient to meet the statutory obligations under HB 290, which requires that the commissioner determine whether a plan is a "comprehensive health benefit plan." The commenter reasons that, because §7.1917 only authorizes the commissioner to review the sufficiency of the filing under §7.1917, if the commissioner determines that the filing is complete, the commissioner will have "determined" the plan is a comprehensive health benefit plan. The commenter recommends that TDI modify the rules in §7.1902 and §7.1917 to clarify that the commissioner must make the determination that a plan is a "comprehensive health benefit plan" under HB 290. The commenter also recommends that TDI describe the factors or processes the commissioner will use in making this determination.

Agency Response. TDI disagrees with the commenter's interpretation of HB 290 and declines to make the change to the rule text. TDI will review each MEWA filing according to its standard practice of reviewing plan or policy documents to determine whether all of the discrete federal and state requirements are met.

Comment. One commenter requests clarification on compliance requirements when a MEWA uses an admitted insurance carrier in Texas for its network, claims processing, and care management. The commenter asks whether TDI will automatically deem a MEWA in compliance with the requirements under Insurance Code §846.0035 if the admitted insurance carrier is in compliance with those requirements and has filed as such. Alternatively, the commenter asks whether the MEWA could file that the MEWA is using an admitted carrier and provide a letter from the carrier that indicates compliance with the provisions in Insurance Code §846.0035.

Agency Response. TDI expects MEWAs to comply with the reporting requirements in Insurance Code Chapter 846 and other provisions in the Insurance Code, as applicable, as well as the requirements in Chapter 7, Subchapter S. MEWAs are responsible for ensuring compliance with all the applicable requirements. A MEWA may work with a third-party administrator according to Insurance Code §846.303. If a MEWA has contracted with a third-party administrator that has previously made filings with TDI, the MEWA is encouraged to provide documentation that references the most recent filings for the applicable services being used by the MEWA. This information will help TDI expedite its review.

SUBCHAPTER S. MULTIPLE EMPLOYER WELFARE ARRANGEMENTS REQUIREMENTS FOR OBTAINING AND MAINTAINING CERTIFICATE OF AUTHORIZATION

STATUTORY AUTHORITY. The commissioner adopts amendments to 28 TAC §§7.1901, 7.1902, and 7.1904 - 7.1915, and new §7.1916 and §7.1917 under Insurance Code §§846.0035(a), 846.0035(b), 846.0035(c), 846.005(a), 846.052(b)(5), 1301.007, 1451.254, 1467.003, 4201.003, and 36.001.

Insurance Code §846.0035(a) authorizes the commissioner to prescribe the manner by which a MEWA may elect to be bound by Insurance Code §846.0035.

Insurance Code §846.0035(b) authorizes the commissioner to determine when a MEWA provides a comprehensive health benefit plan and is subject to additional requirements.

Insurance Code §846.0035(c) authorizes the commissioner to determine whether a MEWA is structured in the manner of a preferred provider benefit plan or an exclusive provider benefit plan.

Insurance Code §846.005(a) provides that the commissioner may, on notice and opportunity for all interested persons to be heard, adopt rules and issue orders reasonably necessary to augment and implement Insurance Code Chapter 846.

Insurance Code §846.052(b)(5) authorizes the commissioner to determine whether a MEWA has demonstrated that it is in compliance with all applicable federal and state laws.

Insurance Code §1301.007 directs the commissioner to adopt rules as necessary to implement Insurance Code Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to Texas residents.

Insurance Code §1451.254 directs the commissioner to adopt rules necessary to implement Insurance Code Chapter 1451, Subchapter F.

Insurance Code §1467.003 directs the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §4201.003 authorizes the commissioner to adopt rules to implement Insurance Code Chapter 4201.

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

§7.1902. Definitions.

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

(1) Business plan--The comprehensive, detailed plan by which the multiple employer welfare arrangement conducts or proposes to conduct its business.

(2) Comprehensive health benefit plan--Any health benefit plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness. The term does not include:

(A) accident-only or disability income insurance coverage, or a combination of accident-only and disability income insurance coverage;

(B) credit-only insurance coverage;

(C) disability insurance;

(D) coverage for a specified disease or illness;

(E) Medicare services under a federal contract;

(F) Medicare supplement and Medicare Select policies regulated in accordance with federal law;

(G) long-term care coverage or benefits, nursing home care coverage or benefits, home health care coverage or benefits, community-based care coverage or benefits, or any combination of those coverages or benefits;

(H) coverage that provides limited-scope dental or vision benefits;

(I) coverage provided by a single service health maintenance organization;

(J) workers' compensation insurance coverage or similar insurance coverage;

(K) coverage provided through a jointly managed trust authorized under 29 United States Code §141 et seq. that contains a plan of benefits for employees that is negotiated in a collective bargaining agreement governing wages, hours, and working conditions of the employees that is authorized under 29 United States Code §157;

(L) hospital indemnity or other fixed indemnity insurance coverage;

(M) reinsurance contracts issued on a stop-loss, quota-share, or similar basis;

(N) short-term major medical contracts;

(O) liability insurance coverage, including general liability insurance coverage and automobile liability insurance coverage;

(P) coverage issued as a supplement to liability insurance coverage;

(Q) automobile medical payment insurance coverage;

(R) coverage for on-site medical clinics;

(S) coverage that provides other limited benefits specified by federal regulations; or

(T) other coverage that is:

(i) similar to the coverage described by subparagraphs (A) - (S) of this paragraph under which benefits for medical care are secondary or incidental to other coverage benefits; and

(ii) specified in federal regulations.

(3) Department--Texas Department of Insurance.

(4) Employee welfare benefit plan--Has the meaning assigned by Insurance Code §846.001, concerning Definitions.

(5) Multiple employer welfare arrangement--An employee welfare benefit plan, or any other arrangement that is established or maintained for the purpose of offering or providing any benefit described in Insurance Code §846.201, and restated in §7.1909 of this title (relating to Benefits Allowed To Be Provided by Multiple Employer Welfare Arrangements), to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, provided that the arrangement meets either or both of the following criteria:

(A) one or more of the employer members in the multiple employer welfare arrangement is either domiciled in this state or has its principal headquarters or principal administrative office in this state; or

(B) the multiple employer welfare arrangement solicits an employer that is domiciled in this state or has its principal headquarters or principal administrative office in this state.

§7.1904. Application for Initial Certificate of Authority.

(a) Any person seeking to establish a multiple employer welfare arrangement (MEWA) that is not fully insured, as that term is defined in Insurance Code §846.002(a), concerning Applicability of Chapter, must submit a complete application for initial certificate of authority to the commissioner and may use the MEWA forms accessible on the department's website at www.tdi.texas.gov/forms as a resource to comply.

(b) In order to be considered complete, the application must contain the following items:

(1) a name application form signed and dated by an authorized representative of the applicant that includes:

(A) the name of the MEWA; the physical address where the MEWA is incorporated; contact information, including telephone number and email address; and title or relationship of each organizer to the proposed MEWA, along with the same information about any affiliated organizations;

(B) a statement that the applicant is seeking to reserve a name as a MEWA and whether the purpose of the application is to change the name of an existing MEWA, form a new MEWA, or seek to be admitted to the State of Texas as a foreign MEWA;

(C) a list of all the states where the MEWA holds a certificate of authority or license, whether the MEWA is fully insured or not; and

(D) a list of all the states where the MEWA holds a certificate of authority or license under an assumed name, whether the MEWA is fully insured or not;

(2) a notarized affidavit signed by the president, secretary, and treasurer, or all of the trustees, that contains:

(A) information about the MEWA, including:

(i) the MEWA's full name;

(ii) the physical address of the MEWA's home office;

(iii) the employer identification number;

(iv) the point of contact's name and contact information; and

(v) the association's seal, if applying as an association. If not applying as an association, a notation that the affiant is a group of employers;

(B) information about the officers, directors, and trustees, as applicable, including:

(i) the full name, social security number, and appointment or election date of the president, secretary, and treasurer; and

(ii) the full name, social security number, and appointment or election date of any other directors or trustees; and

(C) a statement that affirms the following: "We hereby apply for an initial Certificate of Authority authorizing {MEWA name} to act as a Multiple Employer Welfare Arrangement in the State of Texas for a period of twelve (12) months. We know of no reason under the provisions of the Texas Insurance Code why {MEWA name} is not entitled to such a Certificate of Authority";

(3) a biographical affidavit that is completed and filed for each trustee, officer, director, or administrator of the MEWA that includes the following information:

(A) the affiant's current legal name and any names the individual may have used in the past, social security number, date of birth, citizenship(s), and current mailing addresses, phone numbers, and email addresses;

(B) the name and address of the MEWA;

(C) the affiant's current or proposed position or title at the MEWA;

(D) information regarding the affiant's education, memberships in professional organizations, and any professional, occupational, or vocational licenses held (current and past), including a statement whether any were refused, suspended, or revoked in the last 10 years;

(E) the affiant's employment history for the previous 10 years; and

(F) the affiant's fidelity bond coverage history, criminal history, any bankruptcy history, lawsuit history in the past five years, and any previous or current ownership or control of entities involved in the business of insurance, including a statement whether any became insolvent or were placed under supervision or in receivership, rehabilitation, liquidation, or conservatorship, or had their certificate of authority suspended or revoked;

(4) a notarized service of process form signed by the president and secretary or the trustees that designates the commissioner as the MEWA's resident agent for purposes of service of process and includes the following:

(A) the mailing address of the MEWA;

(B) a statement substantially similar to the following: "{MEWA Name} hereby appoints the commissioner of insurance, located at 1601 Congress Ave., Austin, Texas 78701, as its resident agent for service of process under Texas Insurance Code Section 846.059. All process or pleadings in any civil suit or action against {MEWA Name} may be served on the commissioner as though served on {MEWA Name} directly. {MEWA Name} waives all claims of error by reason of this appointment and admits or agrees that this appointment of the commissioner of insurance as its resident agent for service of process will be taken and held as valid and sufficient as though served directly on {MEWA Name}. This appointment will continue for as long as any liability remains outstanding against {MEWA Name} pertaining to any such matters."; and

(C) the MEWA's seal, as applicable;

(5) a certified copy of the articles of incorporation, if applicable;

(6) a certified copy of the bylaws, constitution, or rules or regulations establishing and operating the MEWA;

(7) trust agreements created in connection with the MEWA, which must be signed by all trustees;

