Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §371.1, concerning Definitions; §371.3, concerning Purpose and Authority; §371.31, concerning Federal Felony Match; §371.1011, concerning Recommendation Criteria; §371.1305, concerning Preliminary Investigation; §371.1613, concerning Informal Resolution Process; §371.1663, concerning Managed Care; §371.1669, concerning Self-Dealing; and §371.1709, concerning Payment Hold.

BACKGROUND AND PURPOSE

House Bill 4611, 88th Legislature, Regular Session, 2023, made certain non-substantive revisions to Subtitle I, Title 4, Texas Government Code, which governs HHSC, Medicaid, and other social services as part of the legislature's ongoing statutory revision program. This proposal is necessary to update citations in the rules to reflect changes in the organization of the Texas Government Code sections that become effective on April 1, 2025. The proposed amendments update the affected citations to the Texas Government Code and revise Texas Administrative Code references.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

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

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

(6) the proposed rules will not expand, limit, or repeal existing regulations;

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

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

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules because the amendments only update references to existing laws.

LOCAL EMPLOYMENT IMPACT

The proposed rule amendments will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Erik Cary, HHSC Office of Inspector General (HHSC OIG) Chief Counsel, has determined that for each year of the first five years the rules are in effect, the public will benefit from rules that accurately cite the laws governing HHSC, Medicaid, and other social services.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because the amendments only update references to existing statutes.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to HHSC Office of Inspector General - Chief Counsel Division, P.O. Box 85200, Austin, Texas 78708, or street address 4601 W. Guadalupe St., Austin, Texas 78751-3146; or by email to IG_Rules_Comments_Inbox@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 24R088" in the subject line.

SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §§371.1, 371.3, 371.31

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 Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendments affect Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1. Definitions.

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

(1) Abuse--A practice by a provider that is inconsistent with sound fiscal, business, or medical practices and that results in an unnecessary cost to the Medicaid program; the reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care; or a practice by a recipient that results in an unnecessary cost to the Medicaid program.

(2) Address of record--

(A) An HHS provider's current mailing or physical address, including a working fax number, as provided to the appropriate HHS program's claims administrator or as required by contract, statute, or regulation; or

(B) a non-HHS provider's last known address as reflected by the records of the United States Postal Service or the Texas Secretary of State's records for business organizations, if applicable.

(3) Affiliate; affiliate relationship--A person who:

(A) has a direct or indirect ownership interest (or any combination thereof) of five percent or more in the person;

(B) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity whose interest is equal to or exceeds five percent of the value of the property or assets of the person;

(C) is an officer or director of the person, if the person is a corporation;

(D) is a partner of the person, if the person is organized as a partnership;

(E) is an agent or consultant of the person;

(F) is a consultant of the person and can control or be controlled by the person or a third party can control both the person and the consultant;

(G) is a managing employee of the person, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the person or part thereof;

(H) has financial, managerial, or administrative influence over the operational decisions of a person;

(I) shares any identifying information with another person, including tax identification numbers, social security numbers, bank accounts, telephone numbers, business addresses, national provider numbers, Texas provider numbers, and corporate or franchise names; or

(J) has a former relationship with another person as described in subparagraphs (A) - (I) of this definition, but is no longer described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household of this section within the previous five years if the transfer occurred after the affiliate received notice of an audit, review, investigation, or potential adverse action, sanction, board order, or other civil, criminal, or administrative liability.

(4) Agent--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(5) Allegation of fraud--Allegation of Medicaid fraud received by HHSC from any source that has not been verified by the state, including an allegation based on:

(A) a fraud hotline complaint;

(B) claims data mining;

(C) data analysis processes; or

(D) a pattern identified through provider audits, civil false claims cases, or law enforcement investigations.

(6) Applicant--An individual or an entity that has filed an enrollment application to become a provider, re-enroll as a provider, or enroll a new practice location in a Medicaid program or the Children's Health Insurance Program as described in paragraph [~~subsection~~] (23) of this subsection [~~section~~].

(7) At the time of the request--Immediately upon request and without delay.

(8) Audit--A financial audit, attestation engagement, performance audit, compliance audit, economy and efficiency audit, effectiveness audit, special audit, agreed-upon procedure, nonaudit service, or review conducted by or on behalf of the state or federal government. An audit may or may not include site visits to the provider's place of business.

(9) Auditor--The qualified person, persons, or entity performing the audit on behalf of the state or federal government.

(10) Business day--A day that is not a Saturday, Sunday, or state legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or state legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or state legal holiday.

(11) C.F.R.--The Code of Federal Regulations.

(12) CHIP--The Texas Children's Health Insurance Program or its successor, established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa et seq.) and Chapter 62 of the Texas Health and Safety Code.

(13) Claim--

(A) A written or electronic application, request, or demand for payment by the Medicaid or other HHS program for health care services or items; or

(B) A submitted request, demand, or representation that states the income earned or expense incurred by a provider in providing a product or a service and that is used to determine a rate of payment under the Medicaid or other HHS program.

(14) Claims administrator--The entity an operating agency has designated to process and pay Medicaid or HHS program provider claims.

(15) Closed-end contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by the OIG to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid or other HHS program.

(16) CMS--The Centers for Medicare & Medicaid Services or its successor. CMS is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

(17) Complete Application--A provider enrollment application that contains all the required information, including:

(A) all questions answered completely, including correct dates of birth, social security numbers, license numbers, and all requirements per provider type defined in the Texas Medicaid Provider Procedures Manual;

(B) IRS Form W-9, if required;

(C) signed and certified provider agreements;

(D) Provider Information Form (PIF-1);

(E) Principal Information Forms (PIF-2) on all persons required to be disclosed, if required;

(F) full disclosure of all criminal history, including copies of complete dispositions on all criminal history;

(G) full disclosure of all board or licensing orders, including documentation of compliance with current board orders;

(H) full disclosure of all corporate compliance agreements, settlement agreements, state or federal debt, and sanctions;

(I) documentation of an active license that is not subject to expiration within 30 days of submission of the enrollment application, if required;

(J) completion of a pre-enrollment site visit by HHSC, if required, and all required current documentation (e.g., liability insurance);

(K) documentation of fingerprints of a provider or any person with a five percent or more direct or indirect ownership in the provider, if required; and

(L) any additional documentation related to the addition of a practice location, if required or requested by HHSC.

(18) Conviction or convicted--Means that:

(A) a judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) there is a post-trial motion or an appeal pending; or

(ii) the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) a federal, state, or local court has made a finding of guilt against an individual or entity;

(C) a federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) an individual or entity has entered into participation in a first offender, deferred adjudication, pre-trial diversion, or other program or arrangement where judgment of conviction has been withheld.

(19) Credible allegation of fraud--An allegation of fraud that has been verified by the state. An allegation is considered to be credible when HHSC has carefully reviewed all allegations, facts, and evidence and has verified that the allegation has indicia of reliability. HHSC acts judiciously on a case-by-case basis.

(20) DADS--The Texas Department of Aging and Disability Services, its successor, or designee; the state agency responsible for administering long-term services and support for people who are aging and people with intellectual and physical disabilities.

(21) Day--A calendar day.

(22) Delivery of a health care item or service--Providing any item or service to an individual to meet his or her physical, mental or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any federal health care program.

(23) Enrollment--The HHSC process that a provider or applicant follows to enroll or re-enroll as a provider or enroll a new practice location.

(24) Enrollment application--Documentation required by HHSC that an applicant submits to HHSC to enroll or re-enroll as a provider or to add a practice location. An enrollment application includes any supplemental forms used to add practice locations for Medicare-enrolled or limited-risk providers, as determined by HHSC.

(25) Exclusion--The suspension of a provider or any person from being authorized under the Medicaid program to request reimbursement of items or services furnished by that specific provider.

(26) Executive Commissioner--The HHSC Executive Commissioner.

(27) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or untrue.

(28) Federal health care program--Any plan or program that provides health benefits, whether directly, through insurance, or

otherwise, which is funded directly, in whole or in part, by the United States government (other than the federal employee health insurance program under Chapter 89 of Title 5, U.S.C.).

(29) Fraud--Any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person. The term does not include unintentional technical, clerical, or administrative errors.

(30) Full investigation--Review and development of evidence to support an allegation or complaint to resolution through dismissal, settlement, or formal hearing.

(31) Furnished--Items or services provided or supplied, directly or indirectly, by any person. This includes items and services manufactured, distributed, or otherwise provided by persons that do not directly submit claims to Medicare, Medicaid, or any federal health care program, but that supply items or services to providers, practitioners, or suppliers who submit claims to these programs for such items or services. This term does not include persons that submit claims directly to these programs for items and services ordered or prescribed by another person.

(A) Directly--The provision of items and services by individuals or entities (including items and services provided by them, but manufactured, ordered, or prescribed by another individual or entity) who submit claims to Medicare, Medicaid, or any federal health care program.

(B) Indirectly--The provision of items and services manufactured, distributed, or otherwise supplied by individuals or entities who do not directly submit claims to Medicare, Medicaid, or other federal health care programs, but that provide items and services to providers, practitioners, or suppliers who submit claims to these programs for such items and services.

(32) Health information--Any information, whether oral or recorded in any form or medium, that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and that relates to:

(A) the past, present, or future physical or mental health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the past, present, or future payment for the provision of health care to an individual.

(33) HHS--Health and human services. Means:

(A) a health and human services agency under the umbrella of HHSC, including HHSC;

(B) a program or service provided under the authority of HHSC, including Medicaid and CHIP; or

(C) a health and human services agency, including those agencies delineated in Texas Government Code §521.0001 [~~§531.001~~].

(34) HHSC--The Texas Health and Human Services Commission, its successor, or designee.

(35) HIPAA--Collectively, the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§1320d et seq., and regulations adopted under that act, as modified by the Health Information Technology for Economic and Clinical Health Act (HITECH) (P.L. 111-105), and regulations adopted under that act at 45 C.F.R. Parts 160 and 164.

(36) Immediate family member--An individual's spouse (husband or wife); natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, mother-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(37) Indirect ownership interest--Any ownership interest in an entity that has an ownership interest in another entity. The term includes an ownership interest in any entity that has an indirect ownership interest in the entity at issue.

(38) Inducement--An attempt to entice or lure an action on the part of another in exchange for, without limitation, cash in any amount, entertainment, any item of value, a promise, specific performance, or other consideration.

(39) Inspector General--The individual appointed to be the director of the OIG by the Texas Governor in accordance with Texas Government Code §544.0101 [~~§531.102(a-1)~~].

(40) "Item" or "service" means--

(A) Any item, device, medical supply or service provided to a patient:

(i) that is listed in an itemized claim for program payment or a request for payment; or

(ii) for which payment is included in other federal or state health care reimbursement methods, such as a prospective payment system; and

(B) In the case of a claim based on costs, any entry or omission in a cost report, books of account, or other documents supporting the claim.

(41) Jurisdiction--An issue or matter that the OIG has authority to investigate and act upon.

(42) Knew or should have known--A person, with respect to information, knew or should have known when the person had or should have had actual knowledge of information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. Proof of a person's specific intent to commit a program violation is not required in an administrative proceeding to show that a person acted knowingly.

(43) Managed care plan--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse, in whole or in part, the cost of any health care service. A part of the plan must consist of arranging for or providing health care services as distinguished from indemnification against the cost of those services on a prepaid basis through insurance or otherwise. The term does not include an insurance plan that indemnifies an individual for the cost of health care services.

(44) Managing employee--An individual, regardless of the person's title, including a general manager, business manager, administrator, officer, or director, who exercises operational or managerial control over the employing entity, or who directly or indirectly conducts the day-to-day operations of the entity.

(45) MCO--Managed care organization. Has the meaning described in §353.2 of this title (relating to Definitions) and for purposes of this chapter includes an MCO's special investigative unit under Texas Government Code §544.0352(a)(1) [~~§531.113(a)(1)~~], and any entity with which the MCO contracts for investigative services under Texas Government Code §544.0352(a)(2) [~~§531.113(a)(2)~~].

(46) MCO provider--An association, group, or individual health care provider furnishing services to MCO members under contract with an MCO.

(47) Medicaid or Medicaid program--The Texas medical assistance program established under Texas Human Resources Code Chapter 32 and regulated in part under Title 42 C.F.R. Part 400 or its successor.

(48) Medicaid-related funds--Any funds that:

(A) a provider obtains or has access to by virtue of participation in Medicaid; or

(B) a person obtains through embezzlement, misuse, misapplication, improper withholding, conversion, or misappropriation of funds that had been obtained by virtue of participation in Medicaid.

(49) Medical assistance--Includes all of the health care and related services and benefits authorized or provided under state or federal law for eligible individuals of this state.

(50) Member of household--An individual who is sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(51) OAG--Office of the Attorney General of Texas or its successor.

(52) OIG--HHSC Office of the Inspector General, its successor, or designee.

(53) OIG's method of finance--The sources and amounts authorized for financing certain expenditures or appropriations made in the General Appropriations Act.

(54) Operating agency--A state agency that operates any part of the Medicaid or other HHS program.

(55) Overpayment--The amount paid by Medicaid or other HHS program or the amount collected or received by a person by virtue of the provider's participation in Medicaid or other HHS program that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act or other state or federal statutes for a service or item furnished within the Medicaid or other HHS programs. This includes:

(A) any funds collected or received in excess of the amount to which the provider is entitled, whether obtained through error, misunderstanding, abuse, misapplication, misuse, embezzlement, improper retention, or fraud;

(B) recipient trust funds and funds collected by a person from recipients if collection was not allowed by Medicaid or other HHS program policy; or

(C) questioned costs identified in a final audit report that found that claims or cost reports submitted in error resulted in money paid in excess of what the provider is entitled to under an HHS program, contract, or grant.

(56) Ownership interest--A direct or indirect ownership interest (or any combination thereof) of five percent or more in the equity in the capital, stock, profits, or other assets of a person or any mortgage, deed, trust, note, or other obligation secured in whole or in part by the person's property or assets.

(57) Payment hold (suspension of payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and HHSC or an operating agency are resolved. This is a temporary denial of reimbursement under Medicaid for items or services furnished by a specified provider.

(58) Person--Any legally cognizable entity, including an individual, firm, association, partnership, limited partnership, corporation, agency, institution, MCO, Special Investigative Unit, CHIP participant, trust, non-profit organization, special-purpose corporation, limited liability company, professional entity, professional association, professional corporation, accountable care organization, or other organization or legal entity.

(59) Person with a disability--An individual with a mental, physical, or developmental disability that substantially impairs the individual's ability to provide adequately for the person's care or his or her own protection, and:

(A) who is 18 years of age or older; or

(B) who is under 18 years of age and who has had the disabilities of minority removed.

(60) Physician--An individual licensed to practice medicine in this state, a professional association composed solely of physicians, a partnership composed solely of physicians, a single legal entity authorized to practice medicine owned by two or more physicians, or a nonprofit health corporation certified by the Texas Medical Board under Chapter 162, Texas Occupations Code.

(61) Practitioner--An individual licensed or certified under state law to practice the individual's profession.

(62) Preliminary investigation--A review by the OIG undertaken to verify the merits of a complaint/allegation of fraud, waste, or abuse from any source. The preliminary investigation determines whether there is sufficient basis to warrant a full investigation.

(63) Prima facie--Sufficient to establish a fact or raise a presumption unless disproved.

(64) Professionally recognized standards of health care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the state of Texas.

(65) Program violation--A failure to comply with a Medicaid or other HHS provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications, or any state or federal statute, rule, or regulation applicable to the Medicaid or other HHS program, including any action that constitutes grounds for enforcement as delineated in this subchapter.

(66) Provider--Any person, including an MCO and its subcontractors, that:

(A) is furnishing Medicaid or other HHS services under a provider agreement or contract with a Medicaid or other HHS operating agency;

(B) has a provider or contract number issued by HHSC or by any HHS agency or program or its designee to provide medical assistance, Medicaid, or any other HHS service in any HHS program, including CHIP, under contract or provider agreement with HHSC or an HHS agency; or

(C) provides third-party billing services under a contract or provider agreement with HHSC.

(67) Provider agreement--A contract, including any and all amendments and updates, with Medicaid or other HHS program to subcontract services, or with an MCO to provide services.

(68) Provider screening process--The process in which a person participates to become eligible to participate and enroll as a provider in Medicaid or other HHS program. This process includes enrollment under this chapter or Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment), 42 C.F.R Part 1001, or other processes delineated by statute, rule, or regulation.

(69) Reasonable request--Request for access, records, documentation, or other items deemed necessary or appropriate by the OIG or a requesting agency to perform an official function, and made by a properly identified agent of the OIG or a requesting agency during hours that a person, business, or premises is open for business.

(70) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(71) Records and documentation--Records and documents in any form, including electronic form, which include:

(A) medical records, charting, other records pertaining to a patient, radiographs, laboratory and test results, molds, models, photographs, hospital and surgical records, prescriptions, patient or client assessment forms, and other documents related to diagnosis, treatment, or service of patients;

(B) billing and claims records, supporting documentation such as Title XIX forms, delivery receipts, and any other records of services provided to recipients and payments made for those services;

(C) cost reports and documentation supporting cost reports;

(D) managed care encounter data and financial data necessary to demonstrate solvency of risk-bearing providers;

(E) ownership disclosure statements, articles of incorporation, bylaws, corporate minutes, and other documentation demonstrating ownership of corporate entities;

(F) business and accounting records and support documentation;

(G) statistical documentation, computer records, and data;

(H) clinical practice records, including patient sign-in sheets, employee sign-in sheets, office calendars, daily or other periodic logs, employment records, and payroll documentation related to items or services rendered under an HHS program; and

(I) records affidavits, business records affidavits, evidence receipts, and schedules.

(72) Recoupment of overpayment--A sanction imposed to recover funds paid to a provider or person to which the provider or person was not entitled.

(73) Requesting agency--The OIG; the OAG's Medicaid Fraud Control Unit or Civil Medicaid Fraud Division; any other state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on a provider, a person, or the services rendered by the provider or person.

(74) Risk analysis--The process of defining and analyzing the dangers to individuals, businesses, and governmental entities posed by potential natural and human-caused adverse events. A risk analysis can be either quantitative, which involves numerical probabilities, or qualitative, which involves observations that are not numerical in nature.

(75) Sanction--Any administrative enforcement measure imposed by the OIG pursuant to this subchapter other than administrative actions defined in §371.1701 of this chapter [~~subchapter~~] (relating to Administrative Actions).

(76) Sanctioned entity--An entity that has been convicted of any offense described in 42 C.F.R §§1001.101 - 1001.401 or has been terminated or excluded from participation in Medicare, Medicaid in Texas, or any other state or federal health care program.

(77) Services--The types of medical assistance specified in §1905(a) of the Social Security Act (42 U.S.C. §1396d(a)) and other HHS program services authorized under federal and state statutes that are administered by HHSC and other HHS agencies.

(78) SIU--A Special Investigative Unit of an MCO as defined under Texas Government Code §544.0352(a)(1) [~~§531.113(a)(1)~~].

(79) Social Security Act--Legislation passed by Congress in 1965 that established the Medicaid program under Title XIX of the Act and created the Medicare program under Title XVIII of the Act.

(80) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or HHS agency.

(81) State health care program--A State plan approved under Title XIX, any program receiving funds under Title V or from an allotment to a State under such Title, any program receiving funds under Subtitle I of Title XX or from an allotment to a State under Subtitle I of Title XX, or any State child health plan approved under Title XXI.

(82) Substantial contractual relationship--A relationship in which a person has direct or indirect business transactions with an entity that, in any fiscal year, amounts to more than $25,000 or five percent of the entity's total operating expenses, whichever is less.

(83) Suspension of payments (payment hold)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and HHSC or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(84) System recoupment--Any action to recover funds paid to a provider or other person to which they were not entitled, by means other than the imposition of a sanction under these rules. It may include any routine payment correction by an agency or an agency's fiscal agent to correct an overpayment that resulted without any alleged wrongdoing.

(85) TEFRA--The Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, a federal law that allows states to make medical assistance available to certain children with disabilities without counting their parent's income.

(86) Terminated--Means:

(A) with respect to a Medicaid or CHIP provider, the revocation of the billing provider's Medicaid or CHIP billing privileges after the provider has exhausted all applicable appeal rights or the timeline for appeal has expired; and

(B) with respect to a Medicare provider, supplier, or eligible professional, the revocation of the provider's, supplier's, or eligible professional's Medicare billing privileges after the provider, sup-

plier, or eligible professional has exhausted all applicable appeal rights or the timeline for appeal has expired.

(87) Terminated for cause--Termination based on allegations related to fraud, program violations, integrity, or improper quality of care.

(88) Title V--Title V (Maternal and Child Health Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§701 et seq.

(89) Title XVIII--Title XVIII (Medicare) of the Social Security Act, codified at 42 U.S.C. §§1395 et seq.

(90) Title XIX--Title XIX (Medicaid) of the Social Security Act, codified at 42 U.S.C. §§1396-1 et seq.

(91) Title XX--Title XX (Social Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§1397 et seq.

(92) Title XXI--Title XXI (State Children's Health Insurance Program (CHIP)) of the Social Security Act, codified at 42 U.S.C. §§1397aa et seq.

(93) TMRP--The Texas Medical Review Program, which is the inpatient hospital utilization review process HHSC uses for hospitals reimbursed under HHSC's prospective payment system.

(94) U.S.C.--United States Code.

(95) Vendor hold--Any legally authorized hold or lien by any state or federal governmental unit against future payments to a person. Vendor holds may include tax liens, state or federal program holds, liens established by the OAG Collections Division, and State Comptroller voucher holds.

(96) Waste--Practices that a reasonably prudent person would deem careless or that would allow inefficient use of resources, items, or services.

§371.3. Purpose and Authority.

(a) The OIG is responsible for preventing, detecting, auditing, inspecting, reviewing, and investigating fraud, waste, and abuse in Medicaid and other HHS programs. In addition, the OIG is responsible for enforcing state law relating to the provision of HHS in Medicaid and other HHS programs.

(b) The statutory authority for this chapter is provided by Texas Human Resources Code Chapters 32 and 36; Texas Government Code Chapters 540 and 544 [~~Chapter 531~~], and federal law (Social Security Act) and regulations (42 C.F.R.).

§371.31. Federal Felony Match.

The OIG has a system to cross-reference data collected for the programs identified in Texas Government Code §544.0454 [~~§531.008(c) of the Texas Government Code~~] with the list of fugitive felons maintained by the federal government. The purpose of the data match is to identify fugitive felons who may be enrolled as recipients in programs that are referenced in Texas Government Code §544.0454 [~~§531.008(c) of the Texas Government Code~~].

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

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Karen Ray
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SUBCHAPTER E. PROVIDER DISCLOSURE AND SCREENING

1 TAC §371.1011

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendment affects Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1011. Recommendation Criteria.

(a) A felony or misdemeanor conviction, as defined in 42 C.F.R. §1001.2, under Texas law, the laws of another state, or federal law, may affect a provider's and/or person's ability to participate.

(b) The OIG may recommend denial of an enrollment application of the applicant or a person required to be disclosed in accordance with §371.1005 of this subchapter (relating to Disclosure Requirements) on the basis of information revealed through a background check on the applicant, provider, or a person required to be disclosed. A background check may include:

(1) information concerning the licensing status of the health care professional;

(2) information contained in the criminal history record information check performed in accordance with Texas Government Code §544.0153 [~~§531.1032~~];

(3) a review of federal databases;

(4) the pendency of an open investigation by the OIG; and

(5) any other reason that the OIG determines appropriate.

(c) On a case-by-case basis, the OIG may recommend approval of an enrollment application despite the existence of a criminal history.

(1) When evaluating criminal history record information, the OIG takes into consideration:

(A) the extent to which the conduct relates to the services provided or to be provided under Medicaid;

(B) the degree to which the provider, applicant, or person required to be disclosed does or will interact with Medicaid recipients as a provider; and

(C) any previous evidence that the provider, applicant, or person required to be disclosed engaged in fraud, waste, or abuse under Medicaid.

(2) The OIG also considers the following circumstances:

(A) the number of criminal convictions as defined in 42 C.F.R. §1001.2;

(B) the nature and seriousness of the crime;

(C) whether the individual or entity has completed the sentence, punishment, or other requirements that were imposed for the crime and, if so, the length of time since completion;

(D) in the case of an individual, the age of the individual at the time the crime was committed;

(E) whether the crime was committed in connection with the individual's or entity's participation in Medicaid or other HHS programs;

(F) the extent of the individual's or entity's rehabilitation efforts and outcome;

(G) the conduct of the individual or entity, and the work history of the individual, both before and after the crime;

(H) the relationship of the crime to the individual or entity's fitness or capacity to remain a provider or become a provider;

(I) whether approving the individual or entity would offer the individual or entity the opportunity to engage in further criminal activity;

(J) the extent to which the individual or entity provides relevant information or otherwise demonstrates that approval should be granted; and

(K) any other circumstances that HHSC determines are relevant to the individual or entity's eligibility.

(3) The provider is responsible for providing to HHSC or to the OIG, within three business days of an IG request, information related to the degree to which a person could interact with Medicaid recipients as a provider.

(4) In all instances, the OIG takes into consideration evidence of multiple or repeated instances of the same or similar conduct.

(d) In addition to the considerations outlined in subsection (c) of this section, the OIG specifically takes into consideration the following conduct that may be contained in criminal history record information of providers, applicants, or persons required to be disclosed:

(1) for provider types that have or may have direct access to recipients in their capacity as a provider:

(A) conduct involving healthcare fraud;

(B) conduct involving abuse of patients, minors, the elderly, or the disabled;

(C) conduct involving prohibited sexual conduct or involving children as victims;

(D) conduct against the person such as homicide, kidnapping, or assault;

(E) conduct involving perjury or crimes of other falsification, such as tampering with physical evidence or governmental record;

(F) conduct involving insurance fraud;

(G) conduct involving illegal manufacture, use, possession or distribution of controlled substances; and

(H) conduct involving theft, including theft by check;

(2) for provider types that may transport recipients and guardians in their capacity as a provider:

(A) conduct involving healthcare fraud;

(B) conduct involving abuse of patients, minors, the elderly, or the disabled;

(C) conduct involving prohibited sexual conduct or involving children as victims;

(D) conduct against the person such as homicide, kidnapping, or assault;

(E) conduct involving perjury or tampering with a governmental record;

(F) conduct involving intoxication and operating a motor vehicle, including driving while intoxicated, intoxication assault, and intoxication manslaughter;

(G) conduct involving illegal manufacture, use, possession, or distribution of controlled substances;

(H) conduct involving criminal trespass;

(I) conduct involving extortion; and

(J) conduct involving promotion of prostitution or human trafficking;

(3) for provider types that may have interaction with or access to recipients, recipients' homes, or recipients' property in their capacity as a provider:

(A) conduct involving healthcare fraud;

(B) conduct involving abuse of patients, minors, the elderly, or the disabled;

(C) conduct involving prohibited sexual conduct or involving children as victims;

(D) conduct against the person such as homicide, kidnapping, or assault;

(E) conduct against property such as theft, burglary, property damage, or criminal trespass;

(F) conduct involving breach of fiduciary duty;

(G) conduct involving illegal manufacture, use, possession, or distribution of controlled substances; and

(4) for provider types that have no recipient interaction or access:

(A) conduct involving healthcare fraud;

(B) conduct involving breach of fiduciary duty or a deceptive business practice; and

(C) conduct involving theft, including theft by check.

