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 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.6

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figures in 4 TAC §40.6 are not included in the print version of the Texas Register. The figures are available in the on-line version of the September 22, 2023, issue of the Texas Register.)

The Texas Animal Health Commission (Commission) proposes amendments to Title 4, Texas Administrative Code, Chapter 40 titled "Chronic Wasting Disease." Specifically, amendments are proposed to §40.6 CWD Movement Restriction Zones.

BACKGROUND AND SUMMARY OF PROPOSED AMENDMENTS

The purpose of this chapter is to prevent and control the incidence of chronic wasting disease (CWD) in Texas by seeking to reduce the risk of interstate and intrastate transmission of CWD in susceptible cervid species. The Commission proposes amendments to §40.6 to modify existing movement restriction zones to provided targeted surveillance and reduce the risk of CWD being spread from areas where it may exist.

CWD is a degenerative and fatal neurological communicable disease recognized by the veterinary profession that affects susceptible cervid species. CWD poses a serious threat to livestock and exotic livestock that the Commission is charged with protecting. CWD can spread through natural movements of infected animals and transportation of live infected animals or carcass parts. Specifically, prions are shed from infected animals in saliva, urine, blood, soft-antler material, feces, or from animal decomposition, which ultimately contaminates the environment in which CWD susceptible species live. CWD has a long incubation period, so animals infected with CWD may not exhibit clinical signs of the disease for months or years after infection. The disease can be passed through contaminated environmental conditions, and may persist for a long period of time. Currently, no vaccine or treatment for CWD exists.

To mitigate the risks and spread of CWD, the Commission works in coordination and collaboration with the Texas Parks and Wildlife Department (TPWD) to address CWD. The Commission has jurisdiction over exotic CWD susceptible species. TPWD has jurisdiction over mule deer, white-tailed deer, and other native species. Those native species are classified as property of the state of Texas and managed as state resources. TPWD, under specific statutory authorization, allows herd owners to breed, trade, sell, and move white-tailed or mule deer that meet certain TPWD requirements.

The purpose of the movement restriction zones is to both increase surveillance and reduce the risk of CWD being spread from areas where it may exist. As required by §40.6(g), the Commission reviewed the movement restriction zones and recommends the modifications as stated herein. The proposed amendments modify the boundaries of some existing zones and creates new zones to improve and implement surveillance efforts as part of the agency's effort to manage CWD.

SECTION-BY-SECTION DISCUSSION

§40.6 CWD Movement Restriction Zones

The proposed amendment to §40.6(b)(1)(B) would modify current Containment Zone (CZ) 2 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(1)(C) does not amend the geographical area of CZ 3, but amends the format of the geographic coordinates used in the rule. Specifically, the coordinates are modified to change each coordinate to have eight decimal places rather than eleven decimal places. There is no decline in precision of these revised coordinates, as the revision still provides precision to the millimeter. These amendments help align the coordinates with standards used in geographical information systems.

The proposed amendment to §40.6(b)(1)(E) and §40.6(b)(1)(F) would change CZ 5 and CZ 6 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendments to §40.6(b)(1)(G) would create a new Containment Zone 7 in Hunt and Kaufman Counties in response to the detection of CWD in a deer breeder release site in those counties.

The proposed amendment to §40.6(b)(1)(H) would add a new Containment Zone 8 in Bexar County in response to the detection of CWD in a free-range wild white-tailed deer in that county.

The proposed amendment to §40.6(b)(2)(B) would modify current Surveillance Zone (SZ) 2 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(2)(C) would reduce the size of current SZ 3 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(2)(E) would increase the size of current SZ 5 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(2)(F) would update the attached graphic.

The proposed amendment to create §40.6(b)(2)(G) would reduce the current SZ 7 in order to add a new CZ within that area through amendments to §40.6(b)(1)(G).

The proposed amendment to §40.6(b)(2)(H) would reduce the size of current SZ 8 to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(2)(I) would add a new SZ 9 in Gillespie County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(J) would add a new SZ 10 in Limestone County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(K) and §40.6(b)(2)(L) would add a new SZ 11 and 12 in Uvalde County to align with the modified zones developed in consultation with the Texas Parks and Wildlife Department as part of the proposed amendment to reduce the area covered by SZ 3 in§40.6(b)(2)(C).