(8) a welfare benefit plan document, including documentation or instruments describing the rights and obligations of employers, employees, and beneficiaries with respect to the MEWA;

(9) a summary plan description, consistent with 29 United States Code §1022, that:

(A) is written in a manner calculated to be understood by the average plan participant and is sufficiently accurate and com-

prehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan; and

(B) contains the following information:

(i) the name and type of administration of the plan;

(ii) the name and address of the administrator;

(iii) the names and addresses of any trustee or trustees if they are persons different from the administrator;

(iv) the plan requirements with respect to eligibility for participation and benefits;

(v) a description of provisions relating to nonforfeitable benefits if any are included in the plan;

(vi) a description of circumstances that may result in disqualification, ineligibility, or denial or loss of benefits;

(vii) the source of financing of the plan;

(viii) the identity of any organization through which benefits are provided;

(ix) the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis;

(x) the procedures to be followed in presenting claims for benefits under the plan;

(xi) remedies available under the plan for the redress of claims that are denied in whole or in part; and

(xii) a statement of guaranty fund nonparticipation, if applicable, in the same form as set out for insurers and health maintenance organizations in §1.1001 of this title (relating to Disclosure of Guaranty Fund Nonparticipation);

(10) financial statements, including:

(A) a current financial statement. If the MEWA is already in business, the financial statement must include an annual balance sheet and income statement, developed on generally accepted accounting principles, for the past five years, or since the inception of the MEWA, whichever time period is shorter;

(B) a projected balance sheet for a minimum of three years on a quarterly basis, including assumptions used in producing projections. The projected balance sheet must be developed according to generally accepted accounting principles;

(C) a projected income statement, providing income forecasts for a minimum interval of three years, detailed on a quarterly basis. The projected income statement must be developed according to generally accepted accounting principles;

(D) a projected cash flow analysis on a quarterly basis, for a minimum of three years. Line by line documentation of anticipated cash inflow and outflow by specific account type must be submitted;

(E) a statement of the proposed initial cash and cash reserves summary. This statement must include all items of funding, including but not limited to loan receipts, loan repayments, and stock sales. The statement must include a description of the source and terms of the funding; and

(F) if an existing MEWA, a copy of its Federal Form 5500 for the past five years, or since the inception of the MEWA, whichever time period is shorter;

(11) a copy of the fidelity bond issued in the name of the MEWA protecting against acts of fraud and dishonesty by its trustees, directors, officers, employees, administrator, or other individuals responsible for servicing the employee welfare benefit plan, including, for MEWAs that are not bona fide associations or groups under ERISA, those individuals with access to funds held by the MEWA on behalf of separate employee welfare benefit plans established or maintained by the MEWA's employer-members. Such bond must be in an amount equal to the greater of 10% of the premiums and contributions received by the MEWA, or 10% of the benefits paid, during the preceding calendar year, with a minimum of $10,000 and a maximum of $500,000. No additional bond will be required of a third-party administrator licensed to engage in business in this state;

(12) a business plan that includes the following six major areas.

(A) Current or proposed operations must be outlined with information by the applicant identifying the number of employers in the group currently participating or proposed to participate in the MEWA. The outline must also include the number of participating units. To the extent such information is available, it also must include the number of dependents covered or to be covered by the MEWA. A specific list of the benefits being provided or proposed to be provided must also be included.

(B) Specific information about individuals providing or proposed to provide management services is required. The applicant must indicate whether each trustee is an owner, partner, officer, or director, and/or employee of a participating employer or is committed to participate in the MEWA. In addition, the applicant must provide the name and address of the employer represented by each trustee and by each officer and provide the association of the trustee or officer with such employer. The applicant must list the individuals responsible for managing or handling funds or assets of the MEWA.

(C) With respect to administration of the present or proposed plan, the applicant must give the names and qualifications of individuals or the third-party administrator responsible for or proposed to be responsible for servicing the program of the MEWA. If a third-party administrator is to service the plan, a copy of the third-party administrator's Texas license must be attached. In addition, a copy of the agreement between the MEWA and the third-party administrator must be submitted, signed by the third-party administrator and trustees or directors of the MEWA.

(D) The applicant must provide documentation that the MEWA has provided or will provide a sufficient number of competent persons to service its program in the areas of claims adjusting and underwriting. The applicant must also describe the present or proposed plan to service billings, claims, and underwriting. The criteria for underwriting must be actuarially justified.

(E) The applicant must provide a specific outline and description of the MEWA's marketing efforts. The applicant must list the names of all persons directly employed or proposed to be employed by the arrangement who solicit participants or adjust claims, indicating the qualifications and credentials of such individuals and whether such persons hold any license issued by the department. The applicant must specify any such licenses by type.

(F) The applicant must provide documentation showing that a procedure has been established for handling claims for benefits in the event of dissolution of the MEWA;

(13) subject to Insurance Code §846.157(b), concerning Renewal of Certificate; Additional Actuarial Review, an actuarial opinion prepared by an actuary who is not an employee of the MEWA,

an employee of the MEWA's employer-members, an affiliate of the MEWA, or an affiliate of the MEWA's employer-members, or an employee of an affiliate of the MEWA; and who is a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, or an enrolled actuary under the Employee Retirement Income Security Act of 1974 (29 United States Code §1241 and §1242). The actuarial opinion must include the following:

(A) a description of the actuarial soundness of the MEWA, including any recommended actions that the MEWA should take to improve its actuarial soundness;

(B) the recommended amount of cash reserves the MEWA should maintain.

(i) For all MEWAs, the recommended amount may not be less than the greater of 20% of the total contributions in the preceding plan year or 20% of the total estimated contributions for the current plan year; cash reserves must be calculated with proper actuarial regard for known claims, paid and outstanding, a history of incurred but not reported claims, claims handling expenses, unearned premium, an estimate for bad debts, a trend factor, and a margin for error (cash reserves required by Insurance Code §846.154, concerning Cash Reserve Requirements, must be maintained in cash or federally guaranteed obligations of less than five-year maturity that have a fixed or recoverable principal amount, or such other investments as the commissioner may authorize by rule); and

(ii) For a MEWA that provides a comprehensive health benefit plan under Insurance Code §846.0035, concerning Applicability of Certain Laws to Associations Providing Health Benefits, the MEWA must also comply with Insurance Code Chapter 421, concerning Reserves in General.

(C) the recommended level of specific and aggregate stop-loss insurance the MEWA should maintain;

(14) if the MEWA is in existence at the time of its application, annual reports meeting the substantive requirements of 29 United States Code §1023 and §1024 must be filed. To the extent that such annual reporting requirements are not otherwise met by existing MEWAs when complying with other provisions of this subchapter, a filing under this paragraph must be made, and must include, at a minimum:

(A) the administrator's report of essential information for the most recent year ending, detailing the size and nature of the plan, and the number of participating employees in the plan;

(B) the statement from any insurance company, insurance service, or other similar organization that sells or guarantees plan benefits. The statement must detail:

(i) the premium rate or subscription charge and the total of such premiums or subscription charges in relation to the approximate number of persons covered by each class of benefits; and

(ii) the total amount of premiums received, approximate number of persons covered by each class of benefits, and total claims paid by such company, service, and other organization; and

(C) the published summary plan description and annual report to participants and beneficiaries of the plan;

(15) documentation indicating that the MEWA has applications from not less than five employers and will provide similar benefits for not less than 200 separate participating employees, and that the annual gross premiums of or contributions to the plan will be not less than $20,000 for a vision-benefit-only plan, $75,000 for a dental-benefits-only plan, and $200,000 for all other plans;

(16) for a MEWA that is formed according to Insurance Code §846.053(b)(2), concerning Eligibility Requirements for Initial Certificate of Authority, documentation demonstrating that the employers in the MEWA applicant each have a principal place of business in the same region that does not exceed the boundaries of this state or the boundaries of a metropolitan statistical area designated by the United States Office of Management and Budget;

(17) documentation that the MEWA possesses a written commitment, binder, or policy for stop-loss insurance issued by an insurer authorized to do business in this state that provides:

(A) at least 30 days' notice to the commissioner of any cancellation or nonrenewal of coverage; and

(B) both specific and aggregate coverage with an aggregate retention of no more than 125% of the amount of expected claims for the subsequent plan year and the specific retention amount determined by the actuarial report required by Insurance Code §846.153, concerning Required Filings, and paragraph (13) of this subsection;

(18) documentation demonstrating that the MEWA is in compliance with all applicable federal and state laws, including, at a minimum, the following:

(A) for all plans sponsored by the applicant, whether operating in Texas or in any other state, a list of and access to all reports for the last five years filed with the United States Department of Labor in compliance with the Employee Retirement Income Security Act of 1974, 29 United States Code §§1021(g), 1023, and 1024;

(B) if the MEWA is an employee welfare benefit plan for purposes of the Employee Retirement Income Security Act of 1974 (29 United States Code §1001 et seq.), either:

(i) an advisory opinion from the United States Department of Labor that is no more than three years old recognizing the employer group or association as a bona fide employer association or group if the relevant MEWA structure addressed by the advisory opinion has not changed and will not change after licensure; or

(ii) an opinion from an attorney attesting that the employer group or association as it will be structured after licensure qualifies as a bona fide employer association or group for purposes of the Employee Retirement Income Security Act of 1974 (29 United States Code §1001 et seq.). An attorney attestation must adequately explain how and why the employer group or association meets all of the factors to be a bona fide employer association or group, based on the facts and circumstances of the employer group's or association's governance and operations during the 12 months immediately preceding submission of the application, and on how the MEWA will be structured after licensure, with explicit references to relevant language drawn from the employer group's or association's bylaws, trust agreement, or other organizational documents, which must be submitted to the department with the attorney's attestation; and

(C) for each plan that will be provided by the applicant, an opinion from an attorney attesting to the fact that the plan is in compliance with all applicable federal and state laws. The opinion must adequately explain how each plan complies with the Employee Retirement Income Security Act of 1974 (29 United States Code §1001 et seq.) and the Patient Protection and Affordable Care Act (42 United States Code §18001 et seq.), including how each plan complies with federal requirements applicable to large group, small group, or individual markets, as applicable; and

(19) if the MEWA will provide a comprehensive health benefit plan, the MEWA must provide additional information in ac-

cordance with §7.1917 of this title, concerning Comprehensive Health Benefit Plans.