(e) The OIG may recommend permanent denial of an enrollment application if:

(1) the applicant, provider, or a person required to be disclosed has been convicted, as defined in 42 C.F.R. §1001.2, of an offense arising from a fraudulent act under Medicaid or other HHS programs; and

(2) that fraudulent act resulted in injury to an elderly person, a person with a disability, or a person younger than 18 years of age.

(f) The OIG may recommend denial of any enrollment application, regardless of provider type, if it determines in its discretion that the applicant may pose an increased risk for committing fraud, waste, or abuse or may demonstrate unfitness to provide or bill for medical assistance items or services. In addition to the applicant's criminal, regulatory, and administrative sanction history, the OIG considers all applicable circumstances, including the following, if applicable:

(1) the applicant, a person required to be disclosed, or a person with an ownership or control interest in the provider did not submit complete, timely, and accurate information, failed to cooperate with any provider screening methods, or refused to permit access for a site visit;

(2) the applicant or a person required to be disclosed has failed to repay overpayments to Medicaid, CHIP, or other HHS programs;

(3) the applicant, provider, or a person required to be disclosed pursuant to §371.1005 of this subchapter, has been suspended or prohibited from participating, excluded, terminated, or debarred from participating in any state Medicaid, CHIP or other HHS agency program;

(4) the applicant, provider, or a person required to be disclosed has participated in Medicaid or CHIP program and failed to bill for medical assistance or refer clients for medical assistance within the 12-month period prior to submission of the enrollment application;

(5) the applicant, provider, or a person required to be disclosed has falsified any information on the enrollment application; and

(6) The OIG is unable to verify the identity of the applicant, provider, or a person required to be disclosed.

(g) Healthcare professionals who are licensed and in good standing with a Texas licensing authority that requires the submission of fingerprints for the purpose of conducting a criminal history record information check are not subject to an additional criminal history record information check by the OIG for the purposes of determining eligibility to enroll, unless performing a criminal history record information check is required or appropriate for other reasons, including for conducting an investigation of fraud, waste, or abuse or where required by 42 C.F.R. §455.450.

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SUBCHAPTER F. INVESTIGATIONS

1 TAC §371.1305

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendment affects Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1305. Preliminary Investigation.

(a) The OIG may receive and investigate complaints related to fraud, waste, or abuse within HHSC or an HHS agency. The OIG prioritizes complaints for purposes of determining the order in which complaints are investigated, taking into account the seriousness of the allegations made in a complaint. The OIG may consider the following factors when opening cases and prioritizing cases for the efficient management of the OIG's workload:

(1) the highest potential for recovery or risk to the State;

(2) the history of noncompliance with applicable law and regulations;

(3) identified fraud trends;

(4) internal affairs investigations according to the seriousness of the threat to recipient or public safety or the risk to program integrity in terms of the amount or scope of fraud, waste, or abuse posed by the allegation that is the subject of the investigation;

(5) acts or the failure to act that potentially threatens the public health or may result in physical harm to the public; and

(6) the potential for or actual physical destruction of state property, including the loss, theft and destruction of State assets, property, benefits, or equipment.

(b) The OIG assesses complaints received by the OIG from any source to determine within 30 days of receipt whether it has:

(1) sufficient indicators of fraud, waste, or abuse; and

(2) jurisdiction.

(c) If the OIG has jurisdiction and sufficient information to justify an investigation, the OIG completes a preliminary investigation within 45 days of receipt of the complaint to determine whether there is sufficient basis to warrant a full investigation. The OIG may also collaborate with federal or other state authorities in conducting audits or investigations and in taking enforcement measures in response to program violations.

(1) After completing its preliminary investigation, the OIG may, at its discretion, initiate settlement discussions of an administrative case with the person who is the subject of the investigation. If the matter cannot reasonably be settled or if the OIG determines that further investigation is required before the propriety of settlement or other enforcement can be evaluated, the OIG may conduct a full investigation.

(2) If, at any point during its investigation, the OIG determines that an overpayment resulted without wrongdoing, the OIG may refer the matter for routine payment correction by HHSC's fiscal agent or an operating agency or may offer a payment plan.

(d) The OIG may also consider the following factors in determining whether to open a full investigation:

(1) the nature of the program violation;

(2) evidence of knowledge and intent;

(3) the seriousness of the program violation;

(4) the extent of the violation;

(5) prior noncompliance issues;

(6) prior imposition of sanctions, damages, or penalties;

(7) willingness to comply with program rules;

(8) efforts to interfere with an investigation or witnesses;

(9) recommendations of peer review groups;

(10) program violations within Medicaid, Medicare, Titles V, XIX, XX, CHIP, and other HHS programs;

(11) pertinent affiliate relationships;

(12) past and present compliance with licensure and certification requirements;

(13) history of criminal, civil, or administrative liability; and

(14) any other relevant information or analysis the OIG deems appropriate.

(e) In addition to the factors listed in subsection (d) of this section, the OIG may also consider the following factors in determining whether to close a preliminary investigation:

(1) the complainant is unavailable or unwilling to cooperate;

(2) information or evidence to substantiate the complaint is unavailable or unobtainable;

(3) the complaint is resolved after it is filed with the OIG;

(4) data regarding the subject of the complaint, such as claims or encounter data, does not support the allegations raised in the complaint;

(5) an investigation, audit, inspection, or other review regarding the complaint already exists;

(6) an analysis of the provider's billing patterns does not show that the provider's billing patterns vary significantly from those of comparable providers; or

(7) any other relevant information or analysis the OIG deems appropriate.

(f) Once the preliminary investigation is completed, the OIG reviews the allegations of fraud, waste, abuse, or questionable practices, and all facts and evidence relating to the allegation and prepares a preliminary report before the allegation of fraud or abuse proceeds to a full investigation. The preliminary report documents the following:

(1) the allegation that is the basis of the report;

(2) the evidence reviewed;

(3) the procedures used to conduct the preliminary investigation;

(4) the findings of the preliminary investigation; and

(5) whether a full investigation is warranted.

(g) The OIG maintains a record of all allegations of fraud, waste, or abuse against a provider containing the date each allegation was received or identified and the source of the allegation, if available. This record is confidential under Texas Government Code §544.0259(e) [~~§531.1021(g)~~] and subject to Texas Government Code §544.0259(f) [~~§531.1021(h)~~].

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SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS
DIVISION 1. GENERAL PROVISIONS

1 TAC §371.1613

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendment affects Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1613. Informal Resolution Process.

(a) A person who is served a notice of intent to impose a sanction or notice of a payment hold may request an informal resolution meeting (IRM) to discuss the issues identified by the OIG in the notice.

(b) A written request for an IRM must:

(1) be sent by certified mail to the address specified in the notice letter;

(2) arrive at the address specified in the notice of intent to impose the sanction no later than:

(A) for a payment hold, ten days after service on the person of the notice of payment hold;

(B) for any sanction other than a payment hold or notice of recoupment of overpayment or debt, 30 days after service on the person of the notice; or

(C) for a notice of recoupment or overpayment or debt, a person may request an IRM any time prior to the issuance of the final notice;

(3) include a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the person disagrees, and, in the case of a payment hold, why an IRM would be beneficial for the resolution of the case;

(4) state the basis for the person's contention that the specific issues or findings and conclusions of the OIG are incorrect; and

(5) be signed by the person or an attorney for the person. No other person or party may request an IRM for or on behalf of the subject of the sanction.

(c) On timely request for an initial IRM:

(1) For any sanction other than a payment hold, the OIG schedules the IRM and gives notice of the time and place of the meeting.

(2) For a request based on a payment hold, the OIG decides whether to grant the provider's request for an IRM and, if the OIG decides to grant the IRM, the OIG schedules the IRM and notice of the time and place of the meeting.

(d) A person may also submit to the OIG any documentary evidence or written argument regarding whether the sanction is warranted. Documentary evidence or written argument that may be submitted is not necessarily controlling upon the OIG, however.

(e) A written request for an IRM may be combined with a request for an administrative hearing, if a person is entitled to such hearing, and if it meets the requirements of this subchapter. If both an IRM and an administrative hearing have been requested by a person entitled to both, the informal resolution process shall run concurrently with the administrative hearing process, and the administrative hearing process may not be delayed on account of the informal resolution process.

(f) Upon written request of a provider, the OIG provides for a recording of an IRM at no expense to the provider who requested the meeting. The recording of an IRM is made available to the provider who requested the meeting. The OIG does not record an IRM unless the OIG receives a written request from a provider.

(g) Notwithstanding Texas Government Code §544.0259(e) [~~§531.1021(g)~~], an IRM is confidential, and any information or materials obtained by the OIG, including the OIG's employees or agents, during or in connection with an IRM, including a recording, are privileged and confidential and may not be subject to disclosure under Chapter 552, Texas Government Code, or any other means of legal compulsion for release, including disclosure, discovery, or subpoena.

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DIVISION 2. GROUNDS FOR ENFORCEMENT

1 TAC §371.1663, §371.1669

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 Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendments affect Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1663. Managed Care.

A person is subject to administrative action or sanctions if the person:

(1) is an MCO or an MCO provider and fails to provide a health care benefit, service, or item that the MCO or MCO provider is required to provide according to the terms of its contract with an operating agency, its fiscal agent, or other contractor to provide health care services to Medicaid or HHS program recipients;

(2) is an MCO or MCO provider and fails to provide to an individual a health care benefit, service, or item that the MCO or MCO provider is required to provide by state or federal law, regulation, or program rule;

(3) is an MCO and engages in actions that indicate a pattern of wrongful denial, excessive delay, barriers to treatment, authorization requirements that exceed professionally recognized standards of health care, or other wrongful avoidance of payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(4) is an MCO and engages in actions that cause a delay in making payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating

agency, and the delay results in processing or paying the claim on a date later than that allowed by the MCO's contract;

(5) is an MCO or MCO provider and engages in fraudulent activity or misrepresents or omits material facts in connection with the enrollment in the MCO's managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance;

(6) is an MCO or MCO provider and receives a capitation payment, premium, or other remuneration after enrolling a member in the MCO's managed care plan whom the MCO knows or should have known is not eligible for medical assistance;

(7) is an MCO or MCO provider and discriminates against MCO-enrollees or prospective MCO-enrollees in any manner, including marketing and disenrollment, and on any basis, including, without limitation, age, gender, ethnic origin, or health status;

(8) is an MCO or MCO provider and fails to comply with any term of a contract with a Medicaid or other HHS program or operating agency or other contract to provide health care services to Medicaid or HHS program recipients and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(9) is an MCO or an MCO provider and fails to provide, in the form requested, to the relevant operating agency or its authorized agent upon written request, accurate encounter data, accurate claims data, or other information contractually or otherwise required to document the services and items delivered by or through the MCO to recipients;

(10) is an MCO or an MCO provider and files a cost report or other report with the Medicaid or other HHS program that violates any of the cost report violations in §371.1665 of this division (relating to Cost Report Violations);

(11) is an MCO or MCO provider and misrepresents, falsifies, makes a material omission, or otherwise mischaracterizes any facts on a request for proposal, contract, report, or other document with respect to the MCO's ownership, provider network, credentials of the provider network, affiliated persons, solvency, special investigative unit, plan for detecting and preventing fraud, waste, or abuse, or any other material fact;

(12) is an MCO or MCO provider and fails to maintain the criteria and conditions supporting an application and grant of a waiver to HHSC, or fails to demonstrate the results that were contemplated, based upon representations by the MCO or provider in its proposal submissions or contract negotiations when the waiver was granted, if the failure is related to representations made by the MCO in its proposal, readiness review, contract, marketing materials, audit management responses, or other written representation submitted to the state, and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(13) is an MCO or MCO provider and misrepresents, falsifies, makes a material omission, or otherwise mischaracterizes any facts on a patient assessment or any other document that would have the effect of increasing the MCO's capitation or reimbursement rate, would increase incentive payments or premiums, would decrease the amount of capitation at risk, or would decrease the experience rebate owed to the Medicaid program;

(14) is an MCO or MCO provider and fails to simultaneously notify the OIG and the OAG in writing of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(15) is an MCO and fails to ensure that any payment recovery efforts in which the MCO engages are in accordance with applicable law, contract requirements, or other applicable procedures established by the Executive Commissioner or the OIG;

(16) is an MCO and engages in payment recovery of an amount sought that exceeds $100,000 and that is related to fraud, waste, or abuse in the Medicaid or CHIP program:

(A) without first notifying the OIG and the OAG in writing of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(B) within ten business days after notifying the OIG or the OAG of the discovery or fraud, waste, or abuse in the Medicaid or CHIP program; or

(C) after receipt of a notice from the OIG or the OAG indicating that the MCO is not authorized to proceed with recovery efforts;

(17) is an MCO and fails to timely submit an accurate monthly report to the OIG detailing the amount of money recovered after any and all payment recovery efforts engaged in as a result of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(18) notwithstanding the terms of any contract, is an MCO or MCO provider and fails to timely comply with the requirements of the Texas Medicaid Managed Care program or with the terms of the MCO contract with HHSC or other contract to provide health care services to Medicaid or HHS program recipients, and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(19) is an MCO or MCO provider and engages in marketing services in violation of Texas Government Code §545.0202 [~~§531.02115 of the Texas Government Code~~], the program rules or contract and has not received prior authorization from the program for the marketing campaign;

(20) is an MCO or an MCO provider and fails to use prior authorization and utilization review processes to reduce authorizations of unnecessary services and inappropriate use of services;

(21) is an MCO or MCO provider and commits or conspires to commit a violation of §32.039(b) of the Texas Human Resources Code;

(22) is an MCO and fails to implement or release a payment hold as directed by the OIG or to report accurate payment hold amounts to the OIG;

(23) is an MCO and fails to comply with any provision in Chapter 353, Subchapter F of this title (relating to Special Investigative Units) or Chapter 370, Subchapter F of this title (relating to Special Investigative Units); or

(24) is an MCO and releases information pertaining to an OIG investigation of a provider.

§371.1669. Self-Dealing.

A person is subject to administrative actions or sanctions if the person:

(1) rebates or accepts a fee or a part of a fee or charge for a Medicaid or other HHS program patient referral;

(2) solicits recipients or causes recipients to be solicited, through offers of transportation or otherwise, for the purpose of claiming payment related to those recipients;

(3) knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to

or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency or HHS agency;

(4) knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency, subject to the exceptions enumerated in Chapter 102, Texas Occupations Code;

(5) solicits or receives, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind for referring an individual to a person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid or other HHS program, provided that this paragraph does not prohibit the referral of a patient to another practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(6) solicits or receives, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item for which payment may be made, in whole or in part, under the Medicaid or other HHS program;

(7) offers or pays, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to refer an individual to another person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid or other HHS program, provided that this paragraph does not prohibit the referral of a patient to another practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(8) offers or pays, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to purchase, lease, or order, or arrange for or recommend the purchase, lease, or order of, any good, facility, service, or item for which payment may be made, in whole or in part, under the Medicaid or other HHS program;

(9) provides, offers, or receives an inducement in a manner or for a purpose not otherwise prohibited by this section or §102.001, Texas Occupations Code, to or from a person, including a recipient, provider, employee or agent of a provider, third-party vendor, or public servant, for the purpose of influencing or being influenced in a decision regarding:

(A) selection of a provider or receipt of a good or service under the Medicaid or other HHS program;

(B) the use of goods or services provided under the Medicaid or other HHS program; or

(C) the inclusion or exclusion of goods or services available under the Medicaid program;

(10) is a physician and refers a Medicaid or other HHS program recipient to an entity with which the physician has a financial relationship for the furnishing of designated health services, payment for which would be denied under Title XVIII (Medicare) pursuant to 42 U.S.C. §1395nn, §1396b(s) (Stark I, II, and III), the federal Anti-Kickback Statute, the Affordable Care Act, or other state or federal law prohibiting self-dealing or self-referral;

(11) engages in marketing services in violation of Texas Government Code §545.0202 [~~§531.02115 of the Texas Government Code~~], program rules, or contract and has not received prior authorization from the program for the marketing campaign; or

(12) fails to disclose documentation of financial relationships necessary to establish compliance with §1877 and §1903(s) of the Social Security Act or 42 C.F.R. §§411.350 - .389 (Stark I, II, and III), the federal Anti-Kickback Statute, the Affordable Care Act, or other state or federal law prohibiting self-dealing or self-referral.

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

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 221-7320

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DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §371.1709

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.033, which requires the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; and Texas Government Code § 531.102, which provides that the Executive Commissioner of HHSC shall work in consultation with the HHSC OIG whenever the executive commissioner is required by law to adopt a rule or policy necessary to implement a power or duty of the office.

The amendment affects Texas Government Code §§531.0055, 531.008, 531.001, 531.02115, 531.102, 531.1021, 531.1032, and 531.113.

§371.1709. Payment Hold.

(a) Subject to subsections (c) and (d) of this section, the OIG imposes a payment hold against a provider only:

(1) to compel the production records or documents;

(2) when requested by the state's Medicaid Fraud Control Unit; or

(3) upon the determination a credible allegation of fraud exists.

(b) The OIG may elect not to impose a payment hold, to discontinue a payment hold, to impose a payment hold only in part, or to convert a payment hold imposed in whole to one imposed only in part, for any of the good cause exceptions enumerated in 42 C.F.R. §455.23 and in Texas Government Code §544.0301(d) [~~§531.102(g)(8)~~].

(c) The OIG may not impose a payment hold on claims for reimbursement submitted by a provider for medically necessary services for which the provider has obtained prior authorization from the commission or a contractor of the commission unless the OIG has evidence that the provider has materially misrepresented documentation relating to those services.

(d) Unless the OIG receives a request from a law enforcement agency to temporarily withhold notice pursuant to 42 C.F.R. §455.23, the OIG shall provide notice as required by 42 C.F.R. §455.23(b) and Texas Government Code §544.0302 [~~§531.102(g)~~].

(e) Scope and effect of payment hold.

(1) Once a person is placed on payment hold, payment of Medicaid claims for specific procedures or services is limited or denied as long as the payment hold is in effect.

(2) After a payment hold is terminated for any reason, the OIG may retain the funds accumulated during the payment hold to offset any overpayment, criminal restitution, penalty or other assessment, or agreed-upon amount that may result from ongoing investigation of the person, including any payment amount accepted by the prosecuting authorities made in lieu of a prosecution to reimburse the Medicaid or other HHS program.

(3) The payment hold may be terminated or partially lifted for the reasons outlined in 42 C.F.R. §455.23 or Texas Government Code §544.0301(d) [~~§531.102(g)(8)~~].

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

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CHAPTER 377. CHILDREN'S ADVOCACY PROGRAMS

SUBCHAPTER B. STANDARDS OF OPERATION FOR LOCAL COURT-APPOINTED VOLUNTEER ADVOCATE PROGRAMS

1 TAC §377.107, §377.113

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §377.107, concerning Contract with Statewide Volunteer Advocate Organization, and §377.113, concerning Local Volunteer Advocate Program Administration.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement House Bill 474, 88th Legislature, Regular Session, 2023, which amends Texas Family Code §264.603 and §264.604, which requires HHSC to include in the contract measurable goals and objectives for the number of active and inactive volunteers in the program, and to ensure the statewide organization adopts a grievance process for complaints regarding negligence or misconduct by a volunteer advocate.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §377.107(c) clarifies that the contract must include measurable goals and objectives for both active and inactive volunteer advocates to provide more detailed data on the number of volunteers actively involved in a case as an advocate.

The proposed amendment to §377.113(a)(9) adds that the grievance procedure should also be available for current and former clients who received services from the volunteer advocate program.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

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

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

(6) the proposed rules will expand existing regulations;

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

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

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas, do not impose a cost on regulated persons, and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Crystal Starkey, Deputy Executive Commissioner for Family Health Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be more transparency about access to and quality of volunteer advocate services for children and their families throughout the state.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because the proposed rules will not incur economic costs.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 24R082" in the subject line.

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, and Texas Family Code §264.609, which authorizes the Executive Commissioner of HHSC to adopt rules governing the Court Appointed Volunteer Advocate Program.

The amendments affect Texas Government Code §531.0055 and Texas Family Code §264.609.

§377.107. Contract with Statewide Volunteer Advocate Organization.

(a) HHSC contracts with a single statewide volunteer advocate organization that satisfies subsection (b) of this section, to perform the following functions for local volunteer advocate programs:

(1) training;

(2) technical assistance; and

(3) evaluation services for the benefit of the local volunteer advocate programs.

(b) HHSC may contract only with a statewide volunteer advocate organization that:

(1) is exempt from federal income taxation under Internal Revenue Code of 1986 §501(a) and §501(c)(3); and

(2) is composed of individuals or groups of individuals who have expertise in the dynamics of child abuse and neglect, and with experience in operating local volunteer advocate programs.

(c) The contract must:

(1) include measurable goals and objectives relating to the number of:

(A) active and inactive volunteer advocates in the program; and

(B) children receiving services from the program; and

(2) follow practices to ensure compliance with standards referenced in the contract.

§377.113. Local Volunteer Advocate Program Administration.

(a) Required Written Documents. A local volunteer advocate program must have in writing:

(1) a mission and purpose statement approved by the statewide volunteer advocate organization;

(2) the local volunteer advocate program's goals and objectives, with an action plan and timeline for meeting those goals and objectives;

(3) a method for evaluating the progress of accomplishing the local volunteer advocate program's goals and objectives;

(4) a funding plan based on the local volunteer advocate program's goals and objectives;

(5) personnel policies and procedures;

(6) job descriptions for employees, directors, and volunteers;

(7) procedures for volunteer recruiting, screening, training, and appointment to cases;

(8) policies for support and supervision of volunteers;

(9) a grievance procedure for employees, volunteers, current and former clients, and community members;

(10) a media/crisis communication plan;

(11) a fidelity bond;

(12) accounting procedures;

(13) a weapons prohibition policy approved by the statewide volunteer advocate organization; and

(14) a memorandum of understanding between DFPS and the local volunteer advocate program that defines the working relationship between the local volunteer advocate program and DFPS.

(b) Personnel.

(1) A local volunteer advocate program must have a maximum volunteer-to-supervisor ratio of 30:1 and a maximum case-to-supervisor ratio of 45:1.

(2) A local volunteer advocate program must endeavor to provide equal employment opportunity regardless of race, color, religion, national origin, age, sex (including pregnancy), disability, or other status protected by law and must comply with all applicable laws and regulations regarding employment.

(3) A local volunteer advocate program must endeavor to be an inclusive organization whose employees, volunteers, and directors reflect the diversity of the children and community that the program

serves in terms of gender, ethnicity, and cultural and socio-economic backgrounds.

(c) Conduct.

(1) All volunteers, employees, and directors must conduct themselves in a professional manner.

(2) Volunteers, employees, and directors may not discriminate against any individual on the grounds of race, color, national origin, religion, sex (including pregnancy), age, disability, or other legally protected classes.

(3) A local volunteer advocate program may terminate a relationship with a volunteer, employee, or director who:

(A) does not act in accordance with the policies of the local volunteer advocate program; or

(B) has abused or neglected a position of trust.

(d) Confidentiality.

(1) Each local program must counsel volunteers, employees, and directors on what constitutes confidential information.

(2) A volunteer, employee, or director may not communicate any confidential information pertaining to an individual being served by a local volunteer advocate program to a person who is not authorized to possess the confidential information.

(e) Conflicts of Interest. Each local volunteer advocate program must have a written conflict-of-interest policy that:

(1) prohibits any personal, business, or financial interest that renders a volunteer, employee, or director unable or potentially unable to perform the duties and responsibilities assigned to that volunteer, employee, or director in an efficient and impartial manner; and

(2) prohibits a volunteer, employee, or director from using the position for private gain, or acting in a manner that creates the appearance of impropriety.

(f) Liability.

(1) A person is not liable for civil damages for a recommendation made or an opinion rendered in good faith, while acting in the official scope of the person's duties as a board member, staff member, or volunteer of a local volunteer advocate program.

(2) Neither HHSC nor the statewide volunteer advocate organization will be liable for the actions of local volunteer advocate program volunteers, employees, or directors. Volunteers, employees, and directors of local volunteer advocate programs must abide by the conduct, confidentiality, and conflict-of-interest requirements outlined in this section, as well as all other laws and regulations governing the prescribed conduct and activity.

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

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 460-0992

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 7. TEXAS FINANCIAL EDUCATION ENDOWMENT FUND

7 TAC §§7.101, 7.103 - 7.105

The Finance Commission of Texas (commission) proposes amendments to §7.101 (relating to Applicability and Purpose), §7.103 (relating to TFEE Grant Program), §7.104 (relating to TFEE Gifts and Donations), and §7.105 (relating to TFEE Fund Management) in 7 TAC Chapter 7, concerning Texas Financial Education Endowment Fund.

The rules in 7 TAC Chapter 7 govern the Texas Financial Education Endowment (TFEE). The Texas Legislature established TFEE in 2011, in order to support statewide financial education and consumer credit building activities and programs. The commission and the OCCC have established a grant program to promote the purposes of TFEE.

In general, the purpose of the proposed rule changes to 7 TAC Chapter 7 is to implement changes resulting from the commission's review of the chapter under Texas Government Code, §2001.039. Notice of the review of 7 TAC Chapter 7 was published in the *Texas Register* on August 2, 2024 (49 TexReg 5783). The commission received no comments in response to that notice.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review. The OCCC received no informal precomments on the rule text draft.

The Texas Legislature passed SB 1371 in the 2023 regular legislative session. SB 1371 modernized, clarified, and corrected provisions of the Texas Finance Code administered by the OCCC. In particular, SB 1371 relocated and amended the statutory provision that establishes TFEE. SB 1371 relocated this section from previous Texas Finance Code, §393.628 to current Texas Finance Code, §14.113. SB 1371 also amended Texas Finance Code, §14.113(b) to specify that funds in TFEE will be invested under the prudent business person standard described by the Texas Constitution, replacing previous language that referred to investing funds in the same manner as funds of the Employees Retirement System of Texas (ERS).