The proposed amendment to §40.6(b)(2)(M) would add a new SZ 13 in Zavala County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(N) would add a new SZ 14 in Gonzales County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(O) would add a new SZ 15 in Hamilton and Mills Counties in response to the detection of CWD in a deer breeding facility in Hamilton County.

The proposed amendment to §40.6(b)(2)(P) would add a new SZ 16 in Washington County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(Q) would add a new SZ 17 in Uvalde, Medina, Zavala, and Frio Counties in response to the detection of CWD in a deer breeding facility in Frio County.

The proposed amendment to §40.6(b)(2)(R) would add a new SZ 18 in Bexar County in response to the detection of one case of CWD in a free-range white-tailed deer in that county.

The proposed amendment to §40.6(b)(2)(S) would add a new SZ 19 in Sutton County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(T) would add a new SZ 20 in Zavala County in response to the detection of CWD in a deer breeding facility in that county.

The proposed amendment to §40.6(b)(2)(U) would add a new SZ 21 in Frio County in response to the detection of CWD in a deer breeding facility in that county.

FISCAL NOTE

Ms. Jeanine Coggeshall, General Counsel of the Texas Animal Health Commission, determined for each year of the first five years the rules are in effect, there are no estimated additional costs or reductions in costs to state or local governments as a result of enforcing or administering the proposed rules. Commission employees will administer and enforce these rules as part of their regular job duties and resources. Ms. Coggeshall also determined for the same period that there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules, and the proposed rules do not have foreseeable implications relating to costs or revenues of state governments.

PUBLIC BENEFIT

Ms. Coggeshall determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefits will be the protection of CWD susceptible species by increasing the probability of detecting CWD in areas of the state where it is confirmed or likely to be detected and by reducing the inadvertent movement of the disease from those areas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Commission determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

MAJOR ENVIRONMENTAL RULE

The Commission determined that Texas Government Code §2001.0225 does not apply to the proposed rules because the specific intent of these rules is not primarily to protect the environment or reduce risks to human health from environmental exposure, and therefore, is not a major environmental rule.

TAKINGS ASSESSMENT

The Commission determined that the proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. Therefore, the proposed rules are compliant with the Private Real Property Preservation Act in Texas Government Code §2007.043 and do not constitute a taking.

ECONOMIC IMPACT STATEMENT

The Commission determined that the proposed amendments to §40.6 may impact animal agricultural industries, which meet the definition of a small business or microbusiness pursuant to Texas Government Code, Chapter 2006, and may affect rural communities. Specifically, the Commission determined that the proposed rules may affect herd owners of exotic CWD susceptible species located in the proposed containment and surveillance zones.

The Commission determined that the proposed surveillance and containment zones in response to recent positive CWD cases would not adversely affect herd owners of exotic CWD susceptible species because the proposal applies to exotic CWD susceptible species located in geographic areas where CWD has been detected or there is a high probability of detection. As such, the movement and testing requirements resulting from the proposed zones are intended to reduce exposure to other susceptible species in the same rural community, where the disease risk is greatest, and other communities and small businesses across the state. As a result, the application of the rule will help prevent adverse economic impacts associated with chronic wasting disease.

REGULATORY FLEXIBILITY ANALYSIS

The Commission considered several alternative methods for achieving the proposed rule's purpose while minimizing adverse economic impacts on small businesses, microbusinesses, and rural communities, as applicable, pursuant to Texas Govern-

ment Code, Chapter 2006. The following sections analyze the substantive proposed changes that may have direct, adverse economic impacts on regulated parties in the order they are presented in Chapter 40.

Containment and Surveillance Zones. The Commission considered alternatives for all proposed zones, especially where there are known exotic CWD susceptible species, including voluntary surveillance and alternative zone boundaries that followed more recognizable features. However, the Commission determined that voluntary testing would not protect the health of other CWD susceptible species in the affected area and across the state. The Commission also determined that the regulated community would benefit from consistent zone boundaries for both native and exotic CWD susceptible species. As such, the Commission proposes zone boundaries to align with boundaries developed in consultation with Texas Parks and Wildlife Department. The Commission determined these proposals are necessary to follow the legislative requirement that the Commission protect exotic livestock from certain diseases that pose a serious threat to exotic livestock, specifically CWD.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with the requirements of Texas Government Code §2001.0221, for each year of the first five years the proposed rules would be in effect, the Commission determined the following:

The proposed rules will not create or eliminate a government program;

Implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;

Implementation of the proposed rules will not require an increase or decrease in future legislative appropriations to the Commission;

The proposed rules will not require an increase or decrease in fees paid to the Commission;

The proposed rules will not create a new regulation;

The proposed rules will expand existing rules, but will not otherwise limit or repeal an existing regulation;

The proposed rules may increase the number of individuals subject to the regulation; and

The proposed rules will not adversely affect this state's economy.