(c) On finding of good cause, the commissioner may order an actuarial review of a MEWA in addition to the actuarial opinion required by Insurance Code §846.153. The cost of any such additional actuarial review must be paid by the MEWA.

(d) Upon application of a MEWA, the commissioner may waive or reduce the requirement for aggregate stop-loss coverage and the amount of reserves required by Insurance Code §846.154, if it is determined that the interests of the participating employers and employees are adequately protected.

§7.1905. Commissioner Review of Application; Issuance of Initial Certificate of Authority.

(a) The commissioner will promptly review the documentation submitted by the applicant and may conduct any necessary investigation and examine under oath any persons interested in or connected with the multiple employer welfare arrangement (MEWA). Within 60 days of the filing of a completed application, the commissioner will issue an initial certificate of authority, which is a temporary certificate of authority for a term of one year, to the MEWA, provided that all of the following conditions have been met:

(1) the employers in the MEWA:

(A) are members of an association or group of five or more businesses that are the same trade or industry, including closely related businesses that provide support, services, or supplies primarily to that trade or industry; or

(B) for a MEWA that is formed based under Insurance Code §846.053(b)(2), concerning Eligibility Requirements for Initial Certificate of Authority, each has a principal place of business in the same region that does not exceed the boundaries of this state or the boundaries of a metropolitan statistical area designated by the United States Office of Management and Budget;

(2) if the applicant is an association, that the association in the MEWA is engaged in substantial activity for its members other than sponsorship of an employee welfare benefit plan;

(3) if the applicant is an association and Insurance Code §846.0035, concerning Applicability of Certain Laws to Association Providing Health Benefits, does not apply to the MEWA, that the association in the MEWA has been in existence for a period of not less than two years before engaging in any activities relating to the provision of employer health benefits to its members;

(4) the employee welfare plan of the association or group in the MEWA is controlled and sponsored directly by participating employers, participating employees, or both;

(5) the association or group of employers in the MEWA is a not-for-profit organization;

(6) the MEWA has within its own organization adequate facilities and competent personnel, as determined by the commissioner, to service the employee benefit plan or has contracted with a third-party administrator that holds a current certificate of authority to engage in business in the State of Texas;

(7) the MEWA has applications from not less than five employers and will provide similar benefits for not less than 200 separate participating employees, and the annual gross premiums or contributions to the plan will be not less than $20,000 for a plan that provides only vision benefits, $75,000 for a plan that provides only dental benefits, and $200,000 for all other plans;

(8) the MEWA possesses a written commitment, binder, or policy for stop-loss insurance issued by an insurer that has a certificate of authority to engage in business in the State of Texas that provides:

(A) at least 30 days' notice to the commissioner of any cancellation or nonrenewal of coverage;

(B) both specific and aggregate coverage with an aggregate retention of no more than 125% of the amount of expected claims for the next plan year and a specific retention amount annually determined by the actuarial report required by Insurance Code §846.153(a)(2), concerning Required Filings, and verified by the signature of the actuary who prepared the report; and

(C) both the specific and aggregate coverage will require all claims to be submitted within 90 days after the claim is incurred and provide a 12-month claims incurred period and a 15-month paid claims period for each policy year;

(9) the contributions must be set to fund at least 100% of the aggregate retention plus all other costs of the MEWA;

(10) if the reserves required by Insurance Code §846.154, concerning Cash Reserve Requirements, exceed the greater of 40% of the total contributions for the preceding plan year or 40% of the total contributions expected for the current plan year, the contributions may be reduced to fund less than 100% of the aggregate retention plus all other costs of the MEWA, but in no event less than the level of contributions necessary to fund the minimum reserves required under Insurance Code §846.154, and Insurance Code Chapter 421, concerning Reserves in General, for comprehensive health benefit plans;

(11) the minimum reserves required by Insurance Code §846.154, and Insurance Code Chapter 421 for comprehensive health benefit plans have been established or will be established before the final certificate of authority is issued;

(12) the MEWA has established a procedure for handling claims for benefits in the event of dissolution of the MEWA;

(13) the MEWA has obtained the required fidelity bond;

(14) the MEWA has submitted its plan document or any instrument describing the rights and obligations of the employers, employees, and beneficiaries with respect to the MEWA;

(15) the MEWA has submitted a summary plan description and has filed for review any notifications such as an identification card, policy, or contract, in connection with the employee welfare benefit plan. These notifications include any of the disclosures in the following:

(A) that individuals covered by the plan are only partially insured;

(B) that in the event the plan or the MEWA does not ultimately pay medical expenses that are eligible for payment under the plan for any reason, the participating employer or its participating employee covered by the plan may be liable for those expenses;

(C) that, if applicable, the plan does not participate in the guaranty fund; such disclosure must be provided in the same notice format required of insurers and health maintenance organizations in §1.1001 of this title (relating to Disclosure of Guaranty Fund Nonparticipation); and

(D) the toll-free telephone number and website for the department as required under Insurance Code §521.005, concerning Notice to Accompany Policy; and

(16) for a MEWA that will provide a comprehensive health benefit plan, the MEWA has submitted documentation that adequately

demonstrates compliance with applicable requirements, as specified in §7.1917 of this title (relating to Comprehensive Health Benefit Plans).

(b) Unless excepted by statute, a MEWA may commence doing business in this state only after it receives its initial certificate of authority.

(c) The MEWA must appoint the commissioner of insurance as its registered agent for service of process, by filing the form as described in §7.1904(b)(4) of this title (relating to Application for Initial Certificate of Authority).

§7.1906. Application for Final Certificate of Authority.

(a) A multiple employer welfare arrangement (MEWA) that has received its initial certificate of authority must apply for a final certificate of authority no later than one year after the issuance of its initial certificate of authority. The MEWA must submit a complete application for final certificate of authority to the commissioner and may use the MEWA forms accessible on the department's website at www.tdi.texas.gov/forms as a resource to comply.

(b) The application must include only the following information:

(1) the names and addresses of:

(A) the association or group of employers sponsoring the MEWA;

(B) as applicable, the members of the board of trustees or directors of the MEWA; and

(C) at least five employers, if the arrangement is not an association, whose information will be retained by the commissioner as confidential;

(2) evidence that the fidelity bond requirements have been met;

(3) copies of all plan documents and agreements with service providers, which will be retained by the commissioner as confidential. (Indicate on what pages the specific benefits are listed);

(4) a funding report containing:

(A) a statement certified by the board of trustees or directors, as applicable, and an actuarial opinion that all applicable requirements of Insurance Code Chapter 846, concerning Multiple Employer Welfare Arrangements, have been met;

(B) an actuarial opinion that describes the extent to which contributions or premium rates:

(i) are not excessive;

(ii) are not unfairly discriminatory; and

(iii) are adequate to provide for the payment of all obligations and the maintenance of required cash reserves and surplus of the MEWA;

(C) a certified statement of the current value of the assets and liabilities accumulated by the MEWA (unless the application for final certificate of authority is filed 90 days or later following the close of the fiscal year for the MEWA, in which case the financial statement must be an audited statement), and a projection of the assets, liabilities, income, and expenses of the MEWA for the next 12-month period and that reflects that the MEWA has maintained adequate cash reserves; and

(D) a statement of the costs of coverage to be charged, including an itemization of amounts for administration, reserves, and other expenses associated with operation of the MEWA; and

(5) a notarized statement signed by an authorized director, officer, or trustee that affirms the following: "I know of no reason under the provisions of the Texas Insurance Code why {MEWA Name} is not entitled to a final certificate of authority."

(c) After examination, investigation, and determination that all the requirements of Insurance Code Chapter 846, other applicable Insurance Code provisions, and this subchapter have been met, the commissioner will issue a final certificate of authority to the MEWA.

§7.1907. Denial of Final Certificate of Authority and Extension of Initial Certificate of Authority.

(a) If the commissioner refuses to grant a final certificate of authority to an applicant that fails to meet the requirements of §7.1906 of this title (relating to Application for Final Certificate of Authority), notice of refusal will be in writing. Such notice will set forth the basis for the refusal, and constitutes 30 days' advance notice of revocation of the initial certificate of authority.

(b) If the applicant submits a written request for a hearing within 30 days after the notice of refusal to grant a final certificate of authority is sent, revocation of the initial certificate of authority will be temporarily stayed. The commissioner will promptly conduct a hearing in which the applicant will be given an opportunity to show compliance with the requirements of this subchapter.

(c) The term of the multiple employer welfare arrangement's (MEWA's) initial certificate of authority does not expire during the department's review of a timely filed application for a final certificate of authority.

(d) If a timely filed application is not complete, the MEWA must timely respond to a notice of deficiency from the department. If a MEWA fails to timely respond to a notice of deficiency, the MEWA's initial certificate of authority expires five days after the date the response was due or on the one-year anniversary of the date that the MEWA's initial certificate of authority was issued, whichever occurs later.

(e) A response to a notice of deficiency is timely if the response provides all information requested by the department and is made in writing:

(1) not later than the 15th day after the date the notice of deficiency is received;

(2) not later than the 25th day if the department receives written notice from the MEWA that additional time is required to respond to the inquiry; or

(3) within a reasonable time period as agreed to by the department based on the MEWA's circumstances.

(f) Before the end of the one-year term of its initial certificate of authority, a MEWA may request an extension of its initial certificate of authority. The request must be in writing and must explain in detail the basis for an extension. The initial certificate of authority may be extended for up to one year at the discretion of the commissioner on a determination that the MEWA is likely to meet the requirements of this subchapter within the granted extension period. No more than one extension of the initial certificate of authority will be granted, regardless of the length of time for which an extension was granted under this subsection.

§7.1910. Required Notice to Participants.

(a) In addition to any other notices required by law, a multiple employer welfare arrangement (MEWA), in connection with an employee welfare benefit plan, must provide to each participating employee or former employee covered by the plan a written notice at the

time the coverage of such participating employee or former employee becomes effective. The written notice must contain, at a minimum, the following:

(1) that individuals covered by the plan are only partially insured;

(2) that in the event the plan or the MEWA does not ultimately pay medical expenses that are eligible for payment under the plan for any reason, the participating employer or its participating employee covered by the plan may be liable for those expenses;

(3) that, if applicable, the plan does not participate in the guaranty fund; such disclosure must be provided in the same notice format required of insurers and health maintenance organizations in §1.1001 of this title (relating to Disclosure of Guaranty Fund Nonparticipation);

(4) the toll-free telephone number and website for the department as required under Insurance Code §521.005, concerning Notice to Accompany Policy; and

(5) that a copy of the summary plan description may be obtained from the plan administrator, employer, or trustee, as applicable.