A proposed amendment to §7.101(a) would replace a reference to Texas Finance Code, §393.628 with an updated reference to Texas Finance Code, §14.113. This amendment would correct the statutory reference and implement SB 1371's relocation of the section, as described earlier in this preamble.

Proposed amendments to §7.103(g) would specify requirements for the longitudinal report that grantees file after the end of a two-year grant cycle. The proposed amendments would specify that the longitudinal report is comprehensive, that the report must describe activity performed under the grant agreement, and that the report is due on June 30 following the end of the grant cycle. The proposed amendments are intended to clarify requirements for grantees and to provide a more specific deadline for the report.

Proposed amendments throughout §7.104(a) would replace references to Texas Finance Code, §393.628 with updated references to Texas Finance Code, §14.113. These amendments would correct statutory references and implement SB 1371's relocation of the section, as described earlier in this preamble.

A proposed amendment to §7.105 would replace a reference to Texas Finance Code, §393.628(b) with an updated reference to Texas Finance Code, §14.113(b). Another proposed amendment to §7.105 would replace the current reference to the ERS investment standard with a reference to the prudent person standard described by the Texas Constitution. These amendments would implement the changes contained in SB 1371, as described earlier in this preamble.

Mirand Diamond, Director of Licensing, Finance and Human Resources, has determined that for the first five-year period the proposed rule changes are in effect, there will be no fiscal implications for state or local government as a result of administering the rule changes.

Huffman Lewis, Director of Consumer Protection, has determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the changes will be that the commission's rules will be more easily understood by persons required to comply with the rules, and will be consistent with legislation recently passed by the Texas Legislature.

The OCCC does not anticipate that the proposed rule changes will result in any economic costs to persons who are required to comply with the proposed rule changes.

The OCCC is not aware of any adverse economic effect on small businesses, micro-businesses, or rural communities resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these rule changes, the OCCC invites comments from interested stakeholders and the public on any economic impacts on small businesses, as well as any alternative methods of achieving the purpose of the proposal while minimizing adverse impacts on small businesses, micro-businesses, and rural communities.

During the first five years the proposed rule changes will be in effect, the rules will not create or eliminate a government program. Implementation of the rule changes will not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to the OCCC, because the OCCC is a self-directed, semi-independent agency that does not receive legislative appropriations. The proposal does not require an increase or decrease in fees paid to the OCCC. The proposal would not create a new regulation. The proposal would expand current §7.103 by specifying requirements for the six-month longitudinal report following the end of a grant programming cycle. The proposal would not limit or repeal an existing regulation. The proposed rule changes do not increase or decrease the number of individuals subject to the rule's applicability. The agency does not anticipate that the proposed rule changes will have an effect on the state's economy.

Comments on the proposal may be submitted in writing to Matthew Nance, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705 or by email to rule.comments@occc.texas.gov. To be considered, a written comment must be received on or before the 30th day after the date the proposal is published in the *Texas Register*. After the 30th day after the proposal is published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The rule changes are proposed under Texas Finance Code, §14.113, which authorizes the commission to adopt rules to administer the Texas Financial Education Endowment. In addition, Texas Finance Code, §11.304 authorizes the commission to adopt rules necessary to supervise the OCCC and ensure compliance with Texas Finance Code, Title 4.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 14.

§7.101. Applicability and Purpose

(a) Applicability. This chapter governs the administration of the Texas Financial Education Endowment (TFEE) fund as provided by Texas Finance Code, §14.113. [~~§393.628.~~]

(b) - (c) (No change.)

§7.103. TFEE Grant Program

(a) - (f) (No change.)

(g) Reporting and monitoring.

(1) General reporting requirements. To receive reimbursement of TFEE grant expenses, a grantee must:

(A) submit grant reports in a timely manner;

(B) maintain satisfactory compliance with the grant agreement and proposed grant activities;

(C) report performance measures; and

(D) track and report participant demographic information.

(2) Semi-annual reports. A grantee must submit semi-annual reports that demonstrate performance outcomes and financial information over the term of the grant in accordance with and by the deadlines set forth in the grant agreement.

(3) Six-month longitudinal report. A grantee must submit a comprehensive six-month longitudinal report after program completion to demonstrate program objectives and describe activity performed under the grant agreement. The longitudinal report is due on June 30 following the end of the grant programming cycle.

(4) Monitoring. The grant coordinator or GAC may use the following methods to monitor a grantee's performance and expenditures:

(A) Desk review. The grant coordinator or GAC may conduct a desk review of a grantee to review and compare individual source documentation and materials to summary data provided during the reporting process.

(B) Site visits and inspection reviews. The grant coordinator or GAC may conduct a scheduled site visit to a grantee's place of business to review compliance and performance issues. Site visits may be comprehensive or limited in scope.

(h) (No change.)

§7.104. TFEE Gifts and Donations

(a) Authorized gifts and donations.

(1) TFEE purpose. Under Texas Finance Code, §14.113(d), [~~§393.628(d),~~] the finance commission may solicit gifts, grants, and donations that fulfill the purpose of TFEE to support statewide financial education and consumer credit building activities

and programs in this state, including the specific purposes provided by Texas Finance Code, §14.113(c). [~~§393.628(c).~~]

(2) Consumer credit educational purpose. Under Texas Finance Code, §14.105(a), the commissioner may accept gifts, grants, and donations on behalf of the state for a purpose related to a consumer credit educational opportunity, unless prohibited by Texas Finance Code, §14.105(b) or other law. A consumer credit educational opportunity is also considered to be a consumer credit building activity under TFEE.

(3) From state agencies. Under Texas Finance Code, §14.113(e), [~~§393.628(e),~~] the finance commission may partner with other state agencies to administer the TFEE fund, including the acceptance of gifts and donations from other state agencies, for the purposes outlined in paragraphs (1) and (2) of this subsection.

(4) From other parties. Gifts and donations from parties other than state agencies must meet the same criteria required for grantees eligible under §7.103(b) of this title (relating to TFEE Grant Program).

(b) (No change.)

§7.105. TFEE Fund Management

In accordance with Texas Finance Code, §14.113(b), [~~§393.628(b),~~] TFEE funds will be remitted to the comptroller for deposit in the Texas Treasury Safekeeping Trust Company. TFEE funds may be invested and reinvested under the prudent person standard described by Texas Constitution, Article VII, Section 11b [~~in the same manner as funds of the Employees Retirement System of Texas under Texas Government Code, Chapter 815, Subchapter D~~].

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

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Matthew Nance
General Counsel, Office of Consumer Credit Commissioner
Finance Commission of Texas
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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §§115.1 - 115.6, 115.8 - 115.11, 115.16, 115.21, 115.22, 115.24

The Texas State Securities Board proposes a new rule and amendments to thirteen rules in Chapter 115. Specifically, the Board proposes amendments to §115.1, concerning General Provisions; §115.2, concerning Application Requirements; §115.3, concerning Examination; §115.4, concerning Evidences of Registration; §115.5, concerning Minimum Records; §115.6, concerning Registration of Persons with Criminal Backgrounds; §115.8, concerning Fee Requirements; §115.9, concerning Post-Registration Reporting Requirements; §115.10, concerning Supervisory Requirements; §115.11, concerning Finder Registration and Activities; §115.16, concerning Use of Senior-Specific Certifications and Professional Designations; §115.21, concerning System Addressing Suspected Financial Exploitation of Vulnerable Customers Pursuant to the Texas Securities Act, Section 45; and §115.22, concerning Electronic Submission of Forms and Fees; and proposes new §115.24, concerning Adoption by Reference of Conduct Rules.

The rules in 7 TAC Chapter 115 govern securities dealers and agents. The purpose of the proposed rule changes to this chapter is to implement changes pursuant to the agency's periodic review of its rules.

The references to sections of the Texas Securities Act (Act) in §§115.1, 115.3 -115.5, 115.8, 115.16, and 115.21 would be updated to refer to the correct sections in the codified version of the Act in the Texas Government Code. The codification was adopted by HB 4171, 86th Legislature, 2019 Regular Session, and became effective January 1, 2022 (HB 4171).

Sections 115.1 and 115.5 would also be amended to replace the references in those sections to the term "Securities and Exchange Commission" with the term "SEC." SEC is a defined term in §107.2, concerning Definitions.

Section 115.5 would also be amended to abbreviate a cite to the Code of Federal Regulations found in subsection (a). CFR is a defined term in §107.2, concerning Definitions.

Section 115.1 would also be amended to add "or 'in this state'" to paragraph (a)(8) to conform the definition of "within this state" to language used in the codified Act and to delete redundant language in subparagraph (b)(2)(D) that is also contained in subsection (d). In addition, paragraph (c)(2) would be amended to correct a cross reference.

Section 115.3 would also be amended to replace the reference to "North American Securities Administrators Association" with the term "NASAA" in paragraph (a)(1). NASAA is a defined term in §107.2, concerning Definitions. In addition, paragraph (b)(4) would be amended to update the names of two NASAA examinations.

Amendments to §§115.3(c)(3)(D), 115.5(b)(13), and 115.6(g) would be made to remove or update outdated language.

Section 115.5 would also be amended to abbreviate a reference to "Central Registration Depository" as "CRD" for consistency.

An additional proposed amendment to §115.1 relates to the definition of a dealer's branch office. The definition of a dealer's "branch office" set forth in §115.1(a)(2) would be amended to incorporate and recognize a new rule adopted by the Financial Industry Regulatory Authority (FINRA) establishing a new designated location category referred to as a "residential supervisory location" (or RSL). Dealer firms that are members of FINRA may designate certain locations where they do business as an RSL instead of a "branch office," if the firm and location meet specified criteria and conditions set forth in FINRA rules. A dealer that is registered in Texas must submit a notice filing for all of its Texas locations that meet the definition of "branch office" set forth in §115.(a)(2). Texas registered dealers do not submit notice filings for locations in Texas that are non-branch locations. This change would result in Texas locations that are designated by dealers registered in Texas as RSLs under FINRA rules being excluded from the definition of a dealer's "branch office." This change would also result in registered dealers no longer needing to make a notice filing with the agency for locations that are RSLs, which locations would be thereafter treated under the rules as non branch locations.

Section 115.2 would be reorganized, and a cross reference to §115.22 would be added to §115.2 to improve consistency and readability of provisions governing application requirements. In addition, subsection (d) would be amended to allow the agency registration staff the option to notify applicants by email (which is a faster and more reliable delivery method) rather than by certified mail of automatic withdrawal of applications that have been pending for more than 90 days. References to "certificate of formation" which is the name of the form used by the Texas Secretary of State for formation documents filed with it, would also be added to the respective lists of formation of organization documents (including articles of incorporation, partnership agreements, articles of association, and charters) found in §115.2(a)(2)(B), as well as in §115.5(e)(5), for clarity and to improve accuracy.

Generally applicants for registration are required to have passed various qualification examinations to become registered. Additional proposed amendments to §115.3 relate to waivers from these requirements. Specifically, section 115.3 would also be amended to add new subparagraphs (c)(5)(A) and (c)(5)(B) to recognize and grant waivers of examination or reexamination requirements for certain classes of applicants who are participating in FINRA or NASAA continuing education programs and meet other requirements. FINRA established a voluntary program in 2022 (the Maintaining Qualifications Program or MQP) that allows eligible individuals whose FINRA registration has terminated to maintain their FINRA qualifications for up to five years by completing annual continuing education requirements and by paying an enrollment fee to FINRA to participate in the MQP. Individuals participating in the MQP are not required to either take or retake a qualification exam, as applicable, to become registered with FINRA. Similarly, NASAA's voluntary Exam Validity Extension Program (EVEP) provides an opportunity for registered persons to extend their NASAA qualifications exams for up to five years by participating in the EVEP and maintaining certain continuing education requirements. Since there are no specific waiver provisions in the rules for applicants participating in the EVEP or the MQP, applicants (in the MQP or EVEP, as applicable) requesting waivers from examination requirements must be individually approved by the Securities Commissioner. The amendments to add additional waivers in the rule would reduce the application processing time for these eligible applicants.

Section 115.3 would also be amended to add subparagraph (c)(5)(C) to recognize and grant waivers of examination requirements for applicants who have received an examination waiver from FINRA. Recognizing the FINRA waiver in the rule would reduce the processing time for these types of waivers, provide more transparency, and reflect the agency's current practice of granting waivers of this type on request. In addition, updates and revisions to the Texas securities law examination process would be made to subsection (d) to more accurately reflect this process, and to specifically direct applicants with questions about the process to the Registration Division for information. The amendment would also impose a one-week waiting period to retake the examination for applicants who failed the exam to provide and encourage more time to study prior to retaking the exam.

Section 115.8, which relates to fee requirements, would also be amended to remove an incorrect reference in subsection (a) to fees for officers and partners of a securities dealer, to update the reference to the agency's website, and to clarify that persons seeking information on fee requirements may contact the Registration Division of the agency.

Section 115.9 sets out events that a registered dealer or agent must report to the Securities Commissioner after registration. Paragraph (a)(3) would be amended to clarify that misdemeanor offense actions that are listed in §115.6(c) must be reported. Section 115.6(c) provides a list of misdemeanors that directly relate to the duties and responsibilities of dealers and agents. The Securities Commissioner may revoke or suspend the registration of a person who has been convicted of a misdemeanor offense that directly relates to the person's duties and responsibilities. In addition, paragraph (a)(6) would be amended to clarify that registered entities must notify the Commissioner of changes in legal status of their entities. Applicants for registration are required to include their legal status in their registration application on Form BD, such as a sole proprietorship, partnership, corporation, or limited liability company.

Section 115.10, which relates to supervisory requirements of dealers, would be amended to incorporate and recognize another new FINRA rule that has established a pilot program (Remote Inspections Pilot Program (RIPP)) that allows participating FINRA members to conduct remote internal inspections of certain locations, subject to specified terms. Existing subsection (c) which governs internal inspections of dealers, would be divided into two paragraphs, with new paragraph (c)(1) to include the language in existing subsection (c) with slight amendments and additions, and paragraph (c)(2) being new language that would address the RIPP and its participants. This change would clarify that dealers registered in Texas that are participating in this FINRA pilot program may comply with this section by conducting internal inspections of certain branch offices and other non-branch locations remotely instead of in person. The change would also clarify the rule by including references to applicable FINRA rules governing internal inspections in the proposed new paragraphs in subsection (c) that registered Texas dealers participating in the RIPP would be in compliance with §115.10(c) if they conduct their internal inspections programs in compliance with FINRA rules.

Section 115.11(a) would be amended to remind and inform finder applicants that finders by the definition set forth in §115.1(a)(9) are not permitted to register in other capacities. In addition, subsection (f) would be amended to correct a cross reference and to remove an outdated reference to filings being in paper form.

Section 115.21 would also be renamed to refer to the applicable section of the codified Act.

Section 115.22 would be revised to add a reference to finder registration in subsection (b) for clarification that finder applicants may submit documents electronically, and to remove an unneeded reference to dealers and agents in subsection (c).

New rule §115.24 would adopt by reference an SEC rule governing dealer conduct referred to as the SEC Regulation Best Interest (or Regulation BI). The new rule would also adopt by reference other fair practice, ethical standard, or conduct rules promulgated by FINRA, the SEC, the United States Commodity Futures Trading Commission (CFTC), or any self-regulatory organization approved by the SEC or the CFTC. Regulation Best Interest is an SEC rule governing conduct of FINRA member dealers and their associated persons, which went into effect on June 30, 2020. The rule established and standardized a "best interest" standard of conduct for dealers and their agents when recommending securities transactions or investment strategies to retail investors. Activities and practices that do not comply with the requirements of Regulation BI or the other conduct rules enumerated in the proposed rule, may constitute bases for de-

nials, suspensions, or revocations of the registrations of dealers or agents. A related change would amend §115.5, concerning Minimum Records, to require additional related recordkeeping requirements to verify compliance with new rule §115.24. Since Regulation BI went into effect, agency staff have used this standard for guidance as to what conduct constitutes an inequitable practice under the Act involving retail investors of dealers or agents registered in Texas. The adoption of these proposals would also allow the Securities Commissioner the flexibility to assess administrative fines against violators of these requirements, which will further the Board's mission to protect Texas investors.

Travis J. Iles, Securities Commissioner; Cristi Ramón Ochoa, Deputy Securities Commissioner; Emily Diaz, Director, Registration Division; and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the proposed new rule and amendments are in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the proposed new rule and amendments. While the adoption of the amendment to the definition of "branch office" proposed in §115.1 may reduce the number of branch office filings made with the agency, there will be no fiscal implications to the agency, because there are no fees collected for branch office filings. In addition, while the proposed amendments to §115.3 would add additional waivers from current examination requirements, there will be no fiscal implications to the agency because applicants for registration will still need to pay application fees, whether or not examination requirements are waived.

Mr. Iles, Ms. Ochoa, Ms. Diaz, and Mr. Green have also determined that for each year of the first five years the proposed new rule and amendments are in effect, the public benefits expected as a result of adoption of the proposed new rule and amendments will be (1) greater coordination with other securities regulators (particularly with respect to proposed amendments to §§115.1, 115.3, and 115.10, and proposed new rule §115.24), and (2) dealers and agents will be apprised of their obligations under the Act. Additional public benefits include that (3) administrative burdens for firms will be reduced by recognizing RSLs and RIPPs which will reduce compliance costs, and (4) dealers will be notified of required content for their supervisory systems which will improve their ability to carry out their supervisory duties. Additionally, the proposed amendments to §115.3 will (5) reduce administrative burdens for eligible applicants; (6) facilitate internal processing of registration applications, and (7) allow examination waivers to be processed more quickly, uniformly, and with more transparency. In addition, (8) proposed new §115.24 would further apprise persons of the types of activities or practices which may result in the assessment of sanctions under the Act. Finally, the proposals will (9) ensure the rules are current and accurate and that they conform to the codified version of the Act, which would promote transparency and efficient regulation.

There will be no adverse economic effect on micro or small businesses or rural communities. Since the proposed new rule and amendments will have no adverse economic effect on micro or small businesses or rural communities, preparation of an economic impact statement and a regulatory flexibility analysis is not required. There is no anticipated economic cost to persons who are required to comply with the new rule and amendments as proposed. Although applicants for agent registration incur costs to participate in the MQP and EVEP programs (which are paid to FINRA or NASAA) that would be recognized in proposed amendments to §115.3, participation in these programs is optional and not required for registration under the rules. There is no anticipated impact on local employment.

Mr. Iles, Ms. Ochoa, Ms. Diaz, and Mr. Green have also determined that for the first five-year period the proposed new rule and amendments are in effect: they do not create or eliminate a government program; they do not require the creation or elimination of existing employee positions; they do not require an increase or decrease in future legislative appropriations to this agency; they do not require an increase or decrease in fees paid to this agency; they do not increase or decrease the number of individuals subject to the rules' applicability; and they do not positively or negatively affect the state's economy. Additionally, the proposed amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendments to §115.3 would add additional waivers from current examination requirements, which will reduce administrative burdens on eligible applicants for registration. The proposed amendments to 115.10 would provide clarity and harmonize the supervision with FINRA requirements and replace the current requirements with more flexible requirements.

Additionally, although proposed new §115.24 would create a new rule, the new rule would merely act to describe and formalize into a rule the types of conduct that are already considered to be inequitable practices under the Texas Securities Act. The new rule would not create any new obligations under the Act or make new types of conduct actionable under the Act that are currently not a violation of the Act.

Comments on the proposal must be in writing and will be accepted for 30 days following publication of the proposed sections in the *Texas Register*. Written comments should be submitted to Cheryn Netz, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167. Comments may also be submitted electronically to proposal@ssb.texas.gov. In order to be considered by the Board at adoption, comments must be received no later than 30 days following publication.

The new rule and amendments are proposed under the authority of Texas Government Code (TGC), §4002.151, as adopted by HB 4171. Section 4002.151 of the Act provides the Board with the authority to adopt rules as necessary to implement the provisions of the Act, including rules governing registration statements, applications, notices, and reports; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. In addition, the amendments to §115.3 are also proposed under the authority of TGC, §4004.151. Section 4004.151 of the Act provides the Board with authority to waive examination requirements for any applicant or class of applicants.

The proposed amendments to §§115.1 - 115.3, 115.9 - 115.11, and 115.22 affect the following sections of the Act: Texas Government Code (TGC) Chapter 4004, Subchapters A - D, and F - G. The proposed amendment to §115.21 affects Chapter 4004, Subchapter H of the Act. The proposed amendment to §115.22 also affects TGC §4006.001 of the Act. The proposed amendment to §115.1 also affects TGC §4007.052 of the Act. The proposed amendments to §115.5 and §115.21 and proposed new rule §115.24 affect TGC §4007.105. Finally, the proposed amendment to §115.5 and proposed new rule §115.24 also affect TGC §4007.106. Statutes affected by proposed amendments to §§115.4, 115.8, and 115.16: none.

§115.1. General Provisions.

(a) Definitions. Words and terms used in this chapter are also defined in §107.2 of this title (relating to Definitions). The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Branch office--Any location where one or more agents of a dealer regularly conduct the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or that is held out as such.

(A) This definition excludes:

(i) - (vii) (No change.)

(viii) a location identified and designated with FINRA by the registered dealer as a residential supervisory location (RSL) in accordance with FINRA Rule 3110.19, and which location has been provided to FINRA in accordance with FINRA Rule 3110.19(d).

(B) Notwithstanding the exclusions in subparagraph (A) of this paragraph, any location other than an RSL that meets the requirements of §115.1(a)(2)(A)(viii) that is responsible for supervising the activities of persons associated with the dealer at one or more non-branch locations of the dealer is considered to be a branch office.

(C) (No change.)

(3) - (4) (No change.)

(5) In this state--As used in the Texas Securities Act, §§4001.052, 4001.056, 4004.051, and 4004.101 [~~§12~~], has the same meaning as the term "within this state" as defined in §107.2 of this title [~~(relating to Definitions)~~] and paragraph (8) of this subsection.

(6) - (7) (No change.)

(8) Within this state or in this state--

(A) A person is a "dealer" who engages "within this state" or "in this state" in one or more of the activities set out in the Texas Securities Act, §4001.056 or §4004.051 [~~§4.C~~], if either the person or the person's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be a dealer in more than one state at the same time.

(B) Likewise, a person is an "agent" who engages "within this state" or "in this state" in one or more of the activities set out in the Texas Securities Act, §4001.052 or §4004.101 [~~§4.D~~], whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be an agent in more than one state at the same time.

(C) (No change.)

(9) - (10) (No change.)

(b) Registration requirements of dealers, issuers, and agents, and notice filings for branch offices.

(1) (No change.)

(2) Persons not required to register as an agent.

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

~~[(D) Persons not required to register with the Securities Commissioner pursuant to subparagraph (A) of this paragraph, are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by a dealer or agent in connection with transactions involving securities in Texas.]~~

(c) Types of registrations.

(1) (No change.)

(2) Restricted registration. The restricted registrations are as follows:

(A) The Securities Commissioner recognizes the specialized knowledge examinations administered by FINRA as restricted registration categories. The registration of an applicant passing a specialized knowledge examination in lieu of the general securities examination pursuant to §115.3(b) of this chapter [~~title~~] (relating to Examination [~~Examinations~~]) is restricted to and effective only for conducting the business and securities activities and effecting transactions associated with the specialized examination.

(B) (No change.)

(3) (No change.)

(d) Prohibition on fraud and availability of an exemption from registration. The Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by a dealer or agent in connection with transactions involving securities in Texas. However, the registration requirements detailed in this chapter do not apply to dealers and agents that are exempt from registration as such pursuant to the Texas Securities Act, Chapter 4005, Subchapter A [~~§5~~], or by Board rule pursuant to the Texas Securities Act, §4004.001 or §4005.024 [~~§5.T or §12.C~~], contained in Chapter 109 or 139 of this title.

§115.2. Application Requirements.

(a) Securities dealer application requirements. A complete application consists of the following [~~and must be filed in paper form with the Securities Commissioner~~]:

(1) items filed via the Central Registration Depository System (CRD) which is jointly operated by NASAA, the SEC, and FINRA, for FINRA member firms, or items filed either in paper form or as provided in §115.22 of this chapter (relating to Electronic Submission of Forms and Fees) for non-FINRA member firms, using the applicable uniform forms:

(A) Form BD;

(B) Form U-4 for the designated officer and a Form U-4 for each agent to be registered (officers of a corporation or partners of a partnership shall not be deemed agents solely because of their status as officers or partners); and

(C) the appropriate registration fee(s).

~~[(1) Form BD;]~~

(2) items filed with the Securities Commissioner either in paper form or as provided in §115.22 of this chapter:

(A) a copy of articles of incorporation, certificate of formation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified

by the appropriate jurisdiction or by an officer or partner of the applicant;

(B) a balance sheet prepared in accordance with United States generally accepted accounting principles reflecting the financial condition of the dealer as of a date not more than 90 days prior to the date of such filing. The balance sheet should be compiled, reviewed, or audited by independent certified public accountants or independent public accountants, or must instead be certified by the applicant's principal financial officer. If certified by the principal financial officer of the applicant, such officer shall make the certification on Form 133.18, Certification of Balance Sheet by Principal Financial Officer; and

(C) any other information deemed necessary by the Securities Commissioner to determine a dealer's financial responsibility or dealer's or agent's business repute or qualifications.

[(2) Form U-4 for the designated officer and a Form U-4 for each agent to be registered (officers of a corporation or partners of a partnership shall not be deemed agents solely because of their status as officers or partners);]

[(3) a copy of articles of incorporation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the appropriate jurisdiction or by an officer or partner of the applicant;]

[(4) a balance sheet prepared in accordance with United States generally accepted accounting principles reflecting the financial condition of the dealer as of a date not more than 90 days prior to the date of such filing. The balance sheet should be compiled, reviewed, or audited by independent certified public accountants or independent public accountants, or must instead be certified by the applicant's principal financial officer. If certified by the principal financial officer of the applicant, such officer shall make the certification on Form 133.18, Certification of Balance Sheet by Principal Financial Officer.]

[(5) any other information deemed necessary by the Securities Commissioner to determine a dealer's financial responsibility or a dealer's or agent's business repute or qualifications; and]

[(6) the appropriate registration fee(s).]

(b) (No change.)

(c) Branch office designation and inspection.