COST TO REGULATED PERSONS

The proposed amendments to §40.6 may impose an indirect cost on a regulated person if they are owners of exotic CWD susceptible species located within a proposed surveillance or containment zone. The Commission determined these proposals are necessary to follow the legislative requirement that the Commission protect exotic livestock from chronic wasting disease, a disease that poses a serious threat to the exotic livestock industry in Texas. The proposed rules do not otherwise impose a direct cost on a regulated person, state agency, a special district, or a local government within the state. Pursuant to Section 161.041 of the Texas Agriculture Code, Section 2001.0045 of the Texas Government Code does not apply to rules adopted under Section 161.041; therefore, it is unnecessary to amend or repeal any other existing rule.

REQUEST FOR COMMENT

Written comments regarding the proposed amendments may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719 or by e-mail to comments@tahc.texas.gov. To be considered, comments must be received no later than thirty (30) days from the date of publication of this proposal in the *Texas Register.* When faxing or emailing comments, please indicate "Comments on Chapter 40-CWD Rules" in the subject line.

STATUTORY AUTHORITY

The amendments to §40.6 within Chapter 40 of the Texas Administrative Code are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code.

The Commission is vested by statute, §161.041(a), titled "Disease Control," to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The Commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, even if the agent of transmission is an animal species that is not subject to the jurisdiction of the Commission.

Pursuant to §161.0415, titled "Disposal of Diseased or Exposed Livestock or Fowl," the Commission may require by order the slaughter of livestock, domestic fowl, or exotic fowl exposed to or infected with certain diseases.

Pursuant to §161.0417, titled "Authorized Personnel for Disease Control," the Commission must authorize a person, including a veterinarian, to engage in an activity that is part of a state or federal disease control or eradication program for animals.

Pursuant to §161.046, titled "Rules," the Commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.047, titled "Entry Power," Commission personnel are permitted to enter public or private property for the performance of an authorized duty.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Product," the Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or non-communicable disease.

Pursuant to §161.049, titled "Dealer Records," the Commission may require a livestock, exotic livestock, domestic fowl, or exotic fowl dealer to maintain records of all livestock, exotic livestock, domestic fowl, or exotic fowl bought and sold by the dealer. The Commission may also inspect and copy the records of a livestock, exotic livestock, domestic fowl, or exotic fowl dealer that relate to the buying and selling of those animals. The Commission, by rule, shall adopt the form and content of the records maintained by a dealer.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception," the Commission, by rule, may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another

epidemiologically sound procedure before or after animals are moved. The Commission is authorized, through §161.054(b), to prohibit or regulate the movement of animals into a quarantined herd, premises, or area. The Executive Director of the Commission is authorized, through §161.054(d), to modify a restriction on animal movement, and may consider economic hardship.

Pursuant to §161.0541, titled "Elk Disease Surveillance Program," the Commission, by rule, may establish a disease surveillance program for elk. Such rules include the requirement for persons moving elk in interstate commerce to test the elk for chronic wasting disease. Additionally, provisions must include testing, identification, transportation, and inspection under the disease surveillance program.

Pursuant to §161.0545, titled "Movement of Animal Products," the Commission may adopt rules that require the certification of persons who transport or dispose of inedible animal products, including carcasses, body parts, and waste material. The Commission, by rule, may provide terms and conditions for the issuance, renewal, and revocation of a certification under this section.

Pursuant to §161.056(a), titled "Animal Identification Program," the Commission may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease. Section 161.056(d) authorizes the Commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.057, titled "Classification of Areas," the commission may prescribe criteria for classifying areas in the state for disease control based on sound epidemiological principals and may prescribe control measures for classification areas.