(b) The notice must also briefly explain the types of information in the summary plan description.

§7.1912. Filings by Multiple Employer Welfare Arrangements; Report of Cash Reserves; Approval by Commissioner; Additional Actuarial Review.

(a) Each multiple employer welfare arrangement (MEWA) transacting business in this state must file annually with the commissioner statements and reports described as follows:

(1) within 90 days of the end of the MEWA's fiscal year, financial statements audited by a certified public accountant; and

(2) within 90 days of the end of the MEWA's fiscal year, an actuarial opinion prepared and certified by an actuary who is not an employee of the MEWA, an employee of the MEWA's employer-members, an affiliate of the MEWA, or an affiliate of the MEWA's employer-member, or an employee of an affiliate of the MEWA; and who is a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, or an enrolled actuary under the Employee Retirement Income Security Act of 1974 (29 United States Code §1241 and §1242). The actuarial opinion must include:

(A) a description of the actuarial soundness of the MEWA, including any recommended actions that the MEWA should take to improve its actuarial soundness;

(B) the recommended amount of cash reserves the MEWA should maintain, as follows:

(i) for all MEWAs, the recommended amount may not be less than the greater of 20% of the total contributions in the preceding plan year or 20% of the total estimated contributions for the current plan year; and

(ii) for a MEWA that provides a comprehensive health benefit plan under Insurance Code §846.0035, concerning Applicability of Certain Laws to Associations Providing Health Benefits, the MEWA must also comply with Insurance Code Chapter 421, concerning Reserves in General;

(C) a calculation of cash reserves with proper actuarial regard for known claims, paid and outstanding, a history of incurred by not reported claims, claims handling expenses, unearned premium, an estimate for bad debts, a trend factor, and a margin for error; and

(D) the recommended level of specific and aggregate stop-loss insurance the MEWA should maintain.

(b) The cash reserves required by Insurance Code Chapter 846, concerning Multiple Employer Welfare Arrangements, and this subchapter must be maintained in cash or federally guaranteed obligations of less than five-year maturity that have a fixed or recoverable principal amount or such other investments as the commissioner has authorized by rule.

(c) The commissioner will review the statements and reports required by subsection (a) of this section. The commissioner will automatically renew a MEWA's certificate of authority unless the commissioner finds that the MEWA does not meet the requirements of Insurance Code Chapter 846, and this subchapter.

(d) On a finding of good cause, the commissioner may order an actuarial review of a MEWA in addition to the actuarial opinion required by Insurance Code §846.153(a)(2), concerning Required Filings. The cost of any such additional actuarial review must be paid by the MEWA.

(e) A MEWA must file updated information within 30 days when a material change occurs to information provided in the application for an initial or final certificate of authority according to the requirements of Insurance Code Chapter 846, concerning Multiple Employer Welfare Arrangements, and this subchapter.

§7.1917. Comprehensive Health Benefit Plans.

(a) This section applies only to a multiple employer welfare arrangement (MEWA) that offers or seeks to offer a comprehensive health benefit plan and that:

(1) was issued an initial certificate of authority under §846.054, concerning Issuance of Initial Certificate of Authority, on or after January 1, 2024; or

(2) elects to be bound by Insurance Code §846.0035, concerning Applicability of Certain Laws to Association Providing Health Benefits, under §7.1916 of this title (relating to Election for the Application of Certain Laws).

(b) The MEWA must submit a form signed and dated by an authorized officer or trustee to the department that includes the following:

(1) a statement that is substantially similar to the following: "This document is being submitted in accordance with 28 Texas Administrative Code §7.1917. {MEWA Name} will provide a comprehensive health benefit plan as defined by 28 Texas Administrative Code §7.1902"; and

(2) if the comprehensive health benefit plan is not structured as a preferred provider benefit plan or an exclusive provider benefit plan as defined in Insurance Code §1301.001, concerning Definitions, a description of the health care provider and benefit structure of the plan and an explanation of how it does not qualify as a preferred provider benefit plan or an exclusive provider benefit plan.

(c) In addition to the form required in subsection (b) of this section, the MEWA must submit the following:

(1) a detailed compliance plan addressing the following requirements:

(A) Insurance Code Chapter 421, concerning Reserves in General;

(B) Insurance Code Chapter 422, concerning Asset Protection Act;

(C) Insurance Code Chapter 1451, Subchapter C, concerning Selection of Practitioners; Subchapter F, concerning Access to Obstetrical or Gynecological Care; and Subchapter K, concerning Health Care Provider Directories; and

(D) Insurance Code Chapter 4201, concerning Utilization Review Agents;

(2) if the MEWA provides a comprehensive health benefit plan that is structured in the manner of a preferred provider benefit plan or an exclusive provider benefit plan as defined in Insurance Code §1301.001, concerning Definitions, a detailed compliance plan addressing the following requirements:

(A) Insurance Code Chapter 1301, concerning Preferred Provider Plans; and

(B) Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution; and

(3) for each comprehensive health benefit plan that will be sponsored by the MEWA, an opinion from an attorney attesting to the fact that the plan is in compliance with all applicable federal and state laws. The opinion must adequately explain how each plan complies with the Employee Retirement Income Security Act of 1974 (29 United States Code §1001 et seq.) and the Patient Protection and Affordable Care Act (42 United States Code §18001 et seq.), including how each plan complies with federal requirements applicable to large group, small group, or individual markets, as applicable.

(d) A MEWA may use the MEWA forms accessible on the department's website at www.tdi.texas.gov/forms as a resource to comply with the requirements in subsections (b) and (c) of this section.

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404899
Jessica Barta
General Counsel
Texas Department of Insurance
Effective date: November 6, 2024
Proposal publication date: May 3, 2024
For further information, please call: (512) 676-6555

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SUBCHAPTER S. MULTIPLE-EMPLOYER WELFARE ARRANGEMENTS REQUIREMENTS FOR OBTAINING AND MAINTAINING CERTIFICATE OF AUTHORIZATION

28 TAC §7.1903

STATUTORY AUTHORITY. The commissioner adopts the repeal of §7.1903 under Insurance Code §846.005(a) and §36.001.

Insurance Code §846.005(a) provides that the commissioner may, on notice and opportunity for all interested persons to be heard, adopt rules and issue orders reasonably necessary to augment and implement Insurance Code Chapter 846.

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

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

Filed with the Office of the Secretary of State on October 17, 2024.

TRD-202404898
Jessica Barta
General Counsel
Texas Department of Insurance
Effective date: November 6, 2024
Proposal publication date: May 3, 2024
For further information, please call: (512) 676-6555

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.36

The General Land Office (GLO) adopts amendments to 31 Texas Administrative Code (TAC) §15.36, relating to Certification Status of the City of Galveston Dune Protection and Beach Access Plan (Plan), with changes to the text of the Rule. The GLO adopts amendments to subsection 15.36(d) and new section 15.36(e) to certify the amendments to the Plan as consistent with state law.

The rule amendment was published in the June 7, 2024, issue of the *Texas Register* (49 TexReg 4021) and will be republished.

Copies of the City's Plan can be obtained by contacting the City of Galveston Department of Development Services at 3015 Market St, Galveston, Texas 77550, or the GLO's Archives and Records Division, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, (512) 463-5277.

BACKGROUND AND JUSTIFICATION

On March 21, 2024, the Galveston City Council passed Resolution No. 24-012, which authorized the City Manager to submit proposed amendments to the City's Plan to the GLO for certification. The amendments to the City's Plan were submitted to the GLO with proposed changes shown in redline, which included adopting a variance for the use of reinforced concrete in the area within 200 feet from the line of vegetation for a certain property partially behind the seawall, prohibiting vehicular beach access at Access Point 7 -- Sunny Beach Subdivision, reducing the size of the Restricted Use Area (RUA) at Access Point 1(C) by 1,000 linear feet, adding an ADA use area at Access Point 2 and additional vehicular beach access areas at Access Point 6 and Access Point 13, updating the Beach Access and Parking Plan in Appendix A, and modifications to the Beach Access Maps in Exhibit C. The document submitted to the GLO by the

City included proposed changes to the Plan previously adopted in City Ordinance Numbers 23-030, 23-038, 23-039, and 23-071.

Some, but not all of the changes were later formally adopted as amendments to the City's Plan by City Council on October 2, 2024 in Ordinance No. 24-059, with changes in response to public comments. The amended Plan formally adopted by City Council did not include the reduction of the RUA by 1,000 linear feet, the addition of the new ADA-only vehicular beach area at AP 2, or the additional vehicular beach area at AP 6.

The City is a coastal community in Galveston County, located on Galveston Island and bordering West Bay, Galveston Bay and the Gulf of Mexico. The City's Dune Protection and Beach Access Plan was first adopted on August 12, 1993, and most recently amended to adopt a Beach User Fee (BUF) increase at Seawall Beach Urban Park, which was conditionally certified by the GLO as consistent with state law effective March 4, 2021. The conditional certification status was renewed on October 22, 2021 and June 3, 2022 in *Texas Register* postings. The amendments to adopt a BUF increase at Seawall Beach Urban Park were conditionally certified because the City was not in compliance with certain beach access requirements under its Plan. The City has since met the requirements, and those amendments regarding the BUF increase are now fully certified as consistent with state law. During the time its Plan was conditionally certified, the City continued to restore the public's ability to access and use the public beach. The noncompliance issues noted in the previous Compliance Plan have been resolved, and many of those resolutions are memorialized in the City's proposed amendments to Appendix A and Exhibit C of the Plan.

ANALYSIS OF PLAN AMENDMENTS AND GLO'S AMENDMENT TO 31 TAC §15.36.

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61) and the Texas Administrative Code (31 TAC §§15.3, 15.7, and 15.8), a local government with jurisdiction over Gulf Coast beaches must submit any amendments to its Plan or Beach User Fee Plan (BUF Plan) to the GLO for certification. If appropriate, the GLO will certify that the Plan or BUF Plan is consistent with state law by amendment of a rule, as authorized in Texas Natural Resources Code (TNRC) §§61.011(d)(5) and 61.015(b). The certification by rule reflects the state's certification of the Plan; however, the text of the Plan is not adopted by the GLO, as provided in 31 TAC §15.3(o)(4).