(1) A dealer may designate a branch office upon initial application of the dealer or by amendment to a current Form BR. No sales-related activity may occur in any branch office location until such time as the dealer has notified the Securities Commissioner that such location will function as a branch office by submitting Form BR on CRD for FINRA member firms. For non-FINRA member firms, the request is made by submitting Form BR [in paper form] to the Securities Commissioner.

(2) (No change.)

(3) Each branch office of a dealer that [who] is registered with the Securities Commissioner is subject to unannounced inspections at any time during normal business hours.

(d) Automatic withdrawal of a dealer or agent application for registration that has been pending for at least 90 days. If an application for dealer or agent registration has been pending for at least 90 days and the applicant has failed to substantively respond to a written request for information sent by either electronic mail or by certified mail to the applicant's address as set forth in the application, an automatic withdrawal will occur. The written request must have advised the applicant that if a substantive response is not received within 30 days from the date of the [certified] request, the application will be withdrawn automatically. Regardless of how long an application has been pending, it may not be withdrawn automatically without sending [certified] notice of this subsection to the address set forth in the application and allowing the applicant 30 calendar days from the date of the notice to provide a substantive written response. A copy of this subsection and the most recent written request for information will be included with the notice [certified letter].

(e) Central Registration Depository System (CRD).

(1) Whenever the Texas Securities Act or Board rules require the filing of an application with the Securities Commissioner for dealer or agent registration, members of FINRA or applicants for membership in FINRA shall make such filing electronically through [the] CRD [which is jointly operated by FINRA and the North American Securities Administrators Association, Inc. (NASAA). Applicants shall use the applicable uniform form for the submission of the filing in question and shall supplement their electronic filing by filing, in paper form, the items listed in paragraphs (3) - (6) of subsection (a)(3) - (6) of this section, directly with the Commissioner].

(2) (No change.)

§115.3. Examination.

(a) Requirement.

(1) To determine the applicant's qualifications and competency to engage in the business of dealing in and selling securities, the State Securities Board requires a written examination on general securities principles and on state securities law. Applicants must make a passing score, as determined by NASAA [the North American Securities Administrators Association], FINRA, or the Securities Commissioner, as appropriate, on any required examination.

(2) (No change.)

(b) Examinations accepted.

(1) - (3) (No change.)

(4) Each applicant must pass an examination on state securities law. This requirement may be satisfied by passing an examination on the Texas Securities Act administered by this Agency or by passing the NASAA Uniform Securities Agent State Law Examination (Series 63) or the NASAA Uniform Combined State Law Examination (Series 66).

(c) Waivers of examination requirements.

(1) (No change.)

(2) A full waiver of the examination requirements of the Texas Securities Act, §4004.151 [§13.D], is granted by the Board to the following classes of persons:

(A) - (H) (No change.)

(3) A partial waiver of the examination requirements of the Texas Securities Act, §4004.151 [§13.D], is granted by the Board to the following classes of persons:

(A) applicants who have been continuously registered with the SEC [Securities and Exchange Commission], FINRA, or any other exchange listed in the Act, §4005.054 [§6.F], or recognized by the Board pursuant to §111.2 of this title (relating to Listed and Designated Securities) for 10 years immediately preceding the application for registration in Texas. These applicants are required to pass an examination on state securities law as required by subsection (b)(4) of this section;

(B) - (C) (No change.)

(D) applicants seeking registration for the purpose of dealing exclusively in oil and gas interests (other than interests in limited partnerships). Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(4) of this section [~~. Provided, however, any persons registered prior to January 1, 1976, for the purpose of dealing exclusively in oil and gas interests, are not required to pass an examination~~]; and

(E) (No change.)

(4) The Securities Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §4004.151 [~~§13.D~~].

(5) The following classes of persons are granted a partial waiver by the Board of the examination requirements of §4004.151 of the Act and subsection (a)(1) of this section:

(A) NASAA Exam Validity Extension Program ("EVEP"). Applicants who previously took and passed an examination on state securities law as required by subsection (a)(1) of this section (State Law Requirement), whose registration with another state securities regulator has not lapsed for more than five years who have participated in the EVEP and have maintained compliance with the EVEP requirements are granted a waiver of the State Law Requirement.

(B) FINRA Maintaining Qualifications Program ("MQP").

(i) Applicants who previously took and passed an examination or examinations on general securities principles as required by subsection (a)(1) of this section (GSP Requirement), whose registration with FINRA and with another state securities regulator has not lapsed for more than five years who have participated in the MQP and have maintained compliance with the MQP requirements are granted a waiver of the GSP Requirement.

(ii) Applicants who previously took and passed an examination or examinations on one or more specialized knowledge examinations administered by FINRA as provided in subsection (b)(3) of this section, whose registration with FINRA and with another state securities regulator has not lapsed for more than five years who have participated in the MQP and have maintained compliance with the MQP requirements are granted a waiver of the requirements to pass the FINRA specialized knowledge examination(s) required to obtain the applicable restricted registration(s) as provided in subsection (b)(3) of this section.

(C) FINRA Examination Waivers. Applicants who have received a waiver of any examination requirement(s) by FINRA, including an examination on general securities principles, the SIE examination, or one or more specialized knowledge examinations administered by FINRA, are granted a waiver of the corresponding examination requirement(s) in this section.

(d) Texas securities law examination.

(1) The fee for each filing of a request to take the Texas securities law examination is $35. An admission letter issued by the Board is required for all entrants. The examination is given [~~at 9:00 a.m. on each Tuesday~~] at the main office of the State Securities Board in Austin and at the Agency's branch offices. [~~The examination may be taken at other locations near principal population centers across the state. Testing centers require reservations and may charge an additional (monitor) fee for administering the examination. A list of examination centers with additional details may be obtained from the State Securities Board.~~]

(2) (No change.)

(3) Reexamination. An applicant who fails the examination on the Texas Securities Act may request to retake the examination no sooner than after one week from the date of the examination [~~reexamination~~]. The applicant must bring his or her application up to date before retaking an examination.

(4) (No change.)

(5) Information about taking the examination and how to apply to take the examination in Austin or at an Agency branch office is available on the Agency's website located at www.ssb.texas.gov or by contacting the Registration Division of the State Securities Board.

§115.4. Evidences of Registration.

(a) (No change.)

(b) Amendments. Any changes in the information reflected on the evidence of registration must be submitted to the Securities Commissioner within 30 days of such change. An amendment fee, in the amount set forth in the Texas Securities Act, §4006.054 [~~§35~~], is required to amend the evidence of registration.

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

(e) Renewal.

(1) Procedures for renewing expired and unexpired registrations are set forth in the Texas Securities Act, Chapter 4004, Subchapter F [~~§19.C~~].

(2) - (3) (No change.)

§115.5. Minimum Records.

(a) Dealer records. Compliance with the record-keeping requirements of the United States SEC [~~Securities and Exchange Commission~~], found in 17 Code of Federal Regulations §240.17a-3 and §240.17a-4 (17 CFR §240.17a-3 and §240.17a-4, as amended), will satisfy the requirements of this section.

(b) Records to be made by certain dealers. A person or company registered in Texas as a securities dealer shall make and keep current the following minimum records or the equivalent thereof.

(1) - (11) (No change.)

(12) A record listing of every agent of the dealer that shows, for each agent, every office of the dealer where the agent regularly conducts the business of handling funds or securities or effecting any transaction in, or inducing or attempting to induce the purchase or sale of any security for the dealer, and the CRD [~~Central Registration Depository~~] number, if any, and every internal identification number or code assigned to that agent by the dealer.

(13) For each account with a natural person as a customer or owner:

(A) An account record including the customer's or owner's name, tax identification number, address, telephone number, date of birth, employment status (including occupation and whether the customer is an agent of a dealer), annual income, net worth (excluding value of primary residence), and the account's investment objectives. In the case of a joint account, the account record must include personal information for each joint owner who is a natural person; however, financial information for the individual joint owners may be combined. The account record shall indicate whether it has been signed by the agent responsible for the account, if any, and approved or accepted by a supervisor of the dealer. [~~For accounts in existence on the effective date of this section, the dealer must obtain this information within three years of May 2, 2003.~~]

(B) A record indicating that:

(i) The dealer has furnished to each customer or owner within [~~three years of May 2, 2003, and to each customer or owner who opened an account after May 2, 2003 within~~] 30 days of the opening of the account, and thereafter at intervals no greater than 36 months, a copy of the account record or an alternate document with all information required by subparagraph (A) of this paragraph. The dealer may elect to send this notification with the next statement mailed to the customer or owner after the opening of the account. The dealer may choose to exclude any tax identification number and date of birth from the account record or alternate document furnished to the customer or owner. The dealer shall include with the account record or alternate document provided to each customer or owner an explanation of any terms regarding investment objectives. The account record or alternate document furnished to the customer or owner shall include or be accompanied by prominent statements that the customer or owner should mark any corrections and return the account record or alternate document to the dealer, and that the customer or owner should notify the dealer of any future changes to information contained in the account record.

(ii) - (iii) (No change.)

(C) - (F) (No change.)

(14) - (18) (No change.)

(c) Exemptions from the requirements of subsection (b) of this section:

(1) A dealer is not required to make or keep such records of transactions cleared for such dealer by a member of FINRA, the American Stock Exchange, the Boston Stock Exchange, the Chicago Stock Exchange, the Pacific Stock Exchange, the Chicago Board Options Exchange, or any other recognized and responsible stock exchange approved by the Securities Commissioner pursuant to the Texas Securities Act, Chapter 4005, Subchapter C [~~§6.F~~], where such records are customarily made and kept by the clearing member.

(2) - (4) (No change.)

(d) (No change.)

(e) Records to be preserved by dealers.

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

(5) Persons registered as dealers in Texas shall preserve for at least three years after the termination of the enterprise partnership articles and any amendments thereto, articles of incorporation, certificates of formation, charters, minute books, and stock certificate books of the dealer and of any predecessor, all Forms BD, all Forms BDW, all amendments to these forms, all licenses or other documentation showing the registration of the dealer with any securities regulatory authority.

(6) - (9) (No change.)

(f) - (g) (No change.)

(h) SEC Regulation Best Interest Records. In addition to the requirements in this section, a person or company registered in Texas as a securities dealer shall make and keep appropriate books and records to document compliance with the obligations set forth in SEC Regulation Best Interest (17 CFR §240.15l-1, as amended), including all records described in SEC Rule §240.17a-3(a)(35), and shall preserve the records required to be preserved by SEC Rule §240.17a-4(e)(5) for a period of not less than six years after the earlier of the date the account was closed or the date in which the information was collected, provided, replaced, or updated.

§115.6. Registration of Persons with Criminal Backgrounds.

(a) - (f) (No change.)

(g) State Auditor Applicant Best Practices Guide.

(1) The State Securities Board provides [~~shall post~~] a link on its website to the Applicant Best Practices Guide, which is [~~to be developed and~~] published by the state auditor as required by Texas Occupations Code, §53.026. This guide[~~, which shall be posted once it becomes available, shall set~~] sets forth best practices for an applicant with a prior conviction to use when applying for a license.

(2) (No change.)

§115.8. Fee Requirements.

(a) Registration and notice filing fees. Information about registration and notice filing fees for original and renewal applications for dealers and agents are [~~dealer, agents, officers, or partners of a securities dealer is~~] available on the Agency's website [~~web site~~] located at www.ssb.texas.gov [~~www.ssb.state.tx.us~~] or by contacting the Registration Division [~~an office~~] of the State Securities Board.

(b) Reduced fees for certain persons registered in multiple capacities.

(1) - (2) (No change.)

(3) Reduced fees. If the Securities Commissioner grants a person's request, the person must pay all applicable fees for securities agent or dealer registration as specified in the Texas Securities Act, §4006.001 [~~§35.A~~], but is exempt from the fees specified in the Texas Securities Act, §4006.001 [~~§35.A~~], in connection with original and renewal applications for investment adviser representative or sole proprietor investment adviser registration, as applicable at the time Form 133.36 is filed. The reduction in fees granted by the Securities Commissioner under this subsection shall continue in force, without any further filings, as long as a person remains registered in a multiple capacity status.

(c) (No change.)

(d) Fees for concurrent registrations. Notwithstanding the Texas Securities Act, Chapter 4006 [~~§35~~], a person shall pay only one fee required under that section to engage in business in this state concurrently for the same person or company as:

(1) - (2) (No change.)

(e) (No change.)

§115.9. Post-Registration Reporting Requirements.

(a) Each person registered as a securities dealer shall report to the Securities Commissioner within 30 days after its occurrence or entry against the registered person or an agent thereof, the matters described in this subsection. Likewise, each person registered as an agent of a securities dealer shall report to the Commissioner within 30 days after its occurrence or entry against the agent the matters described in this subsection. The following matters must be reported:

(1) - (2) (No change.)

(3) any [~~misdemeanor~~] action or conviction of a misdemeanor offense that directly relates to the person's duties and responsibilities as a dealer or agent, including any criminal violation listed in §115.6(c) of this chapter (relating to Registration of Persons with Criminal Backgrounds) [~~based on fraud, deceit, or wrongful taking of property~~];

(4) - (5) (No change.)

(6) any change in any other information previously disclosed to the Securities Commissioner on any application form or filing, including change of legal status; and

(7) (No change.)

(b) - (c) (No change.)

§115.10. Supervisory Requirements.

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

(c) Internal inspections. [~~Each dealer shall conduct a review, at least annually, of the businesses in which it engages, which review shall be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations. The dealer shall document this review and provide the documentation to the Securities Commissioner upon request. Each dealer shall review the activities of each office, including the periodic examination of customer accounts to detect and prevent violations of applicable securities laws and regulations. Each branch office of the dealer shall be inspected according to a cycle which shall be set forth in the dealer's written supervisory and inspection procedures. In establishing such cycle, the dealer shall give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location. Each dealer shall retain a written record of the dates upon which each review and internal inspection is conducted.~~]

(1) Each dealer shall conduct a review, at least annually or to be conducted within the timeframes in accordance with and as required by FINRA Rule 3110(c), of the businesses in which it engages, which review of locations shall be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations. The dealer shall document this review and provide the documentation to the Securities Commissioner upon request. Each dealer shall review the activities of each office or location in accordance with and as required by FINRA Rule 3110(c), including the periodic examination of customer accounts to detect and prevent violations of applicable securities laws and regulations. Each branch office of the dealer shall be inspected according to a cycle which shall be set forth in the dealer's written supervisory and inspection procedures and in compliance with and as required by FINRA Rule 3110(c). In establishing such cycle, the dealer shall give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location. Each dealer shall retain a written record of the dates upon which each review and internal inspection is conducted.

(2) For purposes of this subsection, registered dealers that have notified FINRA of their participation in the FINRA remote inspections pilot program established by FINRA Rule 3110.18, or any successor program established by FINRA, and which are in compliance with the requirements of FINRA Rule 3110.18 or successor program will satisfy the requirements of this subsection, provided however, that if a dealer or one or more of its locations becomes ineligible to participate in the program, the dealer must comply with the applicable requirements set forth in paragraph (1) of this subsection.

(d) (No change.)

§115.11. Finder Registration and Activities.

(a) Prohibited activities. A finder is not permitted to register in any other capacity and shall not:

(1) - (7) (No change.)

(b) - (e) (No change.)

(f) Filings.

(1) Application. In lieu of the application requirements listed in §115.2 of this chapter [~~title~~] (relating to Application Requirements), a complete application for a finder consists of the following and must be filed [~~in paper form~~] with the Securities Commissioner:

(A) - (D) (No change.)

(2) (No change.)

§115.16. Use of Senior-Specific Certifications and Professional Designations.

(a) The use of a senior specific certification or designation by any person in connection with the offer, sale, or purchase of securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be an inequitable practice within the meaning of the Texas Securities Act, §4007.105(a)(3) [~~§14.A(3)~~]. The prohibited use of such certifications or professional designation includes, but is not limited to, the following:

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

(b) - (f) (No change.)

§115.21. System Addressing Suspected Financial Exploitation of Vulnerable Customers Pursuant to the Texas Securities Act, Chapter 4004, Subchapter H [~~Section 45~~].

(a) System. Each dealer shall establish, maintain, and enforce a written system of policies, programs, plans, or procedures to address suspected financial exploitation of vulnerable adults. The system must be reasonably designed to achieve compliance with the Texas Securities Act, Chapter 4004, Subchapter H [~~Section 45~~].

(b) Reporting. The report of suspected financial exploitation (complaint) required by the Texas Securities Act, §4004.352 [~~Section 45.C~~], must be made in writing to the Securities Commissioner. The complaint may be in the form of a letter or memorandum and submitted electronically, by facsimile, or any other method designed to assure its prompt receipt. A template for submitting the required information is available on the website of the Texas State Securities Board. The complaint shall include:

(1) - (5) (No change.)

§115.22. Electronic Submission of Forms and Fees.

(a) (No change.)

(b) Documents and fees submitted by applicants for finder registration or for dealer and agent registration may, at the option of the filer, be submitted electronically to the Securities Commissioner.

(c) Filings made and fees paid [~~by dealers and agents~~] may be submitted electronically, as the Agency's system is developed to accept them.

(d) (No change.)

§115.24. Adoption by Reference of Conduct Rules.

(a) Each dealer or agent, as defined by §4001.052 or §4001.056 of the Securities Act, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interests of the dealer or agent making the recommendation ahead of the interest(s) of the retail customer. The best interest obligation shall be satisfied if the dealer or agent complies with the obligations set forth in SEC Regulation Best Interest (17 CFR §240.15l-1, as amended).

(b) Each dealer or agent shall also comply with any other applicable fair practice or ethical standard rule that is promulgated

by FINRA, the SEC, the Commodity Futures Trading Commission (CFTC), or any self-regulatory organization approved by the SEC or the CFTC.

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

Filed with the Office of the Secretary of State on October 25, 2024.

TRD-202405045
Travis J. Iles
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §§116.1 - 116.6, 116.8, 116.9, 116.15, 116.16, 116.21

The Texas State Securities Board proposes amendments to eleven rules in Chapter 116. Specifically, the Board proposes amendments to §116.1, concerning General Provisions; §116.2, concerning Application Requirements; §116.3, concerning Examination; §116.4, concerning Evidences of Registration; §116.5, concerning Minimum Records; §116.6, concerning Registration of Persons with Criminal Backgrounds; §116.8, concerning Fee Requirements; §116.9, concerning Post-Registration Reporting Requirements; §116.15, concerning Advertising Restrictions; §116.16, concerning Use of Senior-Specific Certifications and Professional Designations; and §116.21, concerning System Addressing Suspected Financial Exploitation of Vulnerable Customers Pursuant to the Texas Securities Act, Section 45.

The rules in 7 TAC Chapter 116 govern investment advisers and investment adviser representatives. The purpose of the proposed rule changes to this chapter is to implement changes pursuant to the agency's periodic review of its rules.

The references to sections of the Texas Securities Act (Act) in §§116.1, 116.3, 116.4, 116.8, 116.16, and 116.21 would be updated to refer to the correct sections in the codified version of the Act in the Texas Government Code. The codification was adopted by HB 4171, 86th Legislature, 2019 Regular Session, and became effective January 1, 2022, (HB 4171).

Sections 116.1 and 116.2 would also be amended to replace the references in those sections to the term "Securities and Exchange Commission" with the term "SEC." SEC is a defined term in §107.2, concerning Definitions.

Section 116.1 would also be amended to add references to "solicitor" in subsection (b) for clarification and to delete redundant language in subparagraph (b)(2)(D) that is also contained in subsection (d). A reference to the Form U4 would be added to subparagraph (b)(2)(C) for accuracy and consistency, and a reference to "notice filed" with the Securities Commissioner would be added for clarity and accuracy.

Section 116.2 would also be amended to replace the reference to "North American Securities Administrators Association" with the term "NASAA" in paragraph (a)(1). NASAA is a defined term in §107.2, concerning Definitions. Subsection (a) would also be amended to abbreviate Financial Industry Regulator Authority to "FINRA," which is a defined term in §107.2, concerning Definitions. In addition, paragraph (b)(1) would be amended to update the names of two NASAA examinations.

A cross reference to §116.22 would be added to §116.2 to improve consistency and readability of provisions governing application requirements. Subsection (d) would be amended to allow the agency registration staff the option to notify applicants by email (which is a faster and more reliable delivery method) rather than by certified mail of automatic withdrawal of applications that have been pending for more than 90 days. References to "certificate of formation" which is the name of the form used by the Texas Secretary of State for formation documents filed with it, would also be added to the respective lists of formation of organization documents (including articles of incorporation, partnership agreements, articles of association, and charters) found in §116.2(a)(2)(A), as well as in §116.5(b)(3), for clarity and to improve accuracy.

Generally, applicants for registration are required to have passed various qualification examinations to become registered. Additional proposed amendments to §116.3 relate to waivers from these requirements. Section 116.3(b)(2) would also be amended to reflect that the Form U-10 is no longer in use by FINRA. In addition, §116.3 would also be amended to add new subparagraphs (c)(3)(A) and (c)(5)(B) to recognize and grant waivers of examination or reexamination requirements for certain classes of applicants who are participating in FINRA or NASAA continuing education programs and who meet other requirements. FINRA established a voluntary program in 2022 (the Maintaining Qualifications Program or MQP) that allows eligible individuals whose FINRA registration has terminated to maintain their FINRA qualifications for up to five years by completing annual continuing education requirements and by paying an enrollment fee to FINRA to participate in the MQP. Individuals participating in the MQP are not required to either take or retake a qualification exam, as applicable, to become registered with FINRA. Similarly, NASAA's voluntary Exam Validity Extension Program (EVEP) provides an opportunity for registered persons to extend their NASAA qualifications exams for up to five years by participating in the EVEP and maintaining certain continuing education requirements. Since there are no specific waiver provisions in the rules for applicants participating in the EVEP or the MQP, these requests for waivers from examination requirements must be individually approved by the Securities Commissioner. The amendments to add additional waivers in the rule would reduce the application processing time for these eligible applicants.

Section 116.3 would also be amended to add subparagraph (c)(3)(C) to recognize and grant waivers of examination requirements for applicants who have received an examination waiver from FINRA. Recognizing the FINRA waiver in the rule would reduce the processing time for these types of waivers, provide more transparency, and reflect the agency's current practice of granting waivers of this type on request. In addition, updates and revisions to the Texas securities law examination process would be made to subsection (d) to more accurately reflect this process, and to specifically direct applicants with questions about the process to the Registration Division for information. The amendment would also impose a one-week waiting period to retake the examination for applicants who failed the exam to

provide and encourage more time to study prior to retaking the exam.

Section 116.3 includes certain waivers from examination requirements for investment adviser applicants who have one or more of five different professional designations found in subparagraphs (c)(2)(B) - (F). The rule also requires these organizations to submit changes in their certification programs to the Securities Commissioner. The section would be amended in paragraph (c)(3) to remove this requirement which is no longer needed because a NASAA project group which monitors these programs has assumed this responsibility. This group, which maintains a list of eligible professional designations, has recently replaced a designation which is no longer active with a new eligible designation. In light of this change the section would also be amended in subparagraph (c)(2)(E) to replace the reference to the inactive "CIC" designation with the new "CIMA" designation and update the reference to another designation located in subparagraph (c)(2)(F).

Section 116.8, which relates to fee requirements, would also be amended to remove an incorrect reference in subsection (a) to fees for officers and partners of an investment adviser, to update the reference to the agency's website, and to clarify that persons seeking information on fee requirements may contact the Registration Division of the agency.

Section 116.9 sets out events that a registered investment adviser or investment adviser representative must report to the Securities Commissioner after registration. Paragraph (a)(3) would be amended to clarify that misdemeanor offense actions that are listed in §116.6(c) must be reported. Section 116.6(c) provides a list of misdemeanors that directly relate to the duties and responsibilities of investment advisers and investment adviser representatives. The Securities Commissioner may revoke or suspend the registration of a person who has been convicted of a misdemeanor offense that directly relates to the person's duties and responsibilities. In addition, paragraph (a)(6) would be amended to clarify that registered entities must notify the Commissioner of changes in legal status of their entities. Applicants for registration are required to include their legal status in their registration application on Form ADV, such as a sole proprietorship, partnership, corporation, or limited liability company.

Section 116.15, which was last amended in 2001, prohibits investment advisers registered in Texas from using testimonials in their advertisements and includes other advertising restrictions, mirroring (but not adopting by reference) SEC rules governing advertising that were in effect when the rule was adopted. The SEC Marketing Rule, which regulates how investment advisers registered with the SEC (SEC RIAs) may advertise their services, was amended in 2020, with a final compliance date of November 4, 2022. The change represented a broad, sweeping change in how the SEC regulates direct and indirect advertising and marketing activities of SEC RIAs, including the SEC RIAs doing business in Texas. The SEC rules have always prohibited advertising practices that are untrue, misleading, or deceptive. The new SEC rules relax prohibitions on certain types of practices, now allowing among other things, the use of endorsements or testimonials with certain safeguards. It also provides clearer guidelines concerning permitted marketing practices and increases disclosure requirements to investors, which improves investor confidence and transparency.

During the rule review of Chapter 116 the agency received two comment letters from the regulated industry requesting that §116.15 be amended to remove the current advertising restrictions in the section and instead harmonize it with the more flexible SEC Marketing Rule. The staff and Board agreed with the comments. In response, this section would be renamed and amended to adopt by reference the current SEC rules concerning marketing practices, while removing the existing regulatory restrictions in that section. This proposal if adopted would put advisers registered in Texas on a more level playing field with the SEC RIAs doing business in Texas because they would have the option to use testimonials and endorsements in their marketing and advertising as long as they otherwise comply with other applicable rules in Chapter 116. It would also conform rules relating to marketing practices to model rules which adopt the SEC advertising rules by reference which have been adopted by other state securities regulators. The proposal however would not change the registration requirements applicable to solicitors set forth in §116.1(b)(A).

A related proposal would amend the investment adviser recordkeeping requirements in §116.5 to require investment advisers to create and keep records to verify compliance with SEC Marketing Rule requirements.

The proposals to amend §116.15 and §116.5 would further the mission of the Board and the purposes of the Act by maximizing coordination with federal and other states' securities laws and administration by harmonizing the Board rules with SEC rules so that the same advertising rules would be applicable under the Act as well as SEC rules. The proposal would also further the Board's mission and Act's purposes to minimize regulatory burdens on Texas investment advisers, while ensuring that investors are adequately protected by ensuring they can make informed decisions.

Section 116.21 would also be renamed to refer to the applicable section of the codified Act.