Pursuant to §161.058, titled "Compensation of Livestock or Fowl Owner," the Commission may pay indemnity to the owner of livestock or fowl if necessary to eradicate the disease.

Pursuant to §161.060, titled "Authority to Set and Collect Fees," the Commission may charge a fee for an inspection made by the Commission as provided by Commission rule.

Pursuant to §161.061, titled "Establishment," if the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or any agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. The quarantine of an affected place may extend to any affected area, including a county, district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen. The Commission may, through §161.061(c), establish a quarantine to prohibit or regulate the movement of any article or animal the Commission designates to be a carrier of a disease listed in Section 161.041 or a potential carrier of one of those diseases, if movement is not otherwise regulated or prohibited for an animal into an affected area, including a county district, pasture, lot, ranch, field, range, thoroughfare, building, stable, or stockyard pen.

Pursuant to §161.0615, titled "Statewide or Widespread Quarantine," the Commission may quarantine livestock, exotic livestock, domestic fowl, or exotic fowl in all or any part of this state as a means of immediately restricting the movement of animals potentially infected with disease and shall clearly describe the territory included in a quarantine area.

Pursuant to §161.065, titled "Movement from Quarantined Area; Movement of Quarantined Animals," the Commission may provide a written certificate or written permit authorizing the movement of animals from quarantined places. If the Commission finds animals have been moved in violation of an established quarantine or in violation of any other livestock sanitary law, the Commission shall quarantine the animals until they have been properly treated, vaccinated, tested, dipped, or disposed of in accordance with the rules of the Commission.

Pursuant to §161.081, titled "Importation of Animals," the Commission may regulate the movement of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country. The Commission, by rule, may provide the method for inspecting and testing animals before and after entry into this state, and for the issuance and form of health certificates and entry permits.

Pursuant to §161.101, titled "Duty to Report," a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the disease, if required by the Commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the Commission within 24 hours after diagnosis of the disease.

Pursuant to §161.148, titled "Administrative Penalty," the Commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000.

The proposed rules in this chapter for adoption do not affect other statutes, sections, or codes.

§40.6. CWD Movement Restriction Zones.

(a) (No change.)

(b) Declaration of area restricted for CWD. CWD has been detected in susceptible species in different locations in Texas. This creates a high risk for CWD exposure or infection in CWD susceptible species in those geographic areas. In order to protect other areas of the state from the risk of exposure and spread of CWD, restricted areas, such as containment zones and surveillance zones, are created to protect against the spread of and exposure to CWD and have necessary surveillance to epidemiologically assess the risk. The high-risk areas are delineated as follows:

(1) Containment Zone Boundaries:

(A) (No Change.)

(B) Containment Zone 2. That portion of the state within the boundaries of a line beginning where I.H. 40 enters from the State of New Mexico in Deaf Smith County; thence east along I.H. 40 to U.S. 385 in Oldham County; thence north along U.S. 385 to Hartley in Hartley County; thence east along U.S. 87 to County Rd. 47; thence north along C.R. 47 to F.M. 281; thence west along F.M. 281 to U.S. 385; thence north along U.S. 385 to the Oklahoma state line.
Figure: 4 TAC §40.6(b)(1)(B)
[~~Figure:~~ 4 ~~TAC~~ ~~§40.6(b)(1)(B)~~]

(C) Containment Zone 3. Those portions of [~~That portion of the state lying within~~] Bandera County, Medina County,