The amendments to the City's Plan include a variance from 31 TAC §15.6(f) that allows an exemption from the prohibition on the use of concrete under a structure located within 200 feet of the line of vegetation in an eroding area, under limited circumstances. To qualify for an exemption, the proposed or existing use of the structure is required to be multiple-family or commercial, and the structure must have an elevated, reinforced concrete deck at or above Base Flood Elevation. In addition, the proposed or existing structure must be designed, built, rented, or leased to be occupied as an attached, multiple-family residential living unit at least five stories in height, include multiple-family residential living units, be constructed at least in part behind the Galveston seawall, and utilize a stormwater detention system that mitigates peak water runoff on the development site. Exemption requests must be submitted to the Development Services Department and include stamped engineering drawings dated within 12 months of the submittal date, a statement of explanation for the request, documentation of the need to use reinforced concrete instead of fibercrete underneath the structure, and a demonstration that the above provisions will be met. The City will assess a special concrete maintenance fee to be used to pay for the clean-up of concrete from the public beach near the property, should the need arise.

The variance is limited in scope and application to only one potential property, which is located partially behind the seawall. The City is requesting an exemption to the prohibition on concrete beneath a structure within 200 feet of the line of vegetation in an eroding area because of demonstrated concerns that fibercrete would not provide adequate structural support for a robust stormwater detention system under the footprint of a large multiple-family or commercial structure. The City has indicated that the variance would allow for a proposed development on a single property to be constructed with appropriate stormwater detention in compliance with City stormwater detention criteria, which mandates one-acre-foot-per-acre in areas where detention is necessary. This equates to essentially one foot of water storage depth across the entire tract that is required to be stored on site while the receiving infrastructure drains out prior to site discharge. For the single property where the variance will apply, all site drainage will be required to be designed to collect under the building with sufficient depth that requires structurally adequate means of containing and storing that volume and water height. Fibercrete is unable to withstand lateral forces that a detention volume of this quantity would have on the structure and surrounding soil. A robust and effective stormwater detention system is a necessary component of coastal development and prevents further erosion of the beach and dune system, which is particularly important in areas adjacent to or partially behind a seawall or other hard structure.

The City also indicated that the proposed development will include a public beach access walkway and the addition of twenty-seven (27) public beach access parking spaces, which will enhance public beach access in this area.

In adopting the rule, the GLO considered the multitude of conditions that must be demonstrated for an exemption to be granted, the limited geographical scope of the variance, the requisite location partially behind the seawall, and the positive impact of a robust and effective stormwater detention system that minimizes impacts to the beach and dune system.

In addition to the variance, the amendments allow vehicles to be prohibited from 1,300 linear feet of beach at Access Point (AP) 7 - Sunny Beach Subdivision. Before vehicles can be prohibited from the beach, public beach access parking must be provided in the nearby public parking lot that will accommodate 92 cars (including 7 ADA spaces). In addition, 330 feet of overflow parallel parking (16 parking spaces, 7 of which will be ADA spaces) will be provided adjacent to the 8 Mile Road right-of-way between the parking lot and the beach. Pedestrian beach access from the parking areas will be via a sidewalk connecting the parking areas to the beach. In addition, a 100-foot-wide turnaround will be available on the beach at the seaward end of 8 Mile Road to allow beachgoers to drop off beach gear, non-motorized watercraft, fishing equipment, and people with mobility concerns.

The proposed modification to beach access meets the criteria in 31 TAC §15.7(h)(1), which states that when vehicles are prohibited from the beach, beach access and use is presumed to be preserved if parking on or adjacent to the beach is adequate to accommodate one car for each 15 linear feet of beach, ingress/egress access ways are no farther than 1/2 mile apart, and signs are conspicuously posted which explain the nature and extent of vehicular controls, parking areas, and access points, including access for persons with disabilities. The City

has committed to providing the required beach access signage at this access point before vehicular prohibitions occur and will also conduct quarterly inspections of the signage and replace it as needed. The construction of the public parking lot and pedestrian access pathway to the beach are required to be authorized by a beachfront construction certificate and dune protection permit issued by the City, constructed and available to the public, and the required beach access signage must be conspicuously posted before the City implements the proposed vehicular prohibition at AP 7. The City is required to manage and maintain the off-beach parking and pedestrian access pathway in good condition for the beach to remain closed to vehicular traffic. The City is required to maintain the off-beach parking and pedestrian access pathway in perpetuity as long as the vehicular beach restriction remains in place, or the City must restore vehicular access to the beach.

The proposed amendments included a reduction to the size of the Restricted Use Area (RUA) at AP 1(C) by 1,000 linear feet and authorized a new ADA-only vehicular beach area at AP 2 and added additional vehicular beach areas at AP 6 and AP 13. The RUA is a 2,640-foot-long stretch of beach adjacent to the east end of Stewart Beach that is open to vehicles for persons with disabilities displaying an ADA placard, people who are fishing, or people who are launching non-motorized personal watercraft. The RUA is also accessible to pedestrians from an adjacent off-beach parking area. In response to public comments, the City has removed any proposed amendments to their Plan related to the reduction of the RUA by 1,000 linear feet, the addition of the new ADA-only vehicular beach area at AP 2 in Stewart Beach, and the additional vehicular beach area at AP 6 in their formal approval of the amended Plan. Therefore, in regard to the RUA, the City's Plan will remain unchanged.

The proposed Plan amendments still include the addition of a new 350-foot section of vehicular beach at AP 13 - Pocket Park #3. The conversion of a pedestrian-only beach to vehicular beach at AP 13 is in addition to the existing required off-beach parking lot with a minimum of 273 spaces at this access point.

Since the existing RUA is open to vehicles only as a special use area for persons with disabilities, saltwater fishermen, and the launching of non-motorized personal watercraft, an off-beach parking area and pedestrian beach access pathway area is already required and provided at AP 1(C) - Area west of the Islander East to eastern boundary of Stewart Beach Park. The City specifies in the amended Plan that 143 parking spaces are available at AP 1(C) and also made changes to the parking areas at AP 1(A) - Beachtown Development and AP 1(B) - Palisade Palms to reflect the actual, verified number and location of the parking spaces at these access points, and incorporated previous changes included in City Ordinance No. 11-037. Ordinance No. 11-037 was adopted by City Council on May 26, 2011 and consisted of on-beach and off-beach parking and pedestrian access requirements for AP 1(A), AP 1(B), and AP 1(C) that were necessary for GLO to certify the City of Galveston Beach Access Plan as consistent with state law at that time.

At AP 1(A), the Plan amendments add an on-beach parking area with a minimum width of 480 feet and a minimum number of 101 on-beach parking spaces, reduce the number of parking spaces in the off-beach parking lots from 295 spaces to 161 spaces to reflect the actual capacity of the parking lots, and add 46 off-beach parking spaces throughout the subdivision. Therefore, the number of parking spaces reflected in the Plan at AP 1(A) increased from 295 off-beach spaces to a total of 308 on-beach and off-beach spaces, combined. The number of off-beach parking spaces at AP 1(B) increased from 108 spaces to 116 spaces, and one off-beach parking area with a minimum of 143 spaces was added in the Plan to AP 1(C). City Ordinance No. 11-037 requires a total of 610 parking spaces at these access points. The Plan amendments provide a total of 567 parking spaces at APs 1(A), 1(B), and 1(C), which is 43 spaces short of the required number of spaces. To accommodate for this deficit, 50 additional parking spaces have been added to the free parking area at AP 2 - Stewart Beach Park. The City confirmed that they verified that the parking spaces proposed for APs 1(A), 1(B), 1(C), and in the free parking area at Stewart Beach Park are available on-the-ground. The free parking area at Stewart Beach must remain accessible year-round and include signage that easily identifies the area.

The GLO notified the City of numerous beach access and parking compliance concerns in 2018. Since that time, the City has been working to achieve compliance with the beach access provisions in its Plan. The City was required to develop a Compliance Plan that outlined the compliance issues and established timelines for resolution. After the City provided an adequate Compliance Plan and achieved partial compliance, the GLO conditionally certified the City's Plan and later renewed the conditional certification status on October 22, 2021 and June 3, 2022 in *Texas Register* postings. On February 1, 2023, the GLO notified the City that the outstanding compliance issues had been resolved since the City had demonstrated full compliance with all beach access and parking concerns noted in the Compliance Plan and submitted a Compliance Maintenance Plan requiring quarterly signage inspections and annual beach access and parking inspections. In addition to the amendments described above, the GLO fully certifies the amendments to the Plan that were published in the February 26, 2021 edition of the *Texas Register.* The Plan amendments include updates to the Beach Access Plan in Appendix A and to the Beach Access Maps in Exhibit C to reflect the actions taken by the City to resolve the compliance issues. The City is required to maintain the parking areas and pedestrian access pathways in the Beach Access Maps by conducting regular inspections and taking corrective action as needed, as agreed in the Compliance Maintenance Plan provided to the GLO on February 8, 2023.

The Plan amendments also specify that 1,993 public beach access parking spaces are available at AP 3 - Seawall Beach Urban Park, which is 266 spaces short of the 2,259 spaces previously required in the City's Plan. The size of the free parking area at AP 2 - Stewart Beach Park has been increased by an additional 300 spaces to accommodate for the required 266 spaces, bringing the total number of parking spaces in the free parking area to 600 spaces, which includes the 50 spaces added to the free parking area to accommodate the deficit of parking for APs 1(A), 1(B) and 1(C) as described above in reference to City Ordinance No. 11-037. In the future, 34 parking spaces are available in the free parking area at Stewart Beach for the City to relocate additional required parking from the Seawall Beach Urban Park as needed to make space on the seawall for beach access amenities and public safety.

The Plan amendments reduce the number of off-beach parking spaces at AP 9 - Pocket Park #2 from 352 spaces to 265 spaces to reflect the actual capacity of the parking lot. To accommodate the deficit in parking, 63 of the required spaces were relocated to AP 8 - Beachside Village, and 24 of the required spaces were relocated to AP 15(A) - Pirates Beach Subdivision. In total, 352 parking spaces are available in these three locations. The lo-

cation of the off-beach public beach access parking at AP 8 - Beachside Village Subdivision was also changed from Butterfly Street to locations on streets throughout the subdivision.