Travis J. Iles, Securities Commissioner; Cristi Ramón Ochoa, Deputy Securities Commissioner; Emily Diaz, Director, Registration Division; and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the proposed amendments are in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the proposed amendments. While the proposed amendments to §116.3 would add additional waivers from current examination requirements, there will be no fiscal implications to the agency, because applicants for registration will still need to pay application fees, whether or not examination requirements are waived.

Mr. Iles, Ms. Ochoa, Ms. Diaz, and Mr. Green have also determined that for each year of the first five years the proposed amendments are in effect, the public benefits expected as a result of adoption of the proposed amendments will be (1) greater coordination with other securities regulators (particularly with respect to proposed amendments to §116.3 and §116.15); and (2) investment advisers and investment adviser representatives will be apprised of their obligations under the Act. Additionally, the proposed amendments to §116.3 will (3) reduce administrative burdens for eligible applicants; (4) facilitate internal processing of registration applications; and (5) allow examination waivers to be processed more quickly, uniformly, and with more transparency. Additional public benefits with respect to proposed amendments to §116.15 include (6) clearer guidelines for advisers concerning permitted marketing practices; and (7) increased disclosure requirements to investors, which improves investor confidence and transparency. Finally, the proposals will (8) ensure the rules are current and accurate and that they conform to the codified

version of the Act, which would promote transparency and efficient regulation.

There will be no adverse economic effect on micro or small businesses or rural communities. Since the proposed amendments will have no adverse economic effect on micro or small businesses or rural communities, preparation of an economic impact statement and a regulatory flexibility analysis is not required. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. Although applicants for investment adviser registration incur costs to participate in the MQP and EVEP programs (which are paid to FINRA or NASAA) that would be recognized in proposed amendments to §116.3, participation in these programs is optional and not required for registration under the rules. In addition, although investment advisers would be permitted to use certain marketing practices in the proposed amendment to §116.15, if adopted, the use of such expanded marketing practices that would be permitted is optional and not required for registration under the rules. There is no anticipated impact on local employment.

Mr. Iles, Ms. Ochoa, Ms. Diaz, and Mr. Green have also determined that for the first five-year period the proposed amendments are in effect: they do not create or eliminate a government program; they do not require the creation or elimination of existing employee positions; they do not require an increase or decrease in future legislative appropriations to this agency; they do not require an increase or decrease in fees paid to this agency; they do not increase or decrease the number of individuals subject to the rules' applicability; and they do not positively or negatively affect the state's economy. Additionally, the proposed amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendments to §116.3 would add additional waivers from current examination requirements, which will reduce administrative burdens on eligible applicants for registration. Additionally the proposed amendment to §116.15 would remove existing regulatory restrictions on marketing and advertising and replace them with more flexible regulatory guidelines.

Comments on the proposal must be in writing and will be accepted for 30 days following publication of the proposed sections in the *Texas Register.* Written comments should be submitted to Cheryn Netz, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167. Comments may also be submitted electronically to proposal@ssb.texas.gov. In order to be considered by the Board at adoption, comments must be received no later than 30 days following publication.

The amendments are proposed under the authority of the Texas Government Code (TGC), §4002.151, as adopted by HB 4171. Section 4002.151 provides the Board with the authority to adopt rules as necessary to implement the provisions of the Act, including rules governing registration statements, applications, notices, and reports; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. In addition, the amendments to §116.3 are also proposed under the authority of TGC, §4004.151 of the Act. Section 4004.151 provides the Board with authority to waive examination requirements for any applicant or class of applicants. Finally, the amendments to §116.1 are also proposed under the authority of TGC, §4004.001 of the Act. Section 4004.001 provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule.

The proposed amendments affect the following sections of the Texas Securities Act: TGC Chapter 4004, Subchapters B - F, and H. The proposed amendments to §§116.1, 116.2, 116.4, 116.5, 116.9, 116.15, and 116.16 also affect TGC Chapter 4007, Subchapter B of the Act. The proposed amendments to §§116.1, 116.5, 116.9, 116.15, and 116.16 also affect TGC §4007.105 and §4007.106 of the Act.

§116.1. General Provisions.

(a) Definitions. Words and terms used in this chapter are also defined in §107.2 of this title (relating to Definitions). The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

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

(5) In this state--

(A) A person renders services as an investment adviser "in this state" as set out in the Texas Securities Act, §4004.052 [~~§12.B~~], if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser in more than one state at the same time.

(B) Likewise, a person renders services as an investment adviser representative "in this state" as set out in the Texas Securities Act, §4004.102 [~~§12.B~~], whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser representative in more than one state at the same time.

(C) (No change.)

(6) - (10) (No change.)

(11) Registered investment adviser--An investment adviser who has been issued a registration certificate by the Securities Commissioner under the Texas Securities Act, §4004.054 [~~§15~~]. (A federal covered investment adviser is not prohibited from being registered with the Securities Commissioner. If a federal covered investment adviser elects to register with the Securities Commissioner, it is subject to all of the registration requirements of the Act.)

(12) (No change.)

(b) Registration of investment advisers and investment adviser representatives, and notice filings for branch offices.

(1) (No change.)

(2) Exemption from the registration requirements. The Board pursuant to the Texas Securities Act, §§4004.001 and 4005.024 [~~§§12.C and 5.T~~], exempts from the registration provisions of the Act, §§4004.052 and 4004.102 [~~§12~~], persons not required to register as an investment adviser or an investment adviser representative on or after July 8, 1997, by act of Congress in Public Law Number 104-290, Title III.

(A) Registration as an investment adviser is not required for the following:

(i) (No change.)

(ii) an investment adviser registered with the SEC [~~Securities and Exchange Commission~~] pursuant to a rule or order adopted under the Investment Advisers Act of 1940, §203A(c);

(iii) - (iv) (No change.)

(B) (No change.)

(C) Notice filing requirements and fees for investment advisers and investment adviser representatives, including solicitors, exempted from registration pursuant to this subsection only.

(i) Initially, the provisions of subparagraphs (A) and (B) of this paragraph are available provided that the investment adviser files:

(I) Form ADV and Form U-4 for each individual to be notice filed as an investment adviser representative or solicitor through the IARD designating Texas as a jurisdiction in which the filing is to be made; and

(II) an initial fee equal to the amount that would have been paid had the investment adviser and each investment adviser representative or solicitor filed for registration in Texas.

(ii) Annually, the investment adviser files renewal fees which would have been paid had the investment adviser and each investment adviser representative or solicitor been registered in Texas.

[~~(D) Persons not required to register with the Securities Commissioner pursuant to subparagraphs (A) and (B) of this paragraph, are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by an investment adviser or investment adviser representative in connection with transactions involving securities in Texas.~~]

(c) (No change.)

(d) Prohibition on fraud and availability of an exemption from registration. The Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered or notice filed with the Securities Commissioner. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by an investment adviser or investment adviser representative in connection with transactions involving securities in Texas. However, the registration requirements detailed in this chapter do not apply to investment advisers and investment adviser representatives that are exempt from registration as such pursuant to the Texas Securities Act, Chapter 4005, Subchapter A [~~§5~~], or by Board rule pursuant to the Texas Securities Act, §4004.001 or §4005.024 [~~§5.T or §12.C~~], contained in Chapters 109 or 139 of this title.

§116.2. Application Requirements.

(a) Investment adviser and investment adviser representative application requirements. A complete application consists of the following:

(1) items filed electronically via the Investment Adviser Registration Depository (IARD), which is jointly operated by NASAA, the SEC, and FINRA, or items filed either in paper form or as provided in §116.22 of this chapter (relating to Electronic Submission of Forms and Fees) [~~the North American Securities Administrators Association, Inc. (NASAA), the Securities and Exchange Commission (SEC), and Financial Industry Regulatory Authority (FINRA)~~] using the applicable uniform forms:

(A) - (D) (No change.)

(2) items filed [~~in paper form~~] with the Securities Commissioner either in paper form or as provided in §116.22 of this chapter:

(A) a copy of articles of incorporation, certificate of formation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the jurisdiction or by an officer or partner of the applicant;

(B) - (E) (No change.)

(b) (No change.)

(c) Branch office designation and inspection.

(1) - (2) (No change.)

(3) Each branch office of an investment adviser that [~~who~~] is registered with the Commissioner is subject to unannounced inspections at any time during normal business hours.

(d) Automatic withdrawal of an investment adviser or investment adviser representative application for registration that has been pending for at least 90 days. If an application for investment adviser or investment adviser representative registration has been pending for at least 90 days and the applicant has failed to substantively respond to a written request for information sent by either electronic mail or by certified mail to the applicant's address as set forth in the application, an automatic withdrawal will occur. The written request must have advised the applicant that if a substantive response is not received within 30 days from the date of the [~~certified~~] request, the application will be withdrawn automatically. Regardless of how long an application has been pending, it may not be withdrawn automatically without sending [~~certified~~] notice of this subsection to the address set forth in the application and allowing the applicant 30 calendar days from the date of the notice to provide a substantive written response. A copy of this subsection and the most recent written request for information will be included with the notice [~~certified letter~~].

(e) (No change.)

§116.3. Examination.

(a) (No change.)

(b) Examinations accepted.

(1) Each applicant for registration as an investment adviser or investment adviser representative must pass:

(A) the NASAA Uniform Investment Adviser Law Examination (Series 65) [~~(the new entry level competency examination, Series 65, administered after December 31, 1999)~~]; or

(B) the following combination of examinations:

(i) (No change.)

(ii) the NASAA Uniform Combined State Law Examination (Series 66), the Uniform Investment Advisers State Law Examination (Series, 65, as it existed and was administered on or before December 31, 1999), or an examination of the Texas Securities Act Administered by this Agency.

(2) The [~~Each of these~~] examinations (except the Texas Securities Act examination) listed in paragraph (1) of this subsection are [~~is~~] administered by FINRA [~~and can be scheduled by submitting a Form U-10 to FINRA~~].

(c) Waivers of examination requirements.

(1) (No change.)

(2) A full waiver of the examination requirements of the Texas Securities Act, §4004.151 [~~§13.D~~], is granted by the Board to the following classes of persons:

(A) - (D) (No change.)

(E) applicants who are designated by the Investment & Wealth Institute as Certified Investment Management Analysts ("CIMA") [~~Investment Adviser Association, or its predecessor, the Investment Counsel Association of America, Inc., as Chartered Investment Counselors (CIC)~~];

(F) applicants who are designated by the American College of Financial Services [~~, Bryn Mawr, Pennsylvania,~~] as chartered financial consultants (ChFC);

(G) - (H) (No change.)

(3) The following classes of persons are granted a partial waiver by the Board of the examination requirements of §4004.151 of the Act and subsection (a) of this section:

(A) NASAA Exam Validity Extension Program ("EVEP"). Applicants who previously took and passed the NASAA qualification examinations accepted in subsection (b) of this section whose registration with another state securities regulator has not lapsed for more than five years who have participated in the EVEP and have maintained compliance with the EVEP requirements are granted a waiver of the NASAA qualification examination requirements of this section.

(B) FINRA Maintaining Qualifications Program ("MQP"). Applicants whose registration with FINRA and with another state securities regulator have not lapsed for more than five years, who have participated in the MQP and maintained compliance with the MQP requirements are granted a waiver of the corresponding appropriate FINRA qualifying examinations requirement(s) in this section.

(C) FINRA Examination Waivers. Applicants who have received a waiver of any examination requirement(s) by FINRA, are granted a waiver of the corresponding examination requirement(s) in this section.

(D) Successful participation in the MQP shall not extend to the Series 65 or Series 66 for purposes of investment adviser representative registration.

[~~(3) The CFA Institute, the Certified Financial Planner Board of Standards, Inc., the American Institute of Certified Public Accountants, the American College, and the Investment Adviser Association are required to submit to the Securities Commissioner any changes to their certification programs as such changes occur.~~]

(4) A partial waiver of the examination requirements of the Texas Securities Act, §4004.151 [~~§13.D~~], is granted by the Board to solicitor applicants. Such persons are required to pass only an examination on state securities law.

(5) The Securities Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §4004.151 [~~§13.D~~].

(d) Texas securities law examination.

(1) The fee for each filing of a request to take the Texas securities law examination is $35. An admission letter issued by the Board is required for all entrants. The examination is given [~~at 9:00 a.m. on each Tuesday~~] at the main office of the State Securities Board in Austin and at the Agency's branch offices. [~~The examination may be taken at other locations near principal population centers across the state. Testing centers require reservations and may charge an additional (monitor) fee for administering the examination. A list of examination centers with additional details may be obtained from the State Securities Board.~~]

(2) (No change.)

(3) The passing score for all applicants on the examination on the Texas Securities Act is 70%. An applicant who fails the examination on the Texas Securities Act may request to retake the examination no sooner than after one week from the date of the examination [~~reexamination~~]. The applicant must bring his or her application up to date before retaking an examination.

(4) (No change.)

(5) Information about taking the examination and how to apply to take the examination in Austin or at an Agency branch office is available on the Agency's website located at www.ssb.texas.gov or by contacting the Registration Division of the State Securities Board.

§116.4. Evidences of Registration.

(a) (No change.)

(b) Amendments. Any changes in the information reflected on the evidence of registration must be submitted to the Securities Commissioner within 30 days of such change. An amendment fee, in the amount set forth in the Texas Securities Act, §4006.054 [~~§35~~], is required to amend the evidence of registration.

(c) Successions.

(1) Succession by application.

(A) If a succession results in a surviving entity that is not currently registered as an investment adviser, the successor entity must file a new application, including the fees, as required in §116.2 of this chapter [~~title~~] (relating to Application Requirements). Such a succession may include, but is not limited to, any of the following that results in either a change in control of the beneficial owners, or a change in management:

(i) - (iv) (No change.)

(B) - (C) (No change.)

(2) - (3) (No change.)

(d) (No change.)

(e) Renewal.

(1) Procedures for renewing expired and unexpired registrations are set forth in the Texas Securities Act, Chapter 4004, Subchapter F, and §4004.304 [~~§19.C and §12-1.C~~].

(2) - (3) (No change.)

§116.5. Minimum Records.

(a) Records to be made by investment advisers. Persons registered as investment advisers whose principal place of business is located in another state shall maintain records at least in accordance with the minimum record-keeping requirements of that state. Persons registered as investment advisers whose principal place of business is located in Texas shall make and keep current the following minimum records or the equivalent thereof:

(1) - (12) (No change.)

(13) a file containing all the information required to be retained pursuant to SEC Rule 204-2(a)(11) (17 CFR §275.204-2(a)(11), as amended).

(b) Records to be preserved by investment advisers.

(1) - (2) (No change.)

(3) Persons registered as investment advisers in Texas shall preserve for at least three years after the termination of the enterprise partnership articles and any amendments thereto, articles of incorpo-

ration, certificates of formation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor.

(4) - (5) (No change.)

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

§116.6. Registration of Persons with Criminal Backgrounds.

(a) - (f) (No change.)

(g) State Auditor Applicant Best Practices Guide.

(1) The State Securities Board provides [~~shall post~~] a link on its website to the Applicant Best Practices Guide, which is [~~to be developed and~~] published by the state auditor as required by Texas Occupations Code, §53.026. This guide sets [~~, which shall be posted once it becomes available, shall set~~] forth best practices for an applicant with a prior conviction to use when applying for a license.

(2) (No change.)

§116.8. Fee Requirements.

(a) Registration and notice filing fees. Information about registration and notice filing fees for original and renewal applications for investment adviser and investment adviser representatives [~~, officers, partners,~~] or solicitors of an investment adviser is available on the Agency's website [~~web site~~] located at www.ssb.texas.gov [~~www.ssb.state.tx.us~~] or by contacting the Registration Division [~~an office~~] of the State Securities Board.

(b) Reduced fees for certain persons registered in multiple capacities.

(1) - (2) (No change.)

(3) Reduced fees. If the Securities Commissioner grants a person's request, the person must pay all applicable fees for registration as a dealer or dealer's agent as specified in the Texas Securities Act, §4006.001 [~~§35.A~~], but is exempt from the fees specified in the Texas Securities Act, §4006.001 [~~§35.A~~], in connection with original and renewal applications for registration as an investment adviser representative or sole proprietor investment adviser, as applicable at the time Form 133.36 is filed. The reduction in fees granted by the Securities Commissioner under this subsection shall continue in force, without any further filings, as long as a person remains registered in a multiple capacity status.

(c) (No change.)

(d) Fees for concurrent registrations. Notwithstanding the Texas Securities Act, Chapter 4006 [~~§35~~], a person shall pay only one fee required under that section to engage in business in this state concurrently for the same person or company as:

(1) - (2) (No change.)

(e) (No change.)

§116.9. Post-Registration Reporting Requirements.

(a) Each person registered as an investment adviser shall report to the Securities Commissioner within 30 days after its occurrence or entry against the registered person or an investment adviser representative thereof, the matters described in this subsection. Likewise, each person registered as an investment adviser representative shall report to the Commissioner within 30 days after its occurrence or entry against the investment adviser representative the matters described in this subsection. The following matters must be reported:

(1) - (2) (No change.)

(3) any [~~misdemeanor~~] action or conviction of a misdemeanor offense that directly relates to the person's duties and responsibilities as an investment adviser or investment adviser representative, including any criminal violation listed in §116.6(c) of this chapter (relating to Registration of Persons with Criminal Backgrounds) [~~based on fraud, deceit, or wrongful taking of property~~];

(4) - (5) (No change.)

(6) any change in any other information previously disclosed to the Securities Commissioner on any application form or filing, including change of legal status; and

(7) (No change.)

(b) - (d) (No change.)

§116.15. Adoption by Reference of Investment Adviser Marketing Rules [~~Advertising Restrictions~~].

The antifraud provisions of the Texas Securities Act prohibit an investment adviser from using any advertisement that contains any untrue statement of material fact or that is otherwise misleading. The prohibition would include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio, television, Internet, the World Wide Web, or similar proprietary or common carrier electronic systems, that offers any service as an investment adviser. Specifically, a registered investment adviser shall not publish, circulate, or distribute any advertisement which does not comply with SEC Rule 206(4)-1 (17 CFR §275.206(4)-1, as amended) under the Investment Advisers Act of 1940.

[~~(1) Specifically, an advertisement of a registered investment adviser may not:~~]

[~~(A) use or refer to testimonials (including any statement of a client's experience or endorsement);~~]

[~~(B) refer to past, specific recommendations made by an investment adviser that were profitable, unless the advertisement sets out a list of all recommendations made by the investment adviser within the preceding period of not less than one year, and complies with paragraph (2) of this subsection;~~]

[~~(C) represent that any graph, chart, formula, or other device can, in and of itself, be used to determine which securities to buy or sell, or when to buy or sell securities, or assist persons in making those decisions, unless the advertising prominently discloses the limitations thereof and the difficulties regarding its use; and~~]

[~~(D) represent that any report, analysis, or other service will be provided without charge unless the report, analysis, or other service will be provided without any obligation whatsoever.~~]

[~~(2) A registered investment adviser may advertise its past performance (both actual performance and hypothetical or model results) only if the advertisement discloses all material facts necessary to avoid any unwarranted inference. An investment adviser may not advertise its performance data if the advertisement:~~]

[~~(A) fails to disclose the effect of material market or economic conditions on the results advertised;~~]

[~~(B) fails to disclose whether and to what extent the advertised results reflect the reinvestment of dividends or other earnings;~~]

[~~(C) suggests or makes claims about the potential for profit without disclosing the potential for loss; or~~]

[~~(D) omits any of the facts material to the performance figures.~~]

[~~(3) In addition, generally a registered investment adviser may not advertise gross performance data (i.e., performance data that~~

~~does not reflect the deduction of various fees, commissions, and expenses that a client would pay) unless the investment adviser also includes net performance information in an equally prominent manner.~~]

§116.16. Use of Senior-Specific Certifications and Professional Designations.

(a) The use of a senior specific certification or designation by any person in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be an inequitable practice within the meaning of the Texas Securities Act, §4007.105(a)(3) [~~§14.A(3)~~]. The prohibited use of such certifications or professional designation includes, but is not limited to, the following:

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

(b) - (f) (No change.)

§116.21. System Addressing Suspected Financial Exploitation of Vulnerable Customers Pursuant to the Texas Securities Act, Chapter 4004, Subchapter H [~~Section 45~~].

(a) System. Each investment adviser shall establish, maintain, and enforce a written system of policies, programs, plans, or procedures to address suspected financial exploitation of vulnerable adults. The system must be reasonably designed to achieve compliance with the Texas Securities Act, Chapter 4004, Subchapter H [~~Section 45~~].

(b) Reporting. The report of suspected financial exploitation (complaint) required by the Texas Securities Act, §4004.352 [~~Section 45.C~~], must be made in writing to the Securities Commissioner. The complaint may be in the form of a letter or memorandum and submitted electronically, by facsimile, or any other method designed to assure its prompt receipt. A template for submitting the required information is available on the website of the Texas State Securities Board. The complaint shall include:

(1) - (5) (No change.)

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

Filed with the Office of the Secretary of State on October 25, 2024.

TRD-202405048
Travis J. Iles
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 305-8303

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER P. SURVEILLANCE AND CONTROL OF BIRTH DEFECTS

25 TAC §37.301

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes an amendment to §37.301, concerning Purpose.

BACKGROUND AND PURPOSE

House Bill 4611, 88th Legislature, Regular Session, 2023, made certain non-substantive revisions to Subtitle I, Title 4, Texas Government Code, which governs HHSC, Medicaid, and other social services as part of the legislature's ongoing statutory revision program. This proposal is necessary to update citations in the rule to Texas Government Code sections that become effective on April 1, 2025. The proposed amendment updates the affected citation to Texas Government Code.

FISCAL NOTE

Christy Havel Burton, DSHS Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rule will be in effect:

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

(2) implementation of the proposed rule will not affect the number of DSHS employee positions;

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

(4) the proposed rule will not affect fees paid to DSHS;

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

(6) the proposed rule will not expand, limit, or repeal existing regulations;

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

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

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

Christy Havel Burton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The rule does not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rule because the amendment only updates a reference to existing law.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons

and is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Libby Elliott, Deputy Executive Commissioner, Office of Policy and Rules, has determined that for each year of the first five years the rule is in effect, the public will benefit from having accurate citations to the laws governing HHSC, Medicaid, and other social services.

Christy Havel Burton has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because the amendment only updates a reference to existing law.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 701 W. 51st Street, Austin, Texas 78751; or emailed to *HHSRulesCoordinationOffice@hhs.texas.gov*.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 24R083" in the subject line.

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055 and Texas Health and Safety Code §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code Chapter 1001.

The amendment affects Texas Government Code §531.0055 and Chapter 524.

§37.301. Purpose.

These sections implement the provisions of Health and Safety Code, Chapter 87, that provides the authority to adopt rules relating to the surveillance and control of birth defects. The legislation directs the Texas Department of Health to develop a statewide surveillance program. The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §§1.18 and 1.26, 78th Legislature, Regular Session, 2003. Health and Safety Code, Chapter 1001, establishes the Department of State Health Services (department), which now administers these programs. Texas Government Code §524.0005 [~~Government Code,~~ §531.0055], provides authority to the Executive Commissioner of the Health and Human Services Commission to adopt rules for the department.

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

Filed with the Office of the Secretary of State on October 25, 2024.

TRD-202405062
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 221-9021

CHAPTER 103. INJURY PREVENTION AND CONTROL

25 TAC §103.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes an amendment to §103.1, concerning Purpose and Purview.

BACKGROUND AND PURPOSE

House Bill 4611, 88th Legislature, Regular Session, 2023, made certain non-substantive revisions to Subtitle I, Title 4, Texas Government Code, which governs HHSC, Medicaid, and other social services as part of the legislature's ongoing statutory revision program. This proposal is necessary to update citations in the rule to Texas Government Code sections that become effective on April 1, 2025. The proposed amendment updates the affected citation to Texas Government Code.

FISCAL NOTE

Christy Havel Burton, DSHS Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rule will be in effect:

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

(2) implementation of the proposed rule will not affect the number of DSHS employee positions;

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

(4) the proposed rule will not affect fees paid to DSHS;

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

(6) the proposed rule will not expand, limit, or repeal existing regulations;

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

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

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

Christy Havel Burton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The rule does not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rule because the amendment only updates a reference to existing law.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons and is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Libby Elliott, Deputy Executive Commissioner, Office of Policy and Rules, has determined that for each year of the first five years the rule is in effect, the public will benefit from having accurate citations to the laws governing HHSC, Medicaid, and other social services.

Christy Havel Burton has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because the amendment only updates a reference to existing law.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 24R083" in the subject line.

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055 and Texas Health and Safety Code §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code Chapter 1001.

The amendment affects Texas Government Code §531.0055 and Chapter 524.

§103.1. Purpose and Purview.

(a) These sections implement the following Health and Safety Codes.

(1) Chapter 92 authorizes the Executive Commissioner to adopt rules concerning the reporting and control of injuries.

(2) Chapter 773, §773.112(c) and §773.113(a)(3), requires the department to establish and maintain a trauma reporting and analysis system.

(3) The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §1.18 and §1.26, 78th Legislature, Regular Session, 2003. Health and Safety Code, Chapter 1001, establishes the Department of State Health Services (department), which now administers these programs. Texas Government Code §524.0005 [~~Government Code, §531.0055~~], provides authority to the Executive Commissioner of the Health and Human Services Commission to adopt rules for the department.

(b) The Executive Commissioner or the Executive Commissioner's designee shall, as circumstances may require, proceed as follows.

(1) May contact a medical examiner, justice of the peace, physician, hospital, or acute or post-acute rehabilitation facility attending a person with a case or suspected case of a required reportable event.

(2) May provide aggregate data with the suppression of values at the discretion of the Texas EMS & Trauma Registries.

(3) May release data to other areas of the department.

(4) May give information concerning the injury or its prevention to the patient or a responsible member of the patient's household to prevent further injury.

(5) May collect, or cause to be collected, medical, demographic, or epidemiological information from any medical or laboratory record or file to help the department in the epidemiologic evaluation of injuries and their causes.

(6) Investigation may be made by staff of the department for verifying the diagnosis, ascertaining the cause of the injury, obtaining a history of circumstances surrounding the injury, and discovering unreported cases.

(A) May enter at reasonable times and inspect within reasonable limits, a public place or building, including a public conveyance, in the Commissioner's duty to prevent injury.

(B) May not enter a private residence to conduct an investigation about the causes of injuries without first receiving permission from a lawful adult occupant of the residence.

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

Filed with the Office of the Secretary of State on October 25, 2024.