and Uvalde County lying within the area [~~counties and depicted in the following figure and more specifically~~] described by the following latitude-longitude coordinate pairs: -99.37150859, 29.63847446; -99.37149089, 29.63846663; -99.37140892, 29.63848554; -99.37060541, 29.63866345; -99.36979992, 29.63883436; -99.36899251, 29.63899824; -99.36818327, 29.63915509; -99.36737228, 29.63930489; -99.36655962, 29.63944762; -99.36574537, 29.63958327; -99.36492962, 29.63971183; -99.36411244, 29.63983328; -99.36329391, 29.63994760; -99.36247412, 29.64005480; -99.36165314, 29.64015486; -99.36083106, 29.64024776; -99.36000797, 29.64033351; -99.35918393, 29.64041208; -99.35835904, 29.64048348; -99.35753338, 29.64054769; -99.35670702, 29.64060471; -99.35588005, 29.64065454; -99.35505256, 29.64069716; -99.35422462, 29.64073258; -99.35339632, 29.64076079; -99.35256773, 29.64078179; -99.35173895, 29.64079558; -99.35091005, 29.64080215; -99.35008112, 29.64080150; -99.34925224, 29.64079364; -99.34842348, 29.64077856; -99.34759495, 29.64075627; -99.34676670, 29.64072677; -99.34593884, 29.64069006; -99.34511143, 29.64064614; -99.34428457, 29.64059503; -99.34345833, 29.64053672; -99.34263279, 29.64047122; -99.34180805, 29.64039854; -99.34098418, 29.64031868; -99.34016126, 29.64023165; -99.33933937, 29.64013747; -99.33851860, 29.64003613; -99.33769903, 29.63992766; -99.33688074, 29.63981205; -99.33606381, 29.63968933; -99.33524831, 29.63955950; -99.33443435, 29.63942258; -99.33362198, 29.63927859; -99.33281130, 29.63912752; -99.33200238, 29.63896941; -99.33119531, 29.63880427; -99.33039016, 29.63863210; -99.32958702, 29.63845294; -99.32878597, 29.63826680; -99.32798708, 29.63807369; -99.32719043, 29.63787363; -99.32639610, 29.63766665; -99.32560418, 29.63745277; -99.32481474, 29.63723200; -99.32402786, 29.63700438; -99.32324361, 29.63676991; -99.32246208, 29.63652863; -99.32168334, 29.63628056; -99.32090748, 29.63602572; -99.32013456, 29.63576414; -99.31936466, 29.63549585; -99.31859787, 29.63522086; -99.31783425, 29.63493922; -99.31707388, 29.63465094; -99.31631684, 29.63435606; -99.31556321, 29.63405460; -99.31481305, 29.63374660; -99.31428519, 29.63352423; -99.31327614, 29.63385872; -99.31119621, 29.63441523; -99.30907905, 29.63485167; -99.30693374, 29.63516617; -99.30476947, 29.63535738; -99.30259551, 29.63542449; -99.30042118, 29.63536721; -99.29825581, 29.63518578; -99.29610866, 29.63488098; -99.29398895, 29.63445412; -99.29333571, 29.63428256; -99.29198313, 29.63440194; -99.28980918, 29.63446884; -99.28763488, 29.63441135; -99.28546955, 29.63422971; -99.28332246, 29.63392471; -99.28120282, 29.63349765; -99.27911971, 29.63295035; -99.27708206, 29.63228517; -99.27509860, 29.63150495; -99.27317782, 29.63061305; -99.27132797, 29.62961327; -99.26955695, 29.62850991; -99.26787237, 29.62730769; -99.26628143, 29.62601177; -99.26479095, 29.62462769; -99.26340730, 29.62316139; -99.26213642, 29.62161916; -99.26098374, 29.62000758; -99.25995420, 29.61833359; -99.25905220, 29.61660433; -99.25852828, 29.61543549; -99.25567633, 29.60864361; 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29.64097571700; -99.44655976880, 29.64122299300; Figure: 4 TAC §40.6(b)(1)(C)
-99.44577787910, 29.64146347570; -99.44499328210, [Figure: 4 TAC §40.6(b)(1)(C)]
29.64169714000; -99.44420605650, 29.64192396280;
-99.44341628140, 29.64214392260; -99.44262403450, (D) (No change.)
29.64235699620; -99.44182939580, 29.64256316420;
-99.44103244220, 29.64276240410; -99.44023325350, (E) Containment Zone 5. That portion of the state
29.64295469730; -99.43943190980, 29.64314002420; within the boundaries of a line beginning in Lubbock County where
-99.43862848980, 29.64331836610; -99.43782307470, County Road (C.R.) 3600 intersects with E. Division Street in Slaton;
29.64348970630; -99.43701574320, 29.64365402770; thence west along E. Division Street to S. New Mexico Street; thence
-99.43620657630, 29.64381131280; -99.43539565390, northwest along S. New Mexico Street to Railroad Avenue; thence
29.64396154730; -99.43458305710, 29.64410471440; northwest along Railroad Avenue to Industrial Drive; thence northwest
-99.43376886570, 29.64424080260; -99.43295316160, along Industrial Drive to U.S. Highway (U.S.) 84; thence northwest
29.64436979610; -99.43213602600, 29.64449168250; along U.S. 84 to State Highway (S.H.) Spur 331; thence northwest
-99.43131753850, 29.64460645040; -99.43049778240, along S.H. 331 to S.H. Loop 289; thence north along S.H. Loop 289
29.64471408840; -99.42967683740, 29.64481458510; to Farm to Market (F.M.) 40; thence east along F.M. 40 to C.R. 3650;
-99.42885478660, 29.64490793090; -99.42803171100, thence south along C.R. 3650 to C.R. 6840; thence east along C.R.
29.64499411700; -99.42720769240, 29.64507313300; 6840 to C.R. 3700; thence south along C.R. 3700 to C.R. 3600; thence
-99.42638281280, 29.64514497390; -99.42555715320, south along C.R. 3600 to E. Division Street.
29.64520963000; -99.42473079760, 29.64526709620; Figure: 4 TAC §40.6(b)(1)(E)
-99.42390382590, 29.64531736670; -99.42307632200,
29.64536043630; -99.42224836800, 29.64539630000; [(E) Containment Zone 5. -99.64149620530,
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~~[Figure: 4 TAC §40.6(b)(1)(E)]~~