The Plan amendments reduce the number of off-beach parking spaces at AP 12 - Bermuda Beach Subdivision from 211 spaces to 87 spaces, distributed on John Reynolds Road, John Reynolds Circle, and Jane Road to reflect the actual verified amount and location of the parking spaces determined during the compliance process. To accommodate the deficit in parking, the on-beach parking area at Pabst Road was expanded from 150 linear feet to a minimum of 564.2 linear feet, which accommodates a minimum of 124 parking spaces.

The Plan amendments also include administrative changes related to updating non-substantive language for consistency with 31 TAC Chapter 15.

RESPONSE TO PUBLIC COMMENTS

During the 30-day public comment period, at least 25 commenters requested a public hearing, which required the GLO conduct a public hearing pursuant to Texas Government Code §2001.029. The public hearing was originally scheduled for July 16, 2024, at 823 Rosenberg, 2nd Floor, Galveston, Texas, and the public comment period was extended until the conclusion of the public hearing. Notice of the public hearing and the public comment period extension was provided in the July 12, 2024, issue of the *Texas Register* (49 TexReg 5197). Due to Hurricane Beryl, the public hearing was postponed to August 6, 2024, at 823 Rosenberg, 2nd Floor, Galveston, Texas, and the public comment period was extended to 11:59 PM August 6th. Notice of the public hearing and public comment period extension was posted in the July 26th issue of the *Texas Register* (49 TexReg 5577) and on the City of Galveston's website and social media pages.

The GLO received 379 comments during the public comment period. Comments were received by residents and visitors of the City of Galveston, state of Texas and nationwide, and from groups such as the Surfrider Foundation Galveston Chapter and Texas Conservation Alliance. A majority of the comments objected to the proposed amendments, specifically the use of reinforced concrete in the area within 200 feet from the line of vegetation, the prohibition of vehicles from the beach access at Access Point 7 - Sunny Beach Subdivision and reducing the size of the Restricted Use Area at Access Point 1(C) by 1,000 linear feet.

243 commenters expressed concerns that the proposed amendments were intended to appease private developers and prioritize their economic gain over public beach access, and 40 commenters stated that the amendments were not in the best interest of the public. One commenter stated that City staff made statements that hotel developers would not proceed with construction unless the RUA in front of the proposed development was removed, and the beach was pedestrian-only. Pursuant to the Dune Protection Act (TNRC § 63), Open Beaches Act (TNRC § 61), and 31 TAC Chapter 15, local governments have the authority to amend their beach access and dune protection plans at their discretion as long as the amendments comply with TNRC §§ 61 and 63, and the GLO's Beach/Dune Rules (31 TAC § 15). The GLO does not have jurisdiction over the reasons why a local government may propose to remove vehicular beach access, as long as the appropriate parking, signage and perpendicular beach access are provided according to the presumptive beach access criteria in 31 TAC §15.7. GLO has reviewed the City's proposals and found that they comply with state rules. No change was made in response to these comments.

232 commenters stated that the Plan amendments do not meet the requirement of Texas laws protecting and prioritizing public beach access, including the Texas Open Beaches Act and The Texas Constitution, Article 1 Section 33. A person representing the Surfrider Foundation Galveston Chapter also expressed concerns that private development proposal adjacent to the public beach often result in public access being relocated to off-beach parking areas and that vehicular access and on-beach parking may eventually be eliminated on many Galveston beaches, which does not align with the intent of the OBA and the Texas Constitution. The GLO disagrees with the comments that the proposed Plan amendments do not meet the requirements of Texas laws. Under The Texas Constitution, Article 1, Section 33(c), the legislature may enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments. TNRC §61.022(b) allows a local government to regulate vehicular traffic as long as such regulation is consistent with the OBA and 31 TAC Chapter 15. The procedures set forth in 31 TAC §15.7 provide that a local government, upon certification by the GLO following notice-and-comment rulemaking, can prohibit vehicular traffic on areas of the beach as long as the public's access to and use of the public beach is preserved or enhanced according to the presumptive criteria in 31 TAC §15.7(h). The criteria in 31 TAC §15.7(h)(1) are that when vehicles are prohibited from the beach, beach access and use is presumed to be preserved if parking on or adjacent to the beach is adequate to accommodate one car for each 15 linear feet of beach, ingress/egress access ways are no farther than 1/2 mile apart, and signs are conspicuously posted which explain the nature and extent of vehicular controls, parking areas, and access points, including access for persons with disabilities.

Prohibition of Vehicular Beach Access at Access Point 7

The following comments were provided specifically in response to the proposed prohibition of vehicular beach access at Access Point 7 - Sunny Beach Subdivision.

Sixty-two (62) commenters, mostly property owners in Beachside Village, were in support of the proposed Plan amendment and of the prohibition of vehicular beach access at Access Point 7 - Sunny Beach Subdivision. Some commenters support the prohibition of vehicular beach access at Access Point 7 due to concerns for safety and environmental damage caused by vehicular beach access.

One commenter expressed support for limiting how beachgoers access the beach and said that the City is not limiting use of the beaches, just access to them. The GLO disagrees with this comment because the City's Plan preserves the public's right to access and use the public beach through the availability of off-beach parking with pedestrian access in accordance with the requirements for preserving access in 31 TAC §15.7(h).

Three commenters stated that the proposed closure seems like a plan to limit public beach access and create private beaches, and one commenter stated that private property owners are not at liberty to restrict beach access or to cause beach access to be restricted to the public. Another commenter stated that the ability to use a vehicle on a beach is valued by both residents and tourists and sets Texas apart from other states. The GLO agrees that vehicular beach access is unique and valued, and that private property owners do not have the authority to restrict

public access to the public beach. However, local governments have the ability to regulate vehicular beach traffic under 31 TAC §15.7 as long as such regulation is consistent with the OBA and Beach/Dune Rules. The GLO disagrees with the comments that the proposed closure is a plan to create private beaches because the City's Plan preserves and enhances the public's right to access and use the public beach through the availability of off-beach parking with pedestrian access.

One commenter stated that vehicular access adjacent to the beach provides the public with an opportunity to transport people and gear to the beach, and the proposed off-beach parking and drop-off point at Access Point 7 will not facilitate this same ease of access and is inconsistent with 31 TAC §15.7(h). Multiple commenters also stated that the proposal to replace public parking on the beach with an off-beach parking lot 700 feet from the beach fails to meet the legal requirements, was too far away, and that the parking spaces in the off-beach parking lot at Access Point 7 are too small. Other commenters also stated that the plan to restrict vehicular access at Access Point 7 does not preserve or enhance beach access, violates the Open Beaches Act, and will impact hundreds to thousands of beachgoers. The GLO disagrees with the comments that the proposed amendments do not preserve or enhance beach access and violate the OBA. The OBA (TNRC §61.022(c)) allows a local government to regulate vehicular traffic as long as such regulation is consistent with the OBA and the Beach/Dune Rules. The OBA (TNRC §61.011(d)(3)) also authorized the commissioner to promulgate rules regarding local government prohibitions of vehicular traffic on public beaches, provision of off-beach parking, and other minimum measures needed to mitigate for any adverse effect on public access and dune areas. The procedures set forth in 31 TAC §15.7 provide that a local government, upon certification by the GLO following notice-and-comment rulemaking, can prohibit vehicular traffic on areas of the beach as long as the public's access to and use of the public beach is preserved or enhanced according to the presumptive criteria in 31 TAC §15.7(h).

The proposed modification to beach access meets the criteria in 31 TAC §15.7(h)(1), which states that when vehicles are prohibited from the beach, beach access and use is presumed to be preserved if parking on or adjacent to the beach is adequate to accommodate one car for each 15 linear feet of beach, ingress/egress access ways are no farther than 1/2 mile apart, and signs are conspicuously posted which explain the nature and extent of vehicular controls, parking areas, and access points, including access for persons with disabilities. Ninety-two (92) public parking spaces (including seven ADA parking spaces) are proposed for the parking lot, exceeding the 87 required parking spaces, and the ingress/egress access way is less than 1/2 mile from each adjacent access point. In addition, 330 feet of overflow parallel parking (16 parking spaces, seven of which will be ADA spaces) will be provided adjacent to the 8 Mile Road right-of-way between the parking lot and the beach.

During the permitting process for the parking areas, the City will assess that the parking lot meets any applicable requirements. The City stated that they follow vehicular engineering standards outlined in the Institute of Transportation Engineering's Transportation Handbook to determine the appropriate size of parking spaces, and the City ensures standards to the best of its ability by containing information in City Ordinances and Land Development Regulations.

One commenter expressed concerns that prohibiting vehicular access from the beach at Access Point 7 will create an access impediment to people with disabilities and other individuals who wish to access the water with non-motorized watercraft. However, the availability of a 100-foot-wide turnaround on the beach at the seaward end of 8 Mile Road will allow beachgoers to drop off beach gear, non-motorized watercraft, fishing equipment, and people with mobility concerns, and the City included this in their proposal to further accommodate access for people with disabilities and beachgoers launching non-motorized watercraft or fishing., In addition, the off-beach parking area includes seven ADA spaces and the overflow parallel parking includes an additional seven ADA spaces. In addition to these accommodations for persons with mobility concerns, the proposed modification to beach access meets the presumptive criteria for preserving beach access in 31 TAC §15.7(h)(1).

Removal of 1,000 linear feet from the RUA

Numerous comments were received specifically in response to the proposed reduction of the size of the Restricted Use Area (RUA) at Access Point 1(C) by 1,000 linear feet and the addition of an ADA-only use area at Access Point 2 and additional vehicular beach access areas at Access Point 6 and Access Point 13. These comments are summarized below and do not require a response since the City is no longer proposing to reduce the RUA at AP 1(C) by 1,000 linear feet or to add an ADA-only use area at AP 2 or an additional vehicular beach access area at AP 6. As the City is removing the proposed sections referenced above from their proposed Plan amendments, the GLO does not need to respond to each comment solely related to those proposed amendments.

Forty-one (41) commenters expressed concerns that the 500 feet of new vehicular beach access being added to Pocket Park 1 would be open to all vehicles and would not be restricted to only vehicles operating under restricted uses. Several commenters stated that people with disabilities would be losing their vehicular access and that the proposed changes would restrict access to areas crucial for people with disabilities or pose an undue burden for people with disabilities. Another commenter stated that the proposal violated 31 TAC §15.8(k) as the plan failed to establish, preserve, and enhance access for persons with disabilities and contravened the Texas Accessibility Guidelines.