TRD-202405063
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 221-9021

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER F. RATE REVIEW FOR HEALTH BENEFIT PLANS

28 TAC §3.505

The Texas Department of Insurance (TDI) proposes to amend 28 TAC §3.505, to update the cost-sharing reduction (CSR) and clarify the actuarial value (AV) factors that health benefit plan issuers use in setting premium rates for plans sold to individuals and small groups. These amendments are needed to reflect changes in enrollment over time and provide additional guidance in the setting of rates. TDI anticipates adopting the amendments to be effective June 1, 2025, and TDI will begin enforcing the changes for rates applicable to plans to be issued or renewed effective on or after January 1, 2026.

EXPLANATION. Amendments to §3.505 ensure that premium rates for silver plans sold to individuals through the health insurance exchange are sufficient to cover the cost of CSRs that issuers are required to provide certain consumers within silver plan variations under federal law (42 USC §18071). In 2017, the federal government stopped reimbursing issuers for the cost of providing CSRs. Since 2018, issuers have adjusted premiums for silver plans sold on the exchange to account for those costs. Amendments to §3.505 will ensure that premium rates for silver plans sold to individuals through the health insurance exchange are sufficient to cover the cost of CSRs that issuers are required to provide certain consumers within silver plan variations under federal law (42 USC §18071).

Senate Bill 1296, 87th Legislature, 2021, directed the commissioner to review rates and consider, for silver plans, "whether the rate is appropriate for the plan in relation to the rates charged for qualified health plans offering different levels of coverage, taking into account any funding or lack of funding for cost-sharing reductions and the covered benefits for each level of coverage." In 2022, TDI adopted a CSR factor of 1.35 within §3.505(f)(6)(B)(iii).

TDI develops the CSR factor on the basis of (1) data that reflects the number of individuals enrolled in each silver plan variation, (2) the actuarial value associated with each silver plan variation, and (3) the induced demand factor (IDF) that TDI assigns to each silver plan variation. TDI would generally assign IDFs similar to the IDFs set by the Centers for Medicare & Medicaid Services (CMS), except for platinum-level plans, because TDI actuaries believe the IDF factor of 1.15 is not justified for plans with an AV of 94%. For the purposes of the CSR factor, the TDI-established IDFs have been:

- 1.03 for plans with an AV of 70% or 73%;

- 1.08 for plans with an AV of 87%;

- 1.09 for plans with an AV of 94%; and

- 1.15 for plans with an AV of 100%.

The methodology for calculating the CSR factor has been as follows:

(1) Divide the average actuarial value provided by silver plans on the exchange based on the latest enrollment data by 70%.

(2) Divide the average induced demand factor associated with silver plans on the exchange based on the latest enrollment data by 1.03.

(3) Multiply the resulting number from paragraph (1) by the resulting number from paragraph (2).

Based on the enrollment data for 2021, TDI calculated a CSR factor of 1.35. However, the same methodology would result in a CSR factor of 1.40 based on enrollment reported in 2024.

TDI also proposes to amend the current reference to AV in the rule to clarify that issuers are required to use the federal AV calculator in developing their individual and small group rates.

Descriptions of the section's proposed amendments follow.

Section 3.505. TDI proposes to amend the CSR factor in subsection (f)(6)(B)(iii) to replace the old factor of 1.35 with a new factor of 1.40. As previously described, this new factor is based on the same methodology that TDI has historically used, but it now reflects the changes in enrollment currently seen across the silver-level-plan variations.

TDI is also proposing to amend the rule text in §3.505(f)(6)(B)(i) that requires issuers to provide the AV for their individual and small group plans, which must be "calculated consistent with 45 CFR §156.135." The amendment will clarify that issuers are required to use the federal AV calculator in developing their rates. This will support compliance with federal single risk pool requirements by ensuring issuers use enrollee health status only when setting their index rate used to price all their plans. Enforcing the single risk pool standards and preventing issuers from setting rates that reflect plan-to-plan variations in enrollee health status within the pricing AV will support a level playing field. The changes proposed to this section will apply to rate filings made for plans to be issued or renewed effective on or after January 1, 2026.

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

Ms. Bowden does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Bowden expects that administering the proposed amendments will have the public benefits of ensuring that TDI's rules conform to Insurance Code §1698.052 and that consumers are charged insurance premiums that appropriately reflect the benefits provided. As proposed, the CSR factor will increase to 1.40 for coverage starting in 2026. An increased CSR factor will result in Texas consumers who qualify for advance payments of the premium tax credit under federal law receiving higher levels of tax cred-

its, which will increase their purchasing power, and may reduce the number of individuals who are uninsured or underinsured. Clarifying the reference to the federal AV calculator will have the benefit of ensuring that issuers follow single risk pool rating requirements, and that the AV does not interfere with the effect of the uniform CSR factor.

Ms. Bowden expects that the proposed amendments will not increase the cost of compliance with Insurance Code §1698.052 because they do not impose requirements beyond those in statute. Insurance Code §1698.051(b) requires the commissioner to "establish a process under which the commissioner reviews health benefit plan rates and rate changes for compliance with this chapter and other applicable state and federal law. . . ." This process requires health plans to submit rates by June 15 of each year. Insurance Code §1698.052(c)(2) directs the commissioner to consider, for silver plans, "whether the rate is appropriate for the plan in relation to the rates charged for qualified health plans offering different levels of coverage, taking into account any funding or lack of funding for cost-sharing reductions and the covered benefits for each level of coverage. . . ." Changing the CSR factor is not expected to increase costs because issuers will include the new factor in their annual rate filing, and the factor will be sufficient to capture the costs associated with providing CSRs. Likewise, making the AV requirement clearer is not expected to increase costs because it is a clarification and not a substantive change. In addition, using the federal AV calculator will eliminate the need for issuers to provide independent actuarial analysis and justification for the AV. The clarification will not impact the total amount of premium that issuers are able to charge for individual and small group health plans.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. The cost analysis in the Public Benefit and Cost Note section of this proposal also applies to any small or micro businesses that may be subject to the proposed amendments. The amendments will not impact rural communities, because the rule only affects health benefit plan issuers. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a possible cost on regulated persons. Therefore, no additional rule amendments are required under Government Code §2001.0045.

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

- will not create or eliminate a government program;

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

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

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

- will not create a new regulation;

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

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

- will not positively or adversely affect the Texas economy.

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

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., central time, on December 9, 2024. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., central time, on December 9, 2024. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes to amend §3.505 under Insurance Code §§1698.051(b), 1698.052, 1701.060, and 36.001.

Insurance Code §1698.051(b) requires that the commissioner by rule establish a process under which the commissioner will review individual and small group health benefit plan rates and rate changes for compliance with Insurance Code Chapter 1698 and other applicable state and federal laws, including 42 USC §§300gg, 300gg-94, and 18032(c) and those sections' implementing regulations, including rules establishing geographic rating areas.

Insurance Code §1698.052 requires that the commissioner adopt rules and provide guidance regarding requirements related to individual health benefit plan rates.

Insurance Code §1701.060 specifies that the commissioner may adopt rules necessary to implement the purposes of Insurance Code Chapter 1701.

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

CROSS-REFERENCE TO STATUTE. Section 3.505 implements Insurance Code Chapter 1698.

§3.505. Required Rate Filings.

(a) An issuer may not use a rate with respect to a plan if:

(1) the issuer has not filed the rate with TDI for review;

(2) the rate filing does not comply with the standards in §3.503 of this title (relating to Rating Standards); or

(3) the rate filing has been withdrawn.

(b) Each issuer must submit an annual rate filing no later than June 15 for any individual or small group market plan that will be issued effective on or after January 1 in the following calendar year. A small group issuer may include scheduled quarterly trend increases within the

annual rate filing. An issuer may have only one active annual single risk pool rate filing in each market. An issuer may not modify an annual rate filing later than October 1 prior to the calendar year for which the filing was submitted.

(c) A small group issuer may submit a rate filing for a quarterly rate change that takes effect on April 1, July 1, or October 1. A small group issuer may have only one active quarterly single risk pool rate filing at a given time. Notwithstanding §26.11 of this title (relating to Restrictions Relating to Premium Rates), a small group issuer must submit a quarterly rate filing at least 105 days before the effective date of the rate change.

(d) A rate filing must include the index rate for the single risk pool and reflect every product and plan that is part of the single risk pool in the applicable market. Issuers are not required to enter CSR plan variations separately.

(e) Rate filings made under this subchapter must be submitted through the electronic system designated by TDI, according to any technical instructions provided for the electronic system and consistent with the rules and procedures in Chapter 3, Subchapter A, of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings) and §11.301 of this title (relating to Filing Requirements).

(f) Rate filings made under this subchapter must include the following:

(1) the URRT (Part I);

(2) for a rate increase that is 15% or more within a 12-month period that begins on January 1, as determined by 45 CFR §154.200(b) and (c), concerning Rate Increases Subject to Review, a written description justifying the rate increase (Part II) that complies with 45 CFR §154.215(e), concerning Submission of Rate Filing Justification;

(3) rating filing documentation (Part III) that complies with 45 CFR §154.215(f) and that includes an unredacted actuarial memorandum signed by a qualified actuary;

(4) a rates table that identifies the applicable rate for each plan, depending on an individual's rating area, tobacco use, and age;

(5) an enrollment spreadsheet that contains, with respect to each county:

(A) the number of covered lives, as of March 31 of the current year, that are enrolled in each of the following plan types, separated on the basis of whether the enrollment is through the federal exchange or off-exchange:

(i) catastrophic plans;

(ii) bronze plans;

(iii) silver plans, separated as follows:

(I) silver plans with an AV of 70%;

(II) silver plans with an AV of 73%;

(III) silver plans with an AV of 87%;

(IV) silver plans with an AV of 94%; and

(V) silver plans with an AV of 100%;

(iv) gold plans; and

(v) platinum plans;

(B) whether the plan is available in the county in the current calendar year; and

(C) whether the plan will be available in the county in the next calendar year; and

(6) an AV and cost-sharing factor spreadsheet that contains:

(A) the plan ID specified in the URRT; and

(B) the component factors of an AV and cost-sharing design of plan field in the URRT, which should not include adjustments that account for the morbidity of the population expected to enroll in the plan, including:

(i) the AV used in the pricing of the plan, which must be the same as the AV used to comply with federal requirements for determining the plan's actuarial value, currently found in [~~calculated consistent with~~] 45 CFR §156.135, concerning AV Calculation for Determining Level of Coverage;

(ii) the induced-demand factor of 1.00 for bronze plans, 1.03 for silver plans, 1.08 for gold plans, and 1.15 for platinum plans; and

(iii) for individual silver plans on the exchange, a CSR adjustment factor of 1.40 [~~1.35~~], that accounts for the average costs attributable to CSRs, to the extent that issuers are not otherwise being reimbursed for those costs. If issuers are being reimbursed for those costs by HHS, consistent with 42 USC §18071, concerning Reduced Cost-Sharing for Individuals Enrolling in Qualified Health Plans, then the CSR adjustment factor would not apply.

(g) Issuers may submit data using the templates available on TDI's website at www.tdi.texas.gov/health/ratereview.html.

(h) On request from TDI, an issuer must provide any additional information needed to evaluate the rate filing.

(i) An issuer that does not intend to issue a plan that would require a rate filing for the next calendar year, but that has enrollment in a plan that is subject to this subchapter in the current year or the prior year, must submit the data for such plan under paragraphs (1) and (2) of this subsection, as applicable, to TDI no later than June 15. For example, in June of 2022, an issuer must submit data under paragraph (1) of this subsection for the 2021 calendar year, and data under paragraph (2) of this subsection for the first five months of calendar year 2022. An issuer that does not have data to submit under paragraph (2) of this subsection is still required to submit data under paragraph (1) of this subsection.

(1) For prior year cumulative data, an issuer must submit:

(A) allowed claim costs, defined as total payments made under the plan to health care providers on behalf of covered members and including payments made by the issuer, member cost-sharing, cost-sharing paid by HHS on behalf of low-income members, and net payments from any federal or state reinsurance arrangement or program;

(B) incurred claim costs, defined as allowed claim costs as specified in subparagraph (A) of this paragraph, less member cost-sharing, cost-sharing paid by HHS on behalf of low-income members, and any net payments from a federal or state reinsurance arrangement;

(C) earned premium; and

(D) member months.

(2) For current year cumulative data through March 31, an issuer must submit:

(A) earned premium;

(B) member months; and

(C) the enrollment spreadsheet required under subsection (f)(5) of this section.

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

Filed with the Office of the Secretary of State on October 21, 2024.

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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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TITLE 43. TRANSPORTATION

PART 3. MOTOR VEHICLE CRIME PREVENTION AUTHORITY

CHAPTER 57. MOTOR VEHICLE CRIME PREVENTION AUTHORITY

43 TAC §§57.9, 57.14, 57.27, 57.29, 57.48, 57.50 - 57.52

INTRODUCTION. The Motor Vehicle Crime Prevention Authority (authority) proposes amendments to 43 Texas Administrative Code (TAC) Chapter 57, §§57.9, 57.14; 57.27, 57.29, 57.48, and 57.50 - 57.52.

The proposed amendments in Chapter 57 are necessary to bring the rules into alignment with statute; remove language that is redundant with statute; to clarify existing requirements; to modernize language; to improve readability through the use of consistent terminology; to clarify or delete unused, archaic, or inaccurate definitions, terms, and references or other language; to clarify existing requirements; and more specifically describe the authority's methods and procedures.

EXPLANATION. The authority is conducting a review of its rules in Chapter 57 in compliance with Government Code, §2001.039. Notice of the department's plan to review Chapter 57 is published in this issue of the *Texas Register.* As a part of the rule review, the authority is proposing necessary amendments as detailed in the following paragraphs.

A proposed amendment would add new proposed §57.9(f) to clarify that grantees who are in violation of the MVCPA's non-supplanting requirement may be required by the Board to return supplanted funds to the MVCPA.

A proposed amendment to §57.14(b)(4) would clarify that a projects eligible for grant funding to address a reduction in the sale of stolen auto parts can include projects designed to reduce the sale of stolen catalytic converters, in furtherance of SB 224, 89th Legislature, Regular Session (2023). Proposed new §57.14(b)(6) would add "preventing stolen motor vehicles from entering Mexico" as a project goal for which the MVCPA can provide grant funding, to align the rule with Transportation Code Chapter 1006.

Proposed amendments to §57.27(a)(1), (a)(2), (c), (d) and (f) would clarify language and improve readability without changing the meaning of the rule. Proposed new §57.27(f) clarifies that MVCPA grantees do not have a statutory right to a contested case proceeding to determine whether a deficient condition described in §57.27(a) exists or has been resolved.

Proposed amendments to §57.29(d) and (e) would modernize language and improve readability.

A proposed amendment to §57.48(b) would update the titles of two Comptroller of Public Accounts forms used by insurers to pay the MVCPA fee with correct language and would clarify that the forms may be obtained in electronic format on the Comptroller's website.

A proposed amendment to §57.50 would update the section title to reflect the official agency name of the Texas Department of Insurance. Proposed amendments to the body of the rule would align the section with Transportation Code Chapter 1006.

Proposed amendments to §57.51(a), (b), and (c) would add "designee," "MVCPA," and "MVCPA board" in several places to clarify the initial submission procedures for insurers requesting refund determinations. The proposed amendments would improve readability through the use of consistent terminology.

Proposed amendments to §57.52 would update the section title to clarify that both penalties and interest may be assessed for a late payment of the fee. Additionally, the proposed amendment would add the word "late" to the section title to clarify that a violation of the section can also occur for the late filing of the report of the fee and result in a penalty being assessed against an insurer.

A proposed amendment to §57.52(a) and (a)(1) would remove language concerning the late filing of the report of the fee from subsection (a) and place it in new subsection (b) for clarity and ease of reference. The amendments proposed for subsection (a) would clarify that an insurer shall be assessed a penalty for the late payment of the fee in accordance with Tax Code §111.061(a). New subsection (b) clarifies that a penalty of $50 will be assessed against an insurer for the late filing of the report of the fee. The $50 penalty for the late filing of a report follows the Texas Comptroller's Office current practice involving a late filing of a report by a taxpayer.

A proposed amendment to new §57.52(c)(1) would increase the time period in which an insurer may submit a prescribed form to the MVCPA director to appeal the assessment of penalties and/or interest against an insurer from thirty days to sixty days. Currently, billing statements are mailed out up to two weeks after the balance shows and some insurers have complained that they did not receive notification until after the thirty-day period expired. The amendment would allow insurers sufficient additional time to review the MVCPA director's decision and consider whether to appeal.

Additional non-substantive amendments are proposed throughout Chapter 57 to correct punctuation, grammar, and capitalization.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Glenna Bowman, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no significant fiscal impact to state or local governments as a result of the enforcement or administration of the proposed amendments.

Director William Diggs has determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Diggs has also determined that for each year of the first five years the proposed amended sections are in effect, the anticipated public benefit as a result of enforcing or administering the amendments will be the simplification, clarification, and streamlining of agency rules.

Anticipated Cost to Comply with the Proposal. Mr. Diggs anticipates that there will be no costs to comply with the proposed amendments because the grant recipients can avoid the penalties and assessed costs described in the amendments proposed for §57.50 and §57.52(b) by complying with the rules and statutory requirements.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code, §2006.002, the authority has determined that the proposed amendments will not have an adverse economic impact on small businesses, micro-businesses, and rural communities because there are no anticipated economic costs for persons required to comply with the proposed amendments. Therefore, the authority is not required to prepare a regulatory flexibility analysis under Government Code, §2006.002.

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

GOVERNMENT GROWTH IMPACT STATEMENT. The authority has determined that each year of the first five years the proposed amendments are in effect, no government program would be created or eliminated. Implementation of the proposed amendments would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the authority or an increase or decrease of fees paid to the authority. The proposed amendments do not create a new regulation or expand or repeal a regulation. The amendments proposed to create new §57.52(c)(1) would limit a regulation by increasing the time an insurer has to appeal the assessment of penalties and/or interest from thirty days to sixty days. Lastly, the proposed amendments do not affect the number of individuals subject to Chapter 57's applicability and will not affect this state's economy.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on December 9, 2024. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. The amendments are proposed under Transportation Code, §1006.101, which requires the authority to adopt rules to implement the authority's powers and duties.

CROSS REFERENCE TO STATUTE. The proposed amendments would implement Transportation Code §1006.001, and §1006.153.

§57.9. Nonsupplanting Requirement.

(a) State funds provided by this Act shall not be used to supplant state or local funds.

(b) Supplanting means the replacement of other funds with Motor Vehicle Crime Prevention Authority (MVCPA) grant funds. It shall also include using existing resources already available to a program activity as cash match.

(c) Positions which existed prior to new grant award approval and were funded from any source other than MVCPA grant funds are not eligible for grant funding or to be used as cash match.

(d) If a grant program is reduced by 20% or more from the previous year, and as a result, grant funded or match positions are transferred to other duties for the grant year, they may be returned to grant funding in the subsequent grant year. This exception is not available for any positions that have not been grant funded or used as match for more than one grant year.

(e) Each grantee shall certify that MVCPA funds have not been used to replace state or local funds that would have been available in the absence of MVCPA funds. The certification shall be incorporated in each grantee's expenditure report.

(f) Grantees that supplant funds may be required by the Board to return supplanted funds to the MVCPA.

§57.14. Approval of Grant Projects.

(a) The MVCPA board will approve funding for projects on an annual basis, subject to continuation of funding through state appropriations and availability of funds.

(b) To be eligible for consideration for funding, a project must be designed to support one of the following MVCPA program categories:

(1) Law Enforcement, Detection and Apprehension;

(2) Prosecution, Adjudication and Conviction;

(3) Prevention, Anti-Theft Devices;

(4) Reduction of the Sale of Stolen Vehicles or Parts, including catalytic converters; [~~and~~]

(5) Educational Programs and Marketing; and[.]

(6) Preventing stolen motor vehicles from entering Mexico.

(c) Grant award decisions by the MVCPA are final and not subject to judicial review.

§57.27. Withholding Funds from Grantees.

(a) The MVCPA may withhold funds from a grantee or projects operated by the grantee when:

(1) a determination is made that the grantee has failed to:

(A) comply with applicable federal or state laws, rules, regulations, policies, or the grant agreements on which the award of the grant is predicated;

(B) submit required reports on time;

(C) provide a response to audit or monitoring findings on time;

(D) return any unused grant funds remaining on the expired grant within the required timeframe;

(E) use funds appropriately; or

(F) commence project operations within 45 days of the project start date; or

(2) a determination is made that the grantee has submitted reports or records with deficiencies, irregularities, or are delinquent.

(b) The MVCPA may reduce or withhold grant funds when MVCPA allocations are depleted or insufficient funds are allocated.

(c) The MVCPA will notify grantees of deficient conditions prompting the [~~for~~] withholding of grant funds and the period of time within which to cure any deficiency.

(d) Grantees have 15 days after receiving a deficiency [~~deficient~~] notification to request an appeal.

(e) The MVCPA director or MVCPA board designee will determine the outcome of the grant appeal.

(f) Grant funds [~~Funds~~] will be released to a grantee when the MVCPA director or MVCPA board designee is provided with satisfactory evidence that the deficient conditions have been [~~are~~] corrected.

(g) An appeal under this section is not a contested case under Government Code, Chapter 2001.

§57.29. Termination for Cause.

(a) The MVCPA may terminate any grant for failure to comply with any of the following:

(1) applicable federal or state laws, rules, regulations, policies, or guidelines;

(2) terms, conditions, standards, or stipulations of grant agreements; or

(3) terms, conditions, standards, or stipulations of any other grant awarded to the grantee.

(b) Termination of grants for cause shall be based on finding that:

(1) deficient conditions make it unlikely that the objectives of the grant will be accomplished;

(2) deficient conditions cannot be corrected within a period of time adjudged acceptable by the MVCPA; or

(3) a grantee has acted in bad faith.

(c) The MVCPA shall notify grantees of the conditions and findings constituting grounds for termination.

(d) Unexpended or unobligated funds awarded to a grantee shall[~~,~~] be returned to the MVCPA upon termination of a grant[~~, revert to the MVCPA~~].

(e) A grantee may be determined [~~adjudged~~] ineligible for a future grant award if a grant awarded to the grantee is terminated for cause.

§57.48. Motor Vehicle Years of Insurance Calculations.

(a) Each insurer, in calculating the fees established by Transportation Code §1006.153, shall comply with the following guidelines:

(1) The single statutory fee of $5 is payable on each motor vehicle for which the insurer provides insurance coverage during the calendar year regardless of the number of policy renewals; and

(2) When more than one insurer provides coverage for a motor vehicle during the calendar year, each insurer shall pay the statutory fee for that vehicle.

(3) "Motor vehicle insurance" as referred to in Transportation Code, Chapter 1006, means motor vehicle insurance as defined by the Insurance Code, Article 5.01(e). This definition shall be used when calculating the fees under this section.

(4) All motor vehicle or automobile insurance policies as defined by Insurance Code, Article 5.01(e), covering a motor vehicle shall be assessed the $5 fee except mechanical breakdown policies, garage liability policies, non-resident policies and policies providing only non-ownership or hired auto coverages.

(b) Insurers must report assessment information to the Comptroller using the [~~The~~] Insurance Motor Vehicle Crime Prevention Authority Semiannual Fee Report form and the Insurance [~~Instructions for the Computation of the~~] Motor Vehicle Crime Prevention Authority Semiannual Fee Report-July through December [~~of the Comptroller of Public Accounts are adopted by reference. The form and instructions are available from the Comptroller of Public Accounts, Tax Administration, P.O. Box 149356, Austin, Texas 78714-9356. Each insurer shall use this form and follow those instructions when reporting assessment information to the Comptroller~~].

§57.50. Report to Texas Department of Insurance.

If the MVCPA determines that an insurer failed to pay or intentionally underpaid the fee required by Transportation Code, §1006.153, the MVCPA shall notify the Texas Department of Insurance, and the Texas Department of Insurance may for that reason [~~with the request that the department~~] revoke the insurer's certificate of authority.

§57.51. Refund Determinations.

(a) An insurer that seeks a determination of the sufficiency or a refund of a semi-annual payment must file an amended report for each period and submit a written claim to the MVCPA director or the MVCPA board designee requesting [~~for~~] a determination or a refund not later than four years after the date the semi-annual payment was made to the state comptroller.

(b) The MVCPA director or the MVCPA board designee shall review the claim and obtain from the insurer any additional information, if any, that may be necessary or helpful to assist in the MVCPA determination. If an insurer refuses to provide the requested information, the refund shall be denied in whole or in part.

(c) The MVCPA director or the MVCPA board designee is authorized to employ or retain the services of a third party, such as the state comptroller, to assist in the determination. The MVCPA director or the MVCPA board designee shall prepare a written report to the MVCPA based on the director's or the designee's review and shall contain findings, conclusions, and a recommendation.

(d) The MVCPA shall base its determination on the documentary evidence considered by the director or the MVCPA board designee. The MVCPA decision shall be based on a majority vote of the MVCPA board. The MVCPA decision is final and is not subject to judicial review.

(e) Upon determining that an insurer is entitled to a refund, the MVCPA shall notify the comptroller and request the comptroller to draw warrants for the purpose of refunding overpayments.

§57.52. Assessment of Penalty and/or Interest for Late Payment of the Fee, Late Filing of Report; Appeal Procedures.

(a) Penalty for Late Payment of Fee [~~or Filing of Report~~].

(1) A penalty shall be assessed against an insurer for the delinquent payment of the fee required under Transportation Code §1006.153(b-1) [~~or the delinquent filing of any report of the fee required~~].

(2) The penalty for the delinquent payment of the fee [~~or late filing of the report~~] shall be assessed in accordance with Tax Code §111.061(a).

(3) Interest accrues in the manner described in Tax Code §111.060 on any fee paid after the due date.

(b) Penalty for Late Filing of the Report. A $50 penalty shall be assessed against an insurer for the delinquent filing of any report of the fee.

(c) [~~(b)~~] Appeal Procedures.

(1) An insurer that is assessed a penalty or interest by the MVCPA under Transportation Code §1006.153 may appeal the assessment by submitting an MVCPA prescribed form to the MVCPA Director within sixty (60) [~~thirty (30)~~] days of the date of the assessment.

(2) An insurer shall provide the MVCPA with any written documentation or evidence demonstrating the reasons for the late payment of the fee or late filing of the report.

(3) The MVCPA shall make a final decision on an insurer's appeal at a regularly scheduled open meeting of the MVCPA board. A final decision on the appeal shall be made by a majority vote of the MVCPA board.

(4) An appeal under this section is not a contested case under Government Code, Chapter 2001.

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

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David Richards
General Counsel
Motor Vehicle Crime Prevention Authority
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For further information, please call: (512) 465-1423

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PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 210. CONTRACT MANAGEMENT

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes the repeal of 43 Texas Administrative Code (TAC) §§210.1, 210.2, and 210.3; and proposes new Subchapter A, General Provisions, §210.1 and §210.2, and new Subchapter C, Contract Management, §§210.41, 210.42, and 210.43. The proposed repeals and new sections are necessary as a part of the department's rule review to organize the rules to begin with the generally applicable provisions, to organize subsequent subchapters by subject matter, to delete duplicative language, to add a delegation of signature authority, and to bring the department's protest, claims and contract monitoring rules into alignment with statute, with the current rules of the Texas Comptroller of Public Accounts (Comptroller) in 34 TAC, Part 1, and with current department practices.

The proposed revisions to 43 TAC Chapter 210 would repeal all of Subchapter A, Purchase Contracts, concerning claims, protests and enhanced contract monitoring, to incorporate and reorganize the sections into proposed new Subchapters A and C. Proposed new Subchapter A, General Provisions, would provide definitions applicable to the entire chapter and contract signature authority applicable to all contracts. Proposed new Subchapter C, Contract Management, would incorporate language currently found in Subchapter A regarding claims, protests, and contract monitoring.

EXPLANATION. The department is conducting a review of its rules in Chapter 210 in compliance with Government Code, §2001.039. Notice of the department's intention to conduct this review is also published in this issue of the *Texas Register*. As a part of the review, the department is proposing necessary amendments, repeals, and new sections to update and streamline the rule text, bringing it into compliance with statute and with current department procedure.

Chapter 210 is proposed to be retitled "Procurement and Contracting" to more accurately reflect the scope of the chapter and to avoid any confusion with proposed new Subchapter C, Contract Management.

Repeal of Subchapter A. Purchase Contracts

The proposed repeal of §§210.1, 210.2 and 210.3 would allow for the reorganization of the chapter for clarity and ease of reference. Language from these sections is proposed to be incorporated into proposed new Subchapter C, Contract Management, §§210.41 - 210.43.

New Subchapter A. General Provisions

Proposed new Subchapter A would be titled General Provisions, consistent with the organization and naming conventions found in Chapters 215 and 221 of this title. It would include information that is generally applicable to the remainder of the chapter.

Proposed new §210.1 would add definitions to be applicable to the entire chapter. Definitions in Chapter 210 are currently set out for each section separately, creating confusion and inconsistency. The chapter-wide definitions proposed in new §210.1 would improve clarity, consistency, and readability for the entire chapter.

Proposed new §210.1(a) would add an interpretation provision and references to the State General Services and Purchasing Act and the Code Construction Act. It would provide that terms found in this chapter have the definitions set forth in those statutes unless otherwise specified or unless the context clearly requires a different meaning. This would allow for consistency and clarity among the department's rules and other relevant sources of authority.

Proposed new §210.1(b) would list specific definitions for words and terms used in Chapter 210. Proposed new §210.1(b)(1) would define "Act" as Government Code, Chapters 2151 - 2177, otherwise known as the State Purchasing and General Services Act, which governs purchases made by state agencies. Proposed new §210.1(b)(2) would add the same definition for "board" that currently appears in §210.2, which is proposed for repeal. Proposed new §210.1(b)(3) would add a new definition for "contract," which is more expansive and inclusive of the various types of contracts the department uses. Proposed new §210.1(b)(4) would similarly add a new definition for "contractor" to replace the definition of "vendor" in current §210.1(b)(5) for clarity and consistency, and to align with current department contract terminology. Proposed new §210.1(b)(5) would add a definition for "days" to clarify that throughout the chapter, "days" means calendar days rather than business or working days,

to be consistent with how days are calculated in the Comptroller's procurement rules in 34 TAC, Part 1. Proposed new §210.1(b)(6) would define "department" for the whole chapter to create consistency and clarity. Proposed new §210.1(b)(7) would add a definition for "executive director" to identify the individual responsible for certain duties and authorities in this chapter. Proposed new §§210.1(b)(8), 210.1(b)(9), and 210.1(b)(10) would add definitions for "historically underutilized business," "interagency contract or agreement," and "interlocal contract or agreement" respectively, citing to the relevant defining statutes for clarity and consistency. "Purchase," is currently defined with slightly different wording in both §210.1(b)(4) and §210.1(b)(7), which are both proposed for repeal; proposed new proposed new §210.1(b)(11) would define "purchase" for the whole chapter to create consistency and clarity. Proposed new §210.1(b)(12) would add a new definition for "respondent" to replace the current definition of "interested party" in current §210.2(b)(6), because the proposed definition is more specific and in better alignment with current procurement terminology and department contract language.

Proposed new §210.2 would create a new delegation of signature authority. The department's board currently delegates contract approval and signature authority through action and a board resolution that incorporates department contract procedures. Proposed new §210.2 would eliminate the need for yearly board action on that item and reduce risk by providing a consistent standard that is transparent and readily accessible. It would also satisfy the requirement found in Government Code, §2261.254, that the governing body of a state agency must either sign or delegate signature authority for those contracts exceeding $1,000,000. The delegation would be applicable to all types of contracts and agreements and would allow the executive director to delegate authority further, as authorized by statute.

New Subchapter C. Contract Management.

Proposed new Subchapter C would incorporate and modify language from current §§210.1 - 210.3.

Proposed new §210.41 would incorporate language from current §210.1, concerning claims for purchase contracts. Proposed new §210.41 would not incorporate the definitions in current §210.1, because definitions are proposed to be reorganized into proposed new §210.1. Additionally, as compared to the language in current §210.1, proposed new §§210.41-.42 would replace the word "vendor" with either "contractor" or "respondent" depending on which is appropriate under the new definitions of those terms in proposed new §210.1(b), for consistency with agency contracting terminology. Proposed new §210.42 would also change the term "interested parties" in current §210.1 to "respondent," as defined in proposed new §210.1(b), for consistency and clarity. Proposed new §210.41 would include other non-substantive punctuation, grammatical, and organizational changes to the language in current §210.1. In proposed new §210.41 the word "mediation" is assigned the meaning set forth in Civil Practice and Remedies Code §152.023 and in §210.41(d)(3) the qualifications of the mediator are updated to be consistent with the Attorney General's model rule. Additionally, in proposed new §210.41(d)(4) additional potential mediation costs are addressed to be consistent with the Attorney General's model rules. In proposed new §210.41(e)(2), which incorporates language from current §210.1(f)(2), the word "shall" would be changed to "must" for clarity and consistency. Government Code, §311.016 defines the word "must" as "creates or recognizes a condition precedent," which is the intended meaning in proposed new §210.41(e)(2). The definitions in Government Code, §311.016 apply to Chapter 210 according to Government Code, §311.002(4).

Proposed new §210.42 would incorporate language concerning protests from current §210.2, except for the definitions, which are proposed to be reorganized into proposed new §210.1. Proposed new §210.42 would update language from current §210.2 to more accurately describe the department's procedures for protests of department purchases, and to make non-substantive punctuation, grammatical and organizational improvements. Proposed new §210.42(a) incorporates language from current §210.2, but updates the term "vendor" to "respondent" for clarity and consistency with the new definitions in proposed new §210.1.

Proposed new §210.42(b) would update the department's protest rules to be consistent with the Comptroller's current rules in 34 TAC Chapter 20, as Government Code, §2155.076 requires. Proposed new §210.42(b)(1) would only authorize vendors who have submitted a response to a department solicitation to file a protest. This aligns with the Comptroller's rules in 34 TAC Chapter 20, and limits protests to those who have proper standing. Proposed new §210.42(b) would describe the requirements for a properly filed protest, which is consistent with the language used in the Comptroller's rule, 34 TAC §20.535 regarding filing requirements for a protest.

Proposed new §210.42(c) would add deadlines for a protest to be filed timely, which would vary depending on the type of protest. This proposed language would replace current §210.2(c)(1), which has the same filing deadline regardless of protest type. The proposed new deadlines would be easier to determine and calculate accurately because they are based on the specific solicitation and award dates, whereas current §210.2(c)(1) is based on when the protestor "knew or should have known" an action had occurred. This change would algin proposed new §210.42 with the Comptroller's rule, 34 TAC §20.535, and would provide certainty and transparency in the protest process.

Proposed new §§210.42(d), (f), and (g) would incorporate language from current §§210.2(d), (e), and (f) but would only authorize the department's executive director or procurement director to move forward with a contract award or performance under a contract while a protest is pending, and would only authorize the department's procurement director to informally resolve a protest, or issue a written determination on a protest. Current §§210.2(d), (e), and (f) authorize the department's executive director's designee to take such actions. The procurement director is the department staff member with the most visibility into the procurement process by virtue of supervising the department's Purchasing Section, and is therefore in the best position to make initial decisions on matters involving purchasing decisions. Proposed new §§210.42(d), (f), and (g) would ensure that protest decisions are made by those with the most knowledge of and authority over the matter.

Proposed new §210.42(e) would address the actions the department may take on a protest, including the dismissal of an untimely protest or a protest that does not meet the filing requirements. This would allow the department increased efficiency in disposing of improper protests, so that it could focus its time and resources on resolving the protests that comply with the filing requirements.

Proposed new §210.42(g) would incorporate language from current §210.2(f), but would replace the term "interested parties" with the word "respondents" to align with the new definitions in proposed new §210.1 for clarity and consistency.

Proposed new §210.42(h) would update the department's protest rule to be consistent with the Comptroller's current rule, 34 TAC §20.538, as Government Code, §2155.076 requires. Proposed new §210.42(h) would require that appeals of a written determination be filed with the general counsel and that the general counsel may either make the final determination or refer it to the executive director for final determination. Additionally, proposed new §210.42(h) would replace the term "interested parties" in current §210.2(g) with the word "respondent" and would delete the word "working" before the word "days" to align with the new definitions proposed in new §210.1 for clarity and consistency.

Proposed new §210.43 would incorporate language from current §210.3 concerning enhanced contract monitoring. Proposed new §210.43 would be titled "Enhanced Contract or Performance Monitoring" to align with statutory language in Government Code, §2261.253. Proposed new §210.43 would replace the word "vendor" from current §210.3 with the word "contractor" throughout to align with the new definitions in proposed new §210.1. Additionally, as compared to the current language of §210.3, the language of proposed new §210.43(a) would add two additional factors to the risk assessment to determine which contracts require enhanced contract or performance monitoring: proposed new §210.43(a)(5) would add "special circumstances of the project," and proposed new §210.43(a)(6) would add "the scope of the goods, products or services provided under the contract." These additions would align with the current risk assessment tool used by the department's Purchasing Section.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Glenna Bowman, Chief Financial Officer, has determined that for each year of the first five years the new sections and repeals will be in effect, there will be no significant fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. Brad Payne, Director of the Purchasing Section, has determined that there will be no significant impact on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Payne has also determined that, for each year of the first five years new and repealed sections are in effect, there are several anticipated public benefits.

Anticipated Public Benefits. The public benefits anticipated as a result of the proposal include increased transparency, readability and clarity surrounding agency contracting processes and procedures.

Anticipated Costs to Comply with The Proposal. Mr. Payne anticipates that there will be no costs to comply with these rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code, §2006.002, the department has determined that the proposed new sections and repeals will not have an adverse economic effect on small businesses, micro-businesses, and rural communities because they do not make any changes affecting such entities. Also, many of the changes the department proposes in new §210.42 are required by Government Code, §2155.076, which requires state agencies to adopt rules that are consistent with the Comptroller's rules regarding protest procedures for resolving a vendor protest relating to purchasing issues. Therefore, the department is not required to prepare a regulatory flexibility analysis under Government Code, §2006.002.

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

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed new sections and repeals are in effect, no government program would be created or eliminated. Implementation of the proposed new sections and repeals would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. The proposed new sections §§210.1, 210.2, 210.41, 210.42, and 210.43 create new regulations, and the proposed repealed provisions, §§210.1, 210.2, and 210.3 repeal regulations. The proposed new sections and repeals do not expand or limit an existing regulation. Lastly, the proposed new sections and repeals do not affect the number of individuals subject to the applicability of the rules and will not affect this state's economy.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on December 9, 2024. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

SUBCHAPTER A. PURCHASE CONTRACTS

43 TAC §§210.1 - 210.3

STATUTORY AUTHORITY. The department proposes the repeal of Chapter 210, Subchapter A, Purchase Contracts, under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; Government Code, §2155.076, which requires state agencies, by rule, to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues; Government Code, §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation of contract claims; Government Code, §2261.253(c), which requires state agencies, by rule, to establish a procedure to identify each contract that requires enhanced contract monitoring; and the statutory authority referenced throughout the preamble, which is incorporated herein by reference.

CROSS REFERENCE TO STATUTE. The proposed repeals would implement Government Code, Title 10, Subtitle D; and Transportation Code, Chapters 1001 and 1002.

§210.1. Claims for Purchase Contracts.

§210.2. Protest of Department Purchases under the State Purchasing and General Services Act.

§210.3. Enhanced Contract Monitoring Program.

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

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

TRD-202404975
Laura Moriaty
General Counsel
Texas Department of Motor Vehicles
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For further information, please call: (512) 465-4160

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CHAPTER 210. PROCUREMENT AND CONTRACTING
SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §210.1, §210.2

STATUTORY AUTHORITY. The department proposes new Subchapter A, §210.1 and §210.2 in Chapter 210 under Transportation Code, §1001.0411(b), which authorizes the executive director of the Texas Department of Motor Vehicles (department) to delegate duties or responsibilities; Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; Government Code, §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation of contract claims; Government Code, §2161.003, which requires state agencies to adopt the Texas Comptroller of Public Accounts' historically underutilized business rules as their own rules; Government Code, §2261.254(d), which authorizes the board to delegate approval and signature authority for contracts; and the statutory authority referenced throughout the preamble and in the rule text, which is incorporated herein by reference.

CROSS REFERENCE TO STATUTE. The proposed new sections would implement Government Code, Title 10, Subtitle D, and Chapters 771 and 791; and Transportation Code, Chapters 1001 and 1002.

§210.1. Definitions.

(a) As used throughout this chapter, the words and terms defined in the State Purchasing and General Services Act, Government Code, Title 10, Subtitle D, and the Code Construction Act, Government Code, Chapter 311 will have the same meaning defined therein, and each word or term listed in this chapter will have the meaning set forth herein, unless:

(1) its use clearly requires a different meaning; or

(2) a different definition is prescribed in this section, or for a particular section of this chapter or portion thereof.

(b) The following words and terms, when used in this chapter, will have the following meaning unless the context clearly indicates otherwise:

(1) Act--Government Code, Chapters 2151-2177, the State Purchasing and General Services Act.

(2) Board--The Board of the Texas Department of Motor Vehicles.

(3) Contract--A legally enforceable written agreement, including a purchase order, between the department and a contractor for goods, products, or services.

(4) Contractor--An individual or business entity that has a contract to provide goods, products, or services to the department.

(5) Days--Calendar days.

(6) Department--The Texas Department of Motor Vehicles.

(7) Executive director--The executive director of the department.

(8) Historically underutilized business (HUB)--A business as defined in Government Code, §2161.001(2).

(9) Interagency contract or Interagency agreement-- An agreement entered into under the Interagency Cooperation Act, Government Code, Chapter 771.

(10) Interlocal contract or Interlocal agreement-- An agreement entered into under the Interlocal Cooperation Act, Government Code, Chapter 791.

(11) Purchase--Any form of acquisition for goods, products, or services, including by lease or revenue contract, under the Act.

(12) Respondent--An individual or business entity that has submitted a bid, proposal, or other expression of interest in response to a specific solicitation for goods, products, or services.

§210.2. Delegation of Approval and Signature Authority.

(a) Purpose. The purpose of this section is to establish the approval authority and responsibilities for executing contracts required by the department.

(b) Applicability. This section applies to all contracts, interagency contracts, interlocal contracts, as well as informal letters of agreement, memoranda, and agreements.

(c) Board Delegation. The board delegates the following duties and authorities to the executive director of the department:

(1) the duty and authority to execute contracts, to include approving and signing contracts on behalf of the department;

(2) the authority to further delegate contract approval and signature authority to the executive director's designees for contracts with a dollar value up to and including $1,000,000; and

(3) the authority to further delegate contract approval and signature authority to a deputy executive director of the department for contracts with a dollar value exceeding $1,000,000 as allowed by Government Code, §2261.254.

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

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Laura Moriaty
General Counsel
Texas Department of Motor Vehicles
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For further information, please call: (512) 465-4160

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SUBCHAPTER C. CONTRACT MANAGEMENT

43 TAC §§210.41 - 210.43

STATUTORY AUTHORITY. The department proposes new §§210.41, 210.42, and 210.43 in Chapter 210 under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; Government Code, §2155.076, which requires state agencies, by rule, to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues; Government Code, §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation of contract claims; Government Code, §2261.253(c), which requires state agencies, by rule, to establish a procedure to identify each contract that requires enhanced contract monitoring; and the statutory authority referenced throughout the preamble and in the rule text, which is incorporated herein by reference.

CROSS REFERENCE TO STATUTE. The proposed new sections would implement Government Code, Title 10, Subtitle D; and Transportation Code, Chapters 1001 and 1002.

§210.41. Claims for Purchase Contracts.

(a) Purpose. Government Code, Chapter 2260, provides a resolution process for certain contract claims against the state. Chapter 2260 applies to contracts of the department entered into under the State Purchasing and General Services Act. This section governs the filing, negotiation, and mediation of a claim. When used in this section, the terms "contract" and "contractor" are defined in Government Code, §2260.001.

(b) Filing of claim. A contractor may file a notice of claim with the executive director within 180 days after the date of the event giving rise to the claim. The claim must contain:

(1) the nature of the alleged breach;

(2) any amount the contractor seeks as damages; and

(3) the legal theory supporting recovery.

(c) Negotiation.

(1) The executive director shall negotiate with the contractor to resolve the claim;

(2) Negotiations will begin no later than the 120th day after the date the claim is received by the department;

(3) Negotiations may be written or oral; and

(4) The executive director may afford the contractor an opportunity for a meeting to informally discuss the claim and provide the contractor with an opportunity to present relevant information.

(d) Mediation. The parties may agree to mediate a claim through an impartial party. For the purposes of this subchapter, "mediation" is assigned the meaning set forth in the Civil Practice and Remedies Code, §154.023. The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Government Code, Chapter 2009. The parties may be assisted in the mediation by legal counsel or other individual.

(1) The department and the contractor may agree to nonbinding mediation;

(2) The department will agree to mediation if the executive director determines that mediation may speed resolution of the claim or otherwise benefit the department;

(3) The mediator shall possess the qualifications required under Civil Practice and Remedies Code §154.022;

(4) Unless otherwise agreed in writing, each party shall be responsible for its own costs incurred in connection with a mediation, including without limitation, costs of document reproduction, attorney's fees, consultant fees and expert fees, and the cost of the mediator shall be divided equally between the parties.

(e) Final offer.

(1) The executive director will make a final offer to the contractor within 90 days of beginning negotiations; and

(2) If the final offer is acceptable to the contractor, the contractor must advise the executive director in writing within 20 days of the date of the final offer. The department will forward a settlement agreement to the contractor for signature to resolve the claim.

(f) Contested case hearing. If the contractor is dissatisfied with the final offer, or if the claim is not resolved before the 270th day after the claim is filed with the department, then, unless the parties agree in writing to an extension of time, the contractor may file a request with the executive director for an administrative hearing before the State Office of Administrative Hearings to resolve the unresolved issues of the claim under the provisions of Government Code, Chapter 2260, Subchapter C.

§210.42. Protest of Department Purchases under the State Purchasing and General Services Act.

(a) Purpose. The purpose of this section is to provide a procedure for respondents to protest purchases made by the department. Purchases made by the Texas Procurement and Support Services division of the Texas Comptroller of Public Accounts' office on behalf of the department are addressed in 34 TAC, Part 1, Chapter 20.

(b) Filing of protest.

(1) A respondent who has submitted a written response to a department solicitation may file a written protest.

(2) The protest must contain:

(A) the specific statutory or regulatory provision the protestant alleges the solicitation, contract award or tentative award violated;

(B) a specific description of each action by the department that the protestant alleges violated the identified statutory or regulatory provision;

(C) a precise statement of the relevant facts, including:

(i) sufficient documentation to establish that the protest has been timely filed; and

(ii) a description of the resulting adverse impact to the protestant, department and the state;

(D) a statement of any issues of law or fact that the protestant contends must be resolved;

(E) a statement of the protestant's argument and authorities that the protestant offers in support of the protest;

(F) an explanation of the subsequent action the protestant is requesting; and

(G) a statement that copies of the protest have been mailed or delivered to other identifiable respondents.

(3) The protest must be signed by an authorized representative of the protestant and the signature to the protest must be notarized.

(4) The protest must be filed in the time period specified in this section.

(5) The protest must be mailed or delivered to the department, to the attention of the procurement director.

(c) Timeliness. To be considered timely, the protest must be filed:

(1) by the end of the posted solicitation period, if the protest concerns the solicitation documents or actions associated with the publication of solicitation documents;

(2) by the day of the award of a contract resulting from the solicitation, if the protest concerns the evaluation or method of evaluation for a response to the solicitation; or

(3) no later than 10 days after the notice of award, if the protest concerns the award.

(d) Suspension of contract award or performance. If a protest or appeal of a protest has been filed, then the department will not proceed with the contract award or performance under the contract resulting from the solicitation unless the executive director or procurement director makes a written determination that the contract award should be made or performance under the contract should proceed without delay to protect the best interests of the state and department.

(e) Action by department. Upon receipt of a protest, the department may:

(1) dismiss the protest if:

(A) it is not timely; or

(B) it does not meet the requirements of subsection (b) of this section; or

(2) consider the protest under the procedures in this section.

(f) Informal resolution. The procurement director may solicit written responses to the protest from other affected vendors and attempt to settle and resolve the protest by mutual agreement.

(g) Written determination. If the protest is not resolved by agreement, the procurement director will issue a written determination to the protesting party and other respondents, setting forth the reason for the determination. The procurement director may determine that:

(1) no violation has occurred; or

(2) a violation has occurred and it is necessary to take remedial action as appropriate to the circumstances, which may include:

(A) declare the purchase void;

(B) reverse the contract award; or

(C) re-advertise the purchase using revised specifications.

(h) Appeal.

(1) A protestant may appeal the determination of a protest, to the general counsel. An appeal must be in writing and received in the office of general counsel not later than 10 days after the date the procurement director sent written notice of their determination. The scope of the appeal shall be limited to review of the procurement director's determination.

(2) The general counsel may:

(A) refer the matter to the executive director for consideration and a final written decision that resolves the protest; or

(B) may issue a written decision that resolves the protest.

(3) An appeal that is not filed in a timely manner may not be considered unless good cause for delay is shown or the executive director determines that an appeal raises issues that are significant to agency procurement practices or procedures in general.

(4) A written decision of the executive director or general counsel shall be the final administrative action of the department.

§210.43. Enhanced Contract and Performance Monitoring.

(a) The department will apply risk assessment factors to its contracts as defined in Government Code, §2261.253 to identify those contracts that require enhanced contract or performance monitoring. The risk assessment may consider the following factors:

(1) dollar amount of the contract;

(2) total contract duration;

(3) contractor past performance;

(4) risk of fraud, abuse or waste;

(5) special circumstances of the project;

(6) the scope of the goods, products, or services provided under the contract;

(7) business process impact of failure or delay; and

(8) the board or executive director's request for enhanced contract or performance monitoring.

(b) The department's contract management office or procurement director will notify the board of the results of the risk assessment and present information to the board resulting from the enhanced contract or performance monitoring.

(c) The department's contract management office or procurement director must immediately notify the board of any serious issue or risk that is identified under this section.

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

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Laura Moriaty
General Counsel
Texas Department of Motor Vehicles
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CHAPTER 211. CRIMINAL HISTORY OFFENSE AND ACTION ON LICENSE

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to 43 Texas Administrative Code, (TAC) §211.1 and §211.2; repeal of §§211.3, 211.4, 211.5, and 211.6; and new sections §§211.10, 221.11, 221.12, and 211.13. The proposed amendments, repeals, and new sections are necessary to organize the rules into two subchapters for consistency with other chapters in TAC Title 43, to clarify the types of licenses to which the chapter applies, to clarify which crimes relate to the duties and responsibilities of these license holders, to delete duplicative language found in statute, to conform rule language with statutory changes; to clarify existing requirements, and to modernize language and improve readability. Proposed language also conforms with Senate Bill (SB) 224, 88th Legislature, Regular Session (2023), which amended the Penal Code to add felony offenses involving damage to motor vehicles during the removal or attempted removal of a catalytic converter.

EXPLANATION. The department is conducting a review of its rules under Chapter 211 in compliance with Government Code, §2001.039. Notice of the department's plan to conduct this review is also published in this issue of the *Texas Register.* As a part of the review, the department is proposing necessary amendments, repeals, and new sections as detailed in the following paragraphs.

Occupations Code, Chapter 53 and §§2301.651, 2302.104, 2301.105, and 2302.108, and Transportation Code, §503.034 and §503.038 authorize the department and its board to investigate and act on a license application, or on a license, when a person has committed a criminal offense. Chapter 211 allows the department to maintain fitness standards for license holders with prior criminal convictions while implementing the legislature's stated statutory intent in Occupations Code, §53.003 to enhance opportunities for a person to obtain gainful employment after the person has been convicted of an offense and discharged the sentence for the offense.

The department must follow the requirements of Occupations Code, Chapter 53 to determine whether a person's past criminal history can be considered in evaluating the person's fitness for licensing.

Occupations Code, §53.021 gives a licensing authority the power to suspend or revoke a license, to disqualify a person from receiving a license, or to deny a person the opportunity to take a licensing examination on the grounds that the person has been convicted of: (1) an offense that directly relates to the duties and responsibilities of the licensed occupation; (2) an offense listed in Article 42A.054, Code of Criminal Procedure; or (3) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure. The department's evaluation of past criminal history applies to all license applications. Under Occupations Code, §53.021(a)(1), the department is responsible for determining which offenses directly relate to the duties and responsibilities of a particular licensed occupation.