One commenter requested that an additional 500 linear feet of access be added to the proposed ADA-only vehicular access area at Stewart Beach in addition to what was proposed to maintain a continuous and accessible beachfront for persons with disabilities. One commenter stated that their husband is disabled, and that AP 1(C) is the only access point they've been using and expressed concerns about being able to access other areas. One commenter asked the GLO to consider if the proposed amendments include any potential violations to the Americans with Disabilities Act (ADA).

Several commenters expressed concerns about the lack of ADA accessible amenities at Pocket Park 1 not being an adequate substitute for the accessible amenities (mobi-mats, beach wheelchairs, and restrooms) located at Stewart Beach adjacent to the RUA. One commenter also expressed concerns about the lack of new amenities provided by the City at Pocket Park 1. One commenter stated that they spoke to over 300 people who indicated that off-beach parking and a mat would not replace on-beach access for persons with disabilities.

One commenter stated that existing beach users are aware of the location of the RUA and that it is easily accessed by road. Another commenter stated that the addition of vehicular areas at Stewart Beach and Pocket Park 1 without clear signage or improvements does not enhance beach access.

Several commenters expressed concerns regarding the flooding, erosion, and soft sand within the area where the ADA-only vehicular beach area would be located at AP 2. One commenter stated that the area is located near channeled runoff from the Seawall and is often underwater at high tide. Another commenter stated that locating the ADA parking area in an area subject to flooding would result in reduced days of the year for access.

Several commenters expressed concerns about the reasoning behind splitting up the RUA and stated that it seems like a plan to force local beachgoers further away from developed areas or privatize the beach. One commenter stated that there is not any available public parking behind the current RUA.

Forty-two (42) commenters expressed concerns that the 500 feet of proposed ADA-only vehicular beach area at Access Point 2 - Stewart Beach would not allow people who are fishing or launching motorized personal watercraft. Three commenters also emphasized the importance of the RUA as a safe area for unloading equipment associated with water sports or fishing, and another commenter expressed concerns about people that are fishing or launching non-motorized watercraft merging with other beachgoers as a potential safety risk.

Several commenters stated that police reports do not show any incidents involving vehicles and pedestrians at the RUA within the past five years, and that the City's proposal to reduce the linear footage of the RUA was based on biased surveys. Another commenter said the City stated that the RUA is being reduced because beach users are driving on and destroying dunes, there are safety concerns with pedestrians, and off-beach parking and mats can replace access for persons with disabilities. The commenter further stated that this stretch of beach is one of the safest due to its location adjacent to Stewart Beach and East Beach and close proximity to medical support facilities.

One commenter provided information regarding the usage of the RUA according to Park Board visitor logs from March 2022 to May 2023 and stated that over a period of 62 logged days, 688 vehicles accessed the RUA, which consisted of 97 disabled veterans, 547 people with disabilities, 357 people fishing, and 25 people launching non-motorized watercraft. This commenter also stated that on Memorial Day in 2023, approximately 300 people used the RUA while only 160 beach goers visited the pedestrian-only beach between Stewart Beach and East Beach Park.

One commenter stated that the GLO's August 4, 2023 letter to the City said that the entire linear footage of the RUA must be preserved and/or relocated to another area of east beach to ensure continued access for persons with disabilities, saltwater fisherman, and launching of non-motorized personal watercraft. The commenter asked the GLO to stand by this prior response, and to explain how the GLO's stance may have changed.

One commenter presented a photograph of dunes with apparent damage from vehicular traffic and stated that the photograph was taken at the entrance to the Grand Preserve where golf carts drive over the dunes. Under 31 TAC §15.7(h)(5)(B), in areas where vehicles are prohibited from driving on and along the beach, golf carts must also be prohibited. Golf carts are only authorized to drive on the beach in the RUA if they are for an authorized restricted use or show an ADA placard. Any damages to dunes without a permit issued by the local government are a violation of the Dune Protection Act. According to the City, the Police Department and Marshall's office routinely patrol this area to ensure all vehicles within the RUA are operating under one of the allowable restricted uses. Violations of the DPA or the RUA should be immediately reported to the police department.

One commenter referenced the terms of the judgement issued on June 5, 1964, in the matter of Galveston East Beach, Inc. v State of Texas (Cast Number 97,893, in the District Court of Galveston County, Texas 10th Judicial District)(the "1964 Judgement"), and stated that the 1964 Judgement includes standards for this area of beach that may be superior to and take precedence over certain conflicting or limiting provisions in the City's Plan and ordinances. The commenter stated that the 1964 Judgement fully protects vehicular traffic, which is being restricted in this area, and that the 1964 Judgement predates and could be superior to the TAC provisions allowing the restrictions. The commenter requested the GLO revisit the implications of the 1964 Judgement and suggested the City's Plan be modified to eliminate any provisions contrary to the Judgement and to include certain provisions of the Judgement not currently included within the Plan.

The commenter also stated that camping and boating are both fully protected in the 1964 Judgement and objected to their restrictions through other City ordinances.

Variance for the use of reinforced concrete

One commenter, in support of the exemption, stated that the purpose of the variance is to create a uniform set of rules that will apply to the entire property, since reinforced concrete is already allowable in the half of the site behind the seawall. GLO made no change in response to this comment.

The following comments were provided in response to the proposed variance from 31 TAC §15.6(f) that would allow an exemption from the prohibition on the use of concrete under a structure located within 200 feet of the line of vegetation in an eroding area.

Numerous commenters stated that this is the fastest eroding beachfront on Galveston Island and adding concrete further threatens this beach and will cause or accelerate erosion rates at this property and adjacent properties, and 232 commenters suggested that the development footprint could be decreased instead of locating the development in an area subject to exacerbated erosion. Several commenters expressed concerns that the variance will allow another large complex structure to be built on a highly sensitive, eroding beach, where erosion is exacerbated by the end of the seawall. Two commenters also expressed concerns about the variance negatively impacting nearby beach nourishment projects. The GLO agrees with commenters that the area of beach where the exemption would apply has the highest erosion rate on Galveston Island based on the data from the Bureau of Economic Geology. However, GLO notes that the exemption included in the City's Plan only allows a variance from 31 TAC §15.6(f) to allow reinforced concrete instead of fibercrete in an eroding area within 200 feet of the line of vegetation under certain limited conditions. The TAC currently allows development within 200 feet of the line of vegetation; only the type of material (reinforced vs. unreinforced concrete) to be placed under the footprint of the structure is being considered with this variance.

Four commenters referenced the City of Galveston's 2011 Comprehensive Plan, which states that most of Galveston's beachfront shoreline west of Stewart Beach is eroding at rates of 5-10 feet per year on average. The commenters suggested that the City respond proactively and ensure future development is sustainable and resilient and said that adding concrete in this area does not seem sustainable or resilient, which are the stated goals of the City. Another commenter suggested that the City consider if the proposed exemption is sustainable given the impacts of sea level rise and climate change on beach erosion, high tides, and flooding in Galveston. Several commenters expressed concerns about this variance setting a precedent for allowing large high-rises to continue spreading westward and for future developer requests for these types of variances. GLO shared these comments with the City and they relayed that all ordinances and resolutions were reviewed and approved by City Council members and all applicable City departments. Any future proposed variances will be evaluated individually by the GLO in accordance with the requirements of 31 TAC §15.3(o)(5).

Several commenters questioned the reasoning behind the City proposing this variance. Two commenters stated that it doesn't seem equitable to make an exception for one developer and to overlook the good of the public to benefit one individual. Another commenter questioned deviating from the existing Plan for one property when the rules and regulations of the TAC are written to protect natural resources and protect public health. The GLO has no involvement in determining why a local government may propose to amend their beach access plan, but instead is required to determine if the amendment proposed by the City is consistent with state law.

Twelve commenters stated that the GLO is required to protect the public beach from erosion and adverse effects on public access by regulating beachfront construction and expressed concerns about the proposed variance being contrary to the stated purposes of the Beach/Dune Rule and TNRC §§ 61 and 63. One commenter stated that the proposed exemption is inconsistent with TNRC §61.011(d)(2) which mandates that the Commissioner will promulgate rules for the protection of the public easement from erosion or reduction caused by development or other activities on adjacent land and beach cleanup and maintenance. The GLO has determined that the proposed variance meets the requirements of state rules since the City provided a reasoned justification in writing in accordance with 31 TAC §15.3(o)(5) demonstrating that the variance is equal to or more protective of the goals and policies in 31 TAC §15.1. In adopting the rule, the GLO considered the multitude of conditions that must be demonstrated for an exemption to be granted, the limited geographical scope of the variance, the requisite location partially behind the seawall, and the positive impact of a robust and effective stormwater detention system that minimizes impacts to the beach and dune system. In addition, the City will assess a special concrete maintenance fee to be used to pay for the clean-up of concrete from the public beach near the property, should the need arise.

Two commenters also stated that the proposed exemption is unreasonable and inconsistent with TNRC §61.011(c), which provides that the commissioner shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement, and that the proposed exemption will knowingly cause a loss of public resources for short-term private benefit. The GLO disagrees with the commenters since the proposed variance does not allow or authorize an encroachment or interference with the public beach easement.

One commenter stated that the proposed stormwater detention measures at the site are insufficient as mitigation, as it will not stop or slow the continued erosion caused by storm surge, wave runup, or sea level rise from the Gulf. In the City's reasoned justification for the proposed variance, the stated purpose of the stormwater detention system was not to stop or slow erosion caused by the Gulf, but rather to detain and redirect the flow of stormwater runoff away from the beach to protect the dune and beach profile. According to the City's formal Plan amendment submission dated June 16, 2023, the use of fibercrete would not be structurally sufficient to adhere to the stormwater detention requirements for a multi-story building. The City's June 16th submission further states that the site is being required to collect, detain, and redirect stormwater at a volume of one acre foot per acre, which is a requirement under City of Galveston stormwater detention criteria.

Numerous commenters expressed concerns about a storm washing reinforced concrete onto the public beach and threatening public access and safety. Two commenters also expressed concerns about taxpayers needing to pay for cleanup costs when the concrete ends up on the public beach. Under TNRC §61.067, it is the duty of the GLO to clear debris from a public beach located in an area where there is a declared disaster if the debris is the result of the event that is the subject of the disaster declaration. In addition, the amendments include a special concrete maintenance fee to be used to help pay for the clean-up of concrete from the public beach near the property, should the need arise.