Occupations Code, §53.022 sets out criteria for consideration in determining whether an offense directly relates to the duties and responsibilities of the licensed occupation. Based on those criteria, the department has determined that certain offenses directly relate to the duties and responsibilities of an occupation licensed by the department. However, conviction of an offense that directly relates to the duties and responsibilities of the licensed occupation or is listed in Occupations Code, §53.021(a)(2) and (3) is not an automatic bar to licensing; the department must consider the factors listed under Occupations Code, §53.023 in making its fitness determination. The factors include, among other things, the person's age when the crime was committed, rehabilitative efforts, and overall criminal history. The department is required to publish guidelines relating to its practice under this chapter in accordance with Occupations Code, §53.025.

Proposed New Subchapter A, General Provisions

Chapter 211 currently contains only one subchapter. The proposed amendments would divide Chapter 211 into two subchapters. A proposed amendment would retitle Subchapter A "General Provisions," consistent with the organization and naming conventions found in Chapters 215 and 221 of this title. This proposed amendment would provide consistency and improve readability because Chapter 211 applies to the same applicants and license holders as Chapters 215 and 221. Sections 211.1 and 211.2 are proposed for inclusion in retitled Subchapter A for consistency and ease of reference.

A proposed amendment to the title of §211.1 would add "Purpose and" to the section title to indicate that proposed amendments to this section include the purpose for the chapter in addition to definitions. This proposed change would place the chapter purpose description in the same subchapter and in the same order as similar language in Chapters 215 and 221 of this title for improved understanding and readability. Proposed new §211.1(a) would describe the purpose of Chapter 211 by incorporating existing language in current §211.3(a). The proposed amendments would add at the end of the paragraph the obligation for the department to review criminal history of license applicants before issuing a new or renewal license and the option for the department to act on the license of an existing license holder who commits an offense during the license period, consistent with Occupations Code, Chapter 53 and §§2301.651, 2302.104, 2302.105, and 2302.108, and Transportation Code, §503.034 and §503.038, and existing department procedures.

A proposed amendment to §211.1 would reorganize the current definitions into a subsection (b). Proposed amendments to §211.1(2) would delete references to "registration, or authorization," add an "or" to §211.1(2)(B), delete an "or" and add sentence punctuation in §211.1(2)(C), and delete §211.1(2)(D). These proposed amendments would clarify that Chapter 211 only applies to licenses issued by the department under Transportation Code, Chapter 503 and Occupations Code, Chapters 2301 and 2302, and does not apply to registrations the department may issue under the authority of another Transportation Code chapter. Registrations or permits that the department issues under other Transportation Code chapters do not currently require a review of an applicant's criminal history. Proposed amendments to §211.1(3) would delete the current list of specific retail license types and define the term "retail" by listing only those license types that are not considered to be retail. This proposed amendment would shorten the sentence to improve readability without changing the meaning or scope of the definition. Additionally, this proposed amendment would eliminate the need to update the rule if a future statutory change created a new type of vehicle or changed the name of an existing vehicle type.

A proposed amendment to the title of §211.2 would substitute "Chapter" for "Subchapter" for consistency with the rule text. A proposed amendment in §211.2(b) would add a comma after Occupations Code for consistency in punctuation.

The remaining sections in Subchapter A are proposed for repeal as each of these sections are proposed for inclusion in new Subchapter B.

Proposed New Subchapter B, Criminal History Evaluation

A proposed amendment would add a new subchapter, Subchapter B. Criminal History Evaluation Guidelines and Procedures. Proposed for inclusion in new Subchapter B are new sections §§211.10- 211.13. These new proposed sections would contain the guidelines and procedures rule language currently found in §§211.3-211.6 with the addition of the proposed changes described below.

Proposed new §211.10 would include the rule text of current §211.3 with changes as follows. Current §211.3(a) would be deleted because that language has been incorporated into proposed new §211.1(a), which describes the purpose of Chapter 211. Proposed new §211.10(a) would incorporate the language of current §211.3(b), except for the two paragraphs at the end of that subsection which duplicate a statutory requirement in Occupations Code, §53.022 and do not need to be repeated in rule. Proposed new §211.10(b) would recodify language that is currently in §211.3(c), except for §§211.3(c)(1) and (2), which are redundant and unnecessary statutory references.

Proposed new §211.10(c) would incorporate §211.3(d) with the following changes. Proposed new §211.10(c) would add a comma to correct missing punctuation after "Occupations Code" and would delete three sentences that specify which offenses apply to a license type. Proposed new §211.10(c) would include clarifying paragraph numbers: paragraph (1) would identify offenses that apply to all license types, and paragraph (2) would separate and identify additional offenses that apply only to retail license types. The proposed new language would add clarity and improve readability. Proposed new language would divide the offense categories currently in §211.3(d)(1) - (16) between the new paragraphs as relettered subparagraphs of §§211.10(c)(1) and (2).

Proposed new §211.10(c)(1)(B), would incorporate language currently in §211.3(d)(2) and add language to clarify that offenses involving forgery, falsification of records, or perjury include the unauthorized sale, manufacturing, alteration, issuance, or distribution of a license plate or temporary tag. This proposed clarifying language provide additional notice to applicants and license holders that the department considers forging or falsification of license plates or temporary tags to be a serious and potentially disqualifying offense.

Proposed new §211.10(c)(1)(E) would incorporate language currently in §211.3(d)(5) and add possession and dismantling of motor vehicles to the list of felony offenses under a state or federal statute or regulation that could potentially be disqualifying. Proposed new §211.10(c)(1)(E) would also include "motor vehicle parts" to clarify that disqualifying felony offenses include crimes related to motor vehicle parts as well as to motor vehicles. These proposed clarifications are important due to the increasing frequency of motor vehicle parts theft, including catalytic converters, tailgates, batteries, and wheel rims and tires.

Proposed new §211.10(c)(1)(G) would incorporate language currently in §211.3(d)(7) and would clarify that an offense committed while engaged in a licensed activity or on a licensed premises includes falsification of a motor vehicle inspection required by statute. This clarification is important because emissions inspections in certain counties are required by law and harm the health and safety of Texas citizens if not performed.

Proposed new §211.10(c)(1)(I) would add that offenses of attempting or conspiring to commit any of the foregoing offenses are potentially disqualifying offenses because the person intended to commit an offense. This proposed new language incorporates language from current §211.3(d)(16) and is necessary to add because the offenses that apply to all license holders and the additional offenses that only apply to retail license types are proposed to be reorganized into separate paragraphs to improve readability, so the language regarding conspiracies or attempts to commit the offenses must be repeated in each paragraph to provide notice of these potentially disqualifying offenses.

Proposed new §211.10(c)(2)(E) would make felony offenses under Penal Code, §28.03 potentially disqualifying when a motor vehicle is damaged, destroyed, or tampered with during the removal or attempted removal of a catalytic converter. This new amendment aligns with Senate Bill (SB) 224, 88th Legislature, Regular Session (2023), which amended Penal Code, §28.03 to create a state jail felony for damage to a motor vehicle because of removal or attempted removal of the catalytic converter. Proposed new §211.10(c)(2)(D) would incorporate §211.3(d)(12) and would add two additional offenses against the family: Penal Code, §25.04 and §25.08. Penal Code, §25.04 includes offenses involving the enticement of a child away from the parent or other responsible person, and Penal Code, §25.08 includes offenses related to the sale or purchase of a child. These offenses are relevant to the retail professions licensed by the department because parents frequently bring children to a dealership when considering a vehicle purchase, and a retail license holder may have unsupervised access to a child while a parent test-drives a vehicle or is otherwise engaged in viewing or inspecting a vehicle offered for sale. License holders also have access to the parent's motor vehicle records, including the family's home address. A person with a predisposition to commit these types of crimes would have the opportunity to engage in further similar conduct.

Proposed new §211.10(c)(2)(F) would incorporate the language of current §211.3(d)(13), and clarify that the department would consider any offense against the person to be potentially be disqualifying, would add a reference to Penal Code, Title 5, and would further clarify that an offense in which use of a firearm resulted in fear, intimidation, or harm of another person would be included in the list of potentially disqualifying crimes. Additionally, proposed new §211.10(c)(2)(F) would clarify that a felony offense of driving while intoxicated which resulted in harm to another person may also be potentially disqualifying. The department considers these offenses to be related to the occupations of retail license holders because these license holders have direct contact with members of the public during vehicle test drives or other settings in which no one else is present, and retail license holders have access to an individual's motor vehicle records, including the individual's home address. A person with a predisposition for violence would have the opportunity in these situations to engage in further similar conduct. These proposed amendments would further clarify which offenses against a person the department considers directly related to the licensed occupation and therefore potentially disqualifying. The department's consideration of these crimes is subject to certain limitations in Occupations Code, Chapter 53.

Proposed new §211.11 would incorporate language from current §211.4, with the addition of proposed new §211.11(a), which would clarify that the department will deny a pending application if an applicant or an applicant's representative as defined in

§211.2(a)(2) is imprisoned. Occupations Code, §53.021(b) requires an agency to revoke a license holder's license on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision. Because the department also determines licensure eligibility based on individuals serving as representatives for the license holder, the department also considers the effect of imprisonment of those persons on a license holder. Because the revocation for a felony conviction is mandatory in Occupations Code, §53.021(b), the department must also deny a pending application. An applicant who is imprisoned may reapply once the applicant is no longer imprisoned and an applicant whose application is denied based on an imprisoned individual serving in a representative capacity may choose a different representative and reapply for licensure. Proposed new §211.11(b) would substitute "of" for "or" to correct a typographical error made at adoption of §211.4. Proposed new §211.11(c) incorporates language from current §211.4(d). Proposed new §211.11(d) incorporates language from current §211.4(c).

Proposed new §211.12 would incorporate without change the language in current §211.5 that addresses the procedure for a person to obtain a criminal history evaluation letter from the department. This process allows a person to request an evaluation prior to applying for a license if the person so desires.

Proposed new §211.13(a) would incorporate the current language of §211.6(a) and would clarify that fingerprint requirements apply to "an applicant for a new or renewal license" to improve readability without changing meaning. Proposed new §211.13(b)(1) would incorporate the language of current §211.6(b)(1) and would clarify that a trust beneficiary is a person who may be required by the department to submit a set of fingerprints to the Texas Department of Public Safety as part of the application process for those license types. This is a clarification rather than an extension of the existing requirements for the fingerprinting of owner applicants, because a trust beneficiary is an equitable owner of the trust's assets. It is necessary for the department to fingerprint trust beneficiaries along with other owners because doing so will prevent a bad actor with a history of criminal offenses that directly relate to the duties and responsibilities of a license holder from obtaining a license from the department by using a trust to hide the bad actor's identity and then using that license to perpetrate, or benefit from, fraudulent and criminal actions, or otherwise take advantage of the position of trust created by the license.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Glenna Bowman, Chief Financial Officer, has determined that for each year of the first five years the proposal will be in effect, there will be no significant fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. Monique Johnston, Director of the Motor Vehicle Division, has determined that there will be no significant impact on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Johnston also determined that, for each year of the first five years the proposal is in effect, public benefits are anticipated, and that applicants and license holders will not incur costs to comply with the proposal. The anticipated public benefits include reduced opportunity for fraud and related crime, and improved public safety. Requiring fingerprints for a trust beneficiary will benefit the public by preventing bad actors with a history of criminal offenses that directly relate to the duties and responsibilities of a license holder from obtaining licenses by using a trust to hide their identity and then using those licenses to perpetrate, or benefit from, fraud and criminal actions, or otherwise take advantage of the position of trust created by the license.

Ms. Johnston anticipates that there will be no additional costs on regulated persons to comply with the submission and evaluation of information under this proposal because the rules do not establish any new requirements or costs for regulated persons unless the person commits a crime. The proposed requirement in §211.13(b)(1) for the fingerprinting of trust beneficiaries is a clarification of the existing requirement that applicant owners must be fingerprinted, as trust beneficiaries are equitable owners of the trust's assets. It therefore does not create a new fingerprinting requirement. Additionally, Ms. Johnston anticipates that there will be no additional costs on regulated persons to comply with the fingerprint requirements under this proposal as the new section does not establish fees for fingerprinting or processing criminal background checks. Fees for fingerprinting and access to criminal history reports are established by DPS under the authority of Texas Government Code, Chapter 411.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code, §2006.002, the department has determined that this proposal will not have an adverse economic effect or disproportionate economic impact on small or micro businesses. The department has also determined that the proposed amendments will not have an adverse economic effect on rural communities because rural communities are exempt from the requirement to hold a license under Transportation Code, §503.024. Therefore, under Government Code, §2006.002, the department is not required to perform a regulatory flexibility analysis.

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

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed repeal and amendments are in effect the amendments will not create or eliminate a government program; will not require the creation of new employee positions and will not require the elimination of existing employee positions; will not require an increase or decrease in future legislative appropriations to the department; will not require an increase in fees paid to the department; will create new regulations and expand existing regulations, as described in the explanation section of this proposal; will repeal existing regulations in §§211.3 - 211.6; will increase the number of individuals subject to the rule's applicability regarding fingerprinting of trust beneficiaries; and will not significantly benefit or adversely affect the Texas economy.

REQUEST FOR PUBLIC COMMENT.

If you want to comment on the proposal, submit your written comments by 5:00 p.m. Central Standard Time on December 9, 2024. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the

department will consider written comments and public testimony presented at the hearing.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §211,1. §211.2

STATUTORY AUTHORITY. The department proposes amendments to Chapter 211 under Government Code, §411.122(d), which authorizes department access to criminal history record information maintained by DPS; Government Code, §411.12511, which authorizes the department to obtain criminal history record information from DPS and the FBI for license applicants, license holders, and representatives whose act or omission would be cause for denying, revoking, or suspending a general distinguishing number or license issued under Transportation Code, Chapter 503, or Occupations Code, Chapters 2301 and 2302; Occupations Code, §2301.151, which gives the board authority to regulate the distribution, sale, and lease of motor vehicles and the authority to take any action that is necessary or convenient to exercise that authority; Occupations Code, §2301.152, which authorizes the board to establish the qualifications of license holders, ensure that the distribution, sale, and lease of motor vehicles is conducted as required by statute and board rules, to prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles, and to enforce and administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503; Occupations Code, §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and to govern practice and procedure before the board; Occupations Code, §2301.651, which gives the board authority to deny an application for a license, to revoke or suspend a license, to place on probation, or to reprimand a license holder if the applicant or license holder is unfit, makes a material misrepresentation, violates any law relating to the sale, distribution, financing, or insuring of motor vehicles, willfully defrauds a purchaser, or fails to fulfill a written agreement with a retail purchaser of a motor vehicle; Occupations Code, §2302.051, which authorizes the board to adopt rules as necessary to administer Occupations Code, Chapter 2302; Transportation Code, §503.002, which authorizes the board to adopt rules for the administration of Transportation Code, Chapter 503; and Transportation Code, §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Government Code, Chapter 411; Occupations Code, Chapters 53, 2301 and 2302; Transportation Code, Chapters 503 and 1002; Penal Code, Chapters 25, 28, 43, 49 and Title 5; and Code of Criminal Procedure, Article 42A and 62.

§211.1. Purpose and Definitions.

(a) The licenses issued by the department create positions of trust. License holder services involve access to confidential information; conveyance, titling, and registration of private property; possession of monies belonging to or owed to private individuals, creditors, and governmental entities; and compliance with federal and state environmental and safety regulations. License holders are provided with opportunities to engage in fraud, theft, money laundering, and related crimes, and to endanger the public through violations of environmental and safety regulations. Many license holders provide services directly to the public, so licensure provides persons predisposed to commit assaultive or sexual crimes with greater opportunities to engage in such conduct. To protect the public from these harms, the department shall review the criminal history of license applicants before issuing a new or renewal license and may take action on a license holder who commits an offense during the license period based on the guidelines in this chapter.

(b) When used in this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) "Department" means the Texas Department of Motor Vehicles.

(2) "License" means any license [~~, registration, or authorization,~~] issued by the department under:

(A) Transportation Code, Chapter 503;

(B) Occupations Code, Chapter 2301; or

(C) Occupations Code, Chapter 2302. [~~; or~~]

[~~(D) any other license, registration, or authorization, that the department may deny or revoke because of a criminal offense of the applicant or license holder.~~]

(3) "Retail license types" means those license [~~holder~~] types which require holders to [~~that~~] interact directly with the public, [~~including salvage dealers, converters, independent mobility motor vehicle dealers, lease facilitators, and general distinguishing number holders for the following vehicle categories: all-terrain vehicle, light truck, motorcycle, motorhome, moped /motor scooter, medium duty truck, neighborhood vehicle, other, passenger auto, recreational off-highway vehicle, and towable recreational vehicle,~~] but does not include other license types that do not generally interact directly with the public, including manufacturers, distributors, and general distinguishing number holders for the following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, transmission, wholesale motor vehicle dealer, and wholesale motor vehicle auction.

§211.2. Application of Chapter [~~Subchapter~~].

(a) This chapter applies to the following persons:

(1) applicants and holders of any license; and

(2) persons who are acting at the time of application, or will later act, in a representative capacity for an applicant or holder of a license, including the applicant's or holder's officers, directors, members, managers, trustees, partners, principals, or managers of business affairs.

(b) In this chapter a "conviction" includes a deferred adjudication that is considered to be a conviction under Occupations Code, §53.021(d).

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

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

TRD-202404979
Laura Moriaty
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 465-4160

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43 TAC §§211.3 - 211.6

STATUTORY AUTHORITY. The department proposes repeals to Chapter 211 under Government Code, §411.122(d), which authorizes department access to criminal history record information maintained by DPS; Government Code, §411.12511, which authorizes the department to obtain criminal history record information from DPS and the FBI for license applicants, license holders, and representatives whose act or omission would be cause for denying, revoking, or suspending a general distinguishing number or license issued under Transportation Code, Chapter 503, or Occupations Code, Chapters 2301 and 2302; Occupations Code, §2301.151, which gives the board authority to regulate the distribution, sale, and lease of motor vehicles and the authority to take any action that is necessary or convenient to exercise that authority; Occupations Code, §2301.152, which authorizes the board to establish the qualifications of license holders, ensure that the distribution, sale, and lease of motor vehicles is conducted as required by statute and board rules, to prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles, and to enforce and administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503; Occupations Code, §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and to govern practice and procedure before the board; Occupations Code, §2301.651, which gives the board authority to deny an application for a license, to revoke or suspend a license, to place on probation, or to reprimand a license holder if the applicant or license holder is unfit, makes a material misrepresentation, violates any law relating to the sale, distribution, financing, or insuring of motor vehicles, willfully defrauds a purchaser, or fails to fulfill a written agreement with a retail purchaser of a motor vehicle; Occupations Code, §2302.051, which authorizes the board to adopt rules as necessary to administer Occupations Code, Chapter 2302; Transportation Code, §503.002, which authorizes the board to adopt rules for the administration of Transportation Code, Chapter 503; and Transportation Code, §1002.001, which authorizes the board to adopt or rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Government Code, Chapter 411; Occupations Code, Chapters 53, 2301 and 2302; Transportation Code, Chapters 503 and 1002; Penal Code, Chapters 25, 28, 43, 49 and Title 5; and Code of Criminal Procedure, Article 42A and 62.

§211.3. Criminal Offense Guidelines.

§211.4. Imprisonment.

§211.5. Criminal History Evaluation Letters.

§211.6. Fingerprint Requirements for Designated License Types.

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

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Laura Moriaty
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: December 8, 2024
For further information, please call: (512) 465-4160

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SUBCHAPTER B. CRIMINAL HISTORY EVALUATION GUIDELINES AND PROCEDURES

43 TAC §§211.10 - 211.13

STATUTORY AUTHORITY. The department proposes new sections to Chapter 211 under Government Code, §411.122(d), which authorizes department access to criminal history record information maintained by DPS; Government Code, §411.12511, which authorizes the department to obtain criminal history record information from DPS and the FBI for license applicants, license holders, and representatives whose act or omission would be cause for denying, revoking, or suspending a general distinguishing number or license issued under Transportation Code, Chapter 503, or Occupations Code, Chapters 2301 and 2302; Occupations Code, §2301.151, which gives the board authority to regulate the distribution, sale, and lease of motor vehicles and the authority to take any action that is necessary or convenient to exercise that authority; Occupations Code, §2301.152, which authorizes the board to establish the qualifications of license holders, ensure that the distribution, sale, and lease of motor vehicles is conducted as required by statute and board rules, to prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles, and to enforce and administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503; Occupations Code, §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and to govern practice and procedure before the board; Occupations Code, §2301.651, which gives the board authority to deny an application for a license, to revoke or suspend a license, to place on probation, or to reprimand a license holder if the applicant or license holder is unfit, makes a material misrepresentation, violates any law relating to the sale, distribution, financing, or insuring of motor vehicles, willfully defrauds a purchaser, or fails to fulfill a written agreement with a retail purchaser of a motor vehicle; Occupations Code, §2302.051, which authorizes the board to adopt rules as necessary to administer Occupations Code, Chapter 2302; Transportation Code, §503.002, which authorizes the board to adopt rules for the administration of Transportation Code, Chapter 503; and Transportation Code, §1002.001, which authorizes the board to adopt or rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Government Code, Chapter 411; Occupations Code, Chapters 53, 2301 and 2302; Transportation Code, Chapters 503 and 1002; Penal Code, Chapters 25, 28, 43, 49 and Title 5; and Code of Criminal Procedure, Article 42A and 62.

§211.10. Criminal Offense Guidelines.

(a) Under Occupations Code, Chapter 53, the department may suspend or revoke an existing license or disqualify an applicant from receiving a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the licensed occupation.

(b) The department has determined under the factors listed in Occupations Code, §53.022 that offenses detailed in subsection (c) of this section directly relate to the duties and responsibilities of license holders, either because the offense entails a violation of the public trust,

issuance of a license would provide an opportunity to engage in further criminal activity of the same type, or the offense demonstrates the person's inability to act with honesty, trustworthiness, and integrity. Such offenses include crimes under the laws of another state, the United States, or a foreign jurisdiction, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. The list of offenses in subsection (c) of this section is in addition to offenses that are independently disqualifying under Occupations Code, §53.021.

(c) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of the offenses that may relate to a particular regulated occupation. After due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the department may find that an offense not described below also renders a person unfit to hold a license based on the criteria listed in Occupations Code, §53.022.

(1) the following offenses apply to all license types:

(A) offenses involving fraud, theft, deceit, misrepresentation, or that otherwise reflect poorly on the person's honesty or trustworthiness, including an offense defined as moral turpitude;

(B) offenses involving forgery, falsification of records, perjury, or the unauthorized sale, manufacturing, alteration, issuance, or distribution of a license plate or temporary tag;

(C) offenses involving the offering, paying, or taking of bribes, kickbacks, or other illegal compensation;

(D) felony offenses against public administration;

(E) felony offenses under a state or federal statute or regulation involving the manufacture, sale, finance, distribution, repair, salvage, possession, dismantling, or demolition, of motor vehicles or motor vehicle parts;

(F) felony offenses under a state or federal statute or regulation related to emissions standards, waste disposal, water contamination, air pollution, or other environmental offenses;

(G) offenses committed while engaged in a licensed activity or on licensed premises, including the falsification of a motor vehicle inspection required by statute;

(H) felony offenses involving the possession, manufacture, delivery, or intent to deliver controlled substances, simulated controlled substances, dangerous drugs, or engaging in an organized criminal activity; and

(I) offenses of attempting or conspiring to commit any of the foregoing offenses.

(2) the following additional offenses apply to retail license types:

(A) felony offenses against real or personal property belonging to another;

(B) offenses involving the sale or disposition of another person's real or personal property;

(C) a reportable felony offense conviction under Chapter 62, Texas Code of Criminal Procedure for which the person must register as a sex offender;

(D) an offense against the family as described by Penal Code, §§25.02, 25.04, 25.07, 25.072, 25.08, or 25.11;

(E) felony offenses under Penal Code, §28.03 involving a motor vehicle that is damaged, destroyed, or tampered with during the removal or attempted removal of a catalytic converter;

(F) offenses against the person under Penal Code, Title 5, including offenses in which use of a firearm resulted in fear, intimidation, or harm of another person, and in Penal Code, Chapter 49, a felony offense of driving while intoxicated that resulted in the harm of another person;

(G) a felony stalking offense as described by Penal Code, §42.072;

(H) a felony offense against public order and decency as described by Penal Code §§43.24, 43.25, 43.251, 43.26, 43.261, or 43.262; and

(I) offenses of attempting or conspiring to commit any of the foregoing offenses.

(d) When determining a person's present fitness for a license, the department shall also consider the following evidence:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

(7) other evidence of the person's present fitness, including letters of recommendation.

(e) It is the person's responsibility to obtain and provide to the licensing authority evidence regarding the factors listed in subsection (d) of this section.

§211.11. Imprisonment.

(a) The department shall deny a license application if the applicant or a person described by §211.2(a)(2) of this chapter (relating to Application of Chapter) is imprisoned while a new or renewal license application is pending.

(b) The department shall revoke a license upon the imprisonment of a license holder following a felony conviction or revocation of felony community supervision, parole, or mandatory supervision.

(c) A person currently imprisoned because of a felony conviction may not obtain a license, renew a previously issued license, or act in a representative capacity for an application or license holder as described by §211.2(a)(2).

(d) The department may revoke a license upon the imprisonment for a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision of a person described by §211.2(a)(2) of this chapter who remains employed with the license holder.

§211.12. Criminal History Evaluation Letters.

(a) Pursuant to Texas Occupations Code, Chapter 53, Subchapter D, a person may request that the department evaluate the person's eligibility for a specific occupational license regulated by the department by:

(1) submitting a request on a form approved by the department for that purpose; and

(2) paying the required Criminal History Evaluation Letter fee of $100.

(b) The department shall respond to the request not later than the 90th day after the date the request is received.

§211.13. Fingerprint Requirements for Designated License Types.

(a) The requirements of this section apply to an applicant for a new or renewal license for the license types designated in Chapter 215 or Chapter 221 of this title as requiring fingerprints for licensure.

(b) Unless previously submitted for an active license issued by the department, the following persons may be required to submit a complete and acceptable set of fingerprints to the Texas Department of Public Safety and pay required fees for purposes of obtaining criminal history record information from the Texas Department of Public Safety and the Federal Bureau of Investigation:

(1) a person, including a trust beneficiary, applying for a new license, license amendment due to change in ownership, or license renewal; and

(2) a person acting in a representative capacity for an applicant or license holder who is required to be listed on a licensing application, including an officer, director, member, manager, trustee, partner, principal, or manager of business affairs.

(c) After reviewing a licensure application and licensing records, the department will notify the applicant or license holder which persons in subsection (b) of this section are required to submit fingerprints to the Texas Department of Public Safety.

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

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Laura Moriaty
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Texas Department of Motor Vehicles
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