Two commenters stated that a storm could damage the entire building and wash it onto the beach, and one commenter expressed concerns about erosional structural damage to any development authorized under the exemption and subsequent seawall damage. One commenter stated that concrete could end up as debris on the road, making it hard for residents to access their homes after a storm. One commenter provided a photograph of the Riviera Condominiums, and stated that its concrete foundation has been compromised and that they anticipate this being a similar issue if another development is constructed in a highly eroding area. One commenter stated that when structural development is located in eroding areas and the structure fails, it negatively impacts beach habitat and recreational public beach resources, which are preserved in the public trust for all Texans. The commenter also stated that erosion will impact the proposed development during its economic lifespan, resulting in encroachment towards the Gulf, loss of the public beach seaward of the development and structural failure of the proposed concrete. The GLO agrees that construction in eroding areas is more vulnerable and has a greater potential to negatively impact the beach and dune system. Under TNRC §33.067 and 31 TAC §15.17, local governments were required to develop Erosion Response Plans to reduce public expenditures for erosion and storm damage losses to public and private property. All construction within city limits must adhere to the building set-back line requirements under the City's Erosion Response Plan, which were implemented to help mitigate storm damage due to erosion. The proposed variance does not change where development can be located in eroding areas. Rather, it allows a different type of material (reinforced concrete instead of unreinforced fibercrete) to be used within 200 feet of the line of vegetation under certain limited circumstances.

Nine commenters, including the Texas Conservation Alliance, stated that this stretch of beach is important habitat for Galveston's genetically unique ghost wolves, along with other area wildlife, and expressed concerns that allowing variances such as this will further threaten wildlife access to this habitat. Another commenter stated that the proposed variance will rob sea turtles of their right to life, safe haven, and nesting sites. The Beach Dune rules do not include provisions for habitat protections for endangered species or other species of concern.

One commenter stated that the area to which the exemption would apply is located in a high hazard area according to the National Flood Insurance Program (NFIP), and that construction in high hazard areas is guided by the International Building Code (IBC), and the City adopted the IBC as its construction standard in 2023. According to the commenter, the IBC requires concrete slabs used for parking, floors of enclosures, landings, decks and walkways to be structurally independent of buildings, not more than 4 inches thick, with no turned-down edges, no reinforcing, isolated from pilings and columns, and with control or construction joints spaced no more than 4 feet apart. Alternatively, slabs must be self-supporting capable of remaining intact under flood conditions. The commenter expressed concerns that the proposed variance from 31 TAC §15.6(f) is also a variance from IBC construction standards and that engineering safety implications are being neglected with this proposed exception. According to the City, structures located within a VE Special Flood Hazard Area are evaluated by both the City of Galveston's Coastal Resources Division and Building Division to ensure that the construction is compliant with all FEMA regulations and the City of Galveston's flood zone ordinances. The City has stated that the Building Division will ensure all applicable IBC requirements contained in city ordinances are met by issuing appropriate building permits and conducting required inspections.

One commenter expressed concerns that the proposed variance from 31 TAC §15.6(f) will potentially result in a substantial increase in flood insurance rates for island property owners. Under 31 TAC §15.6(e)(2), a local government is required to inform the GLO and FEMA regional representative before it issues any variance from FEMA regulations or allows an activity done in variance of FEMA's regulations found in Volume 44 of the Code of Federal Regulations, Parts 59-77, as variances may affect a local government's participation in the National Flood Insurance Program. In the City's formal Plan amendment submission dated November 22, 2023, the City stated that the City's Floodplain Manager has determined that the requested variance from 31 TAC §15.6(f) would not be a variance of the regulations found in Volume 44 CFR, Parts 59-77 and that the proposal is not in conflict with the Galveston Flood Plan Management ordinance.

Miscellaneous Public Comments

Additional comments received during the public comment period are summarized below.

40 commenters stated that the City of Galveston did not hold its traditional public comment period for this amendment. According to the City, the amendment requests were taken in front of the Galveston City Council on April 27, 2023, May 13, 2023, May 25, 2023, October 27, 2023, March 21, 2024 and October 2, 2024, and in front of the Planning Commission on October 3, 2023 and March 5, 2024. The City stated that the Planning Commission and City Council meetings provided an opportunity for public comments, which ensured compliance with the Texas Open Meetings Act.

One commenter stated that the free parking area at Access Point 2 - Stewart Beach is inaccessible due to the surrounding drainage feature and that there is a lack of signage and formal parking. Another commenter stated that the free parking area is routinely flooded and that beachgoers are unable to park without getting stuck. The GLO requested the City respond directly to these comments and according to the City, a footpath is present across the drainage channel south of the Stewart Beach free parking area and signage is currently in place identifying the free parking area. The City is required to maintain the parking areas and signage identifying the parking areas included in the City's beach access plan by conducting regular inspections and taking corrective action as agreed to in the Compliance Maintenance Plan provided to the GLO on February 8, 2023. According to the Compliance Maintenance Plan, the City will conduct an on-site verification of public signage and ensure access points and parking areas are in place and effectively providing access, and will attempt to implement any necessary corrective actions and replace any missing signage within 90 days of the inspections report. The GLO will monitor compliance with the Plan.

Some comments did not directly relate to this rulemaking, and no changes were made in response to these comments. One commenter suggested using signs warning of rattlesnakes in the dunes. Another commenter asked if the elimination of seasonal access between Access Points 33 and 34 and if the elimination of vehicular access at Access Point 33 was included in the proposed Plan amendment. The proposed amendments do not include any changes to vehicular beach access at Access Points 33 and 34. No changes were made in response to these comments.

One commenter asked if beach user fee revenues are used to maintain the beach, such as trash pickup, or if they only cover the expenses for added amenities and improvements. Under 31 TAC §15.8, local governments may only charge beach user fees in exchange for providing beach-related services, which is defined in 31 TAC §15.2(10) as including sanitation and litter control and beach maintenance.

One commenter stated that charging fees to access restricted areas at Stewart Beach raises questions about compliance with beach access plan, and that public beaches are meant to be open and accessible without fees. This comment is not directly related to this rulemaking as a new beach user fee is not proposed. Under 31 TAC §15.8, local governments may charge beach user fees in exchange for providing beach-related services if the local government has a state approved dune protection and beach access plan that includes a beach user fee plan. The City's Plan includes an approved beach user fee plan, and the City is allowed to charge beach user fees in accordance with their Plan.

One commenter stated that the closure of facilities on the seawall during daylight hours in the summer inconveniences beach users and that there is a lack of tangible improvements on the seawall despite increased fees, aside from installed lighted bollards. This comment is not directly related to this rulemaking as the operating hours of beach facilities is not included in the City's Plan and the proposed amendments do include a change to the City's beach user fee plan.

STATUTORY AUTHORITY

The amendments are adopted under Texas Natural Resources Code §§33.602, 33.607, 61.011, 61.015(b), 61.022 (b) & (c), 63.091, and 63.121, which provide the GLO with the authority

to adopt rules governing the preservation and enhancement of the public's right to access and use public beaches and certification of local government beach access and dune protection plans as consistent with state law.

Texas Natural Resources Code §§33.602, 33.607, 61.011, 61.015(b), 61.022 (b) & (c), 63.091, and 63.121 are affected by the proposed amendments. The GLO hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

§15.36. Certification Status of City of Galveston Dune Protection and Beach Access Plan

(a) The City of Galveston (City) has submitted to the General Land Office a dune protection and beach access plan which was adopted on August 12, 1993 and amended on February 9, 1995, June 19, 1997, February 14, 2002, March 13, 2003, January 29, 2004, February 26, 2004, and April 12, 2012. The City's plan is fully certified as consistent with state law.

(b) The General Land Office certifies as consistent with state law the City's Erosion Response Plan as an amendment to the Dune Protection and Beach Access Plan.

(c) The General Land Office certifies as consistent with state law the City's Beach and Dune Plan as amended on January 15, 2016 by Ordinance 16-003 to increase the daily beach user fee to a maximum of $15.00 and season passes to a maximum of $50 at Stewart Beach, R.A. Apffel Park, Dellanera Park, and Pocket Parks Nos. 1-3.

(d) The General Land Office certifies as consistent with state law amendments to the City of Galveston's Dune Protection and Beach Access Plan as amended on January 24, 2019 by Ordinance No. 19-012. The amendments include an increase in the Beach User Fee on the Seawall, the adoption of updated maps in Exhibit B, and a variance for certain in-ground pools. The amendments were adopted by City Council in Ordinance No. 19-012 on January 24, 2019, which incorporated previously adopted Ordinance No. 18-005.

(e) The General Land Office certifies as consistent with state law amendments to the City of Galveston's Dune Protection and Beach Access Plan in accordance with City Ordinance No. 24-059 dated October 2, 2024. The amendments include a variance for the use of reinforced concrete, prohibit vehicular access at Access Point 7, add additional vehicular beach access area at Access Point 13 and update the Beach Access and Parking Plan in Appendix A and Beach Access Maps in Exhibit C.

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

Filed with the Office of the Secretary of State on October 18, 2024.

TRD-202404915
Jennifer Jones
Chief Clerk and Deputy Land Commissioner
General Land Office
Effective date: November 7, 2024
Proposal publication date: June 7, 2024
For further information, please call: (512) 475-1859

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 150. MEMORANDUM OF UNDERSTANDING AND BOARD POLICY STATEMENTS

SUBCHAPTER A. PUBLISHED POLICIES OF THE BOARD

37 TAC §150.55, §150.56

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC Chapter 150, Memorandum of Understanding and Board Policy Statements. The amendments are adopted without change to the proposed text as published in the September 6, 2024 issue of the *Texas Register* (49 TexReg 6977). The amendments are adopted to address grammatical changes and sentence structure for uniformity and consistency throughout the rules. The text of the rules will not be republished.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under Texas Government Code, Title 5. Open Government, Subtitle B, Ethics, Chapter 572 and Section 508.0441. Subtitle B, Ethics, Chapter 572, is the ethics policy of this state for state officers or state employees. Section 508.0441 requires the Board to implement a policy under which a Board member or Parole Commissioner should disqualify himself or herself on parole or mandatory supervision decisions. Section 508.035, Government Code, designates the presiding officer to establish policies and procedures to further the efficient administration of the business of the board.

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

Filed with the Office of the Secretary of State on October 18, 2024.

TRD-202404909
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: November 7, 2024
Proposal publication date: September 6, 2024
For further information, please call: (512) 406-5478

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