(F) Containment Zone 6. That portion of Kimble County lying within the area described by the following latitude-longitude coordinate pairs: -99.64149621, 30.33874132; -99.64368510, 30.33881528; -99.64586373, 30.33901322; -99.64802279, 30.33933429; -99.65015303, 30.33977712; -99.65224534, 30.34033981; -99.65429078, 30.34101997; -99.65628058, 30.34181467; -99.65820623, 30.34272051; -99.66005949, 30.34373363; -99.66183243, 30.34484969; -99.66351745, 30.34606390; -99.66510735, 30.34737108; -99.66659532, 30.34876563; -99.66797498, 30.35024158; -99.66924042, 30.35179262; -99.67038623, 30.35341211; -99.67046478, 30.35354140; -99.67147782, 30.35460589; -99.67153231, 30.35466602; -99.67188955, 30.35506746; -99.67307523, 30.35651392; -99.67312411, 30.35657758; -99.67320400, 30.35668212; -99.67419784, 30.35807241; -99.67454917, 30.35859626; -99.67490549, 30.35911757; -99.67503636, 30.35931075; -99.67551616, 30.36002521; -99.67559375, 30.36014136; -99.67626717, 30.36115489; -99.67635112, 30.36128197; -99.67635732, 30.36129141; -99.67702442, 30.36230809; -99.67772804, 30.36343779; -99.67786171, 30.36366423; -99.67809406, 30.36406547; -99.67822368, 30.36429368; -99.67830298, 30.36443424; -99.67837167, 30.36455844; -99.67856992, 30.36489830; -99.67891471, 30.36548187; -99.67926295, 30.36606391; -99.67965467,

30.36671045; -99.67976457, 30.36689341; -99.68033394, 30.36784959; -99.68069940, 30.36848209; -99.68110363, 30.36923041; -99.68115289, 30.36932508; -99.68164128, 30.37031202; -99.68186455, 30.37079984; -99.68190773, 30.37089671; -99.68244431, 30.37219105; -99.68252473, 30.37240319; -99.68256169, 30.37250197; -99.68292311, 30.37353271; -99.68339520, 30.37497459; -99.68340763, 30.37501266; -99.68385461, 30.37638495; -99.68388655, 30.37648116; -99.68392077, 30.37656326; -99.68419882, 30.37725785; -99.68482272, 30.37907928; -99.68530791, 30.38093218; -99.68565230, 30.38280863; -99.68585441, 30.38470059; -99.68591337, 30.38659996; -99.68582891, 30.38849860; -99.68560139, 30.39038839; -99.68523178, 30.39226124; -99.68472164, 30.39410911; -99.68407316, 30.39592411; -99.68328911, 30.39769844; -99.68237283, 30.39942452; -99.68132825, 30.40109495; -99.68015984, 30.40270257; -99.67887259, 30.40424049; -99.67747201, 30.40570213; -99.67596409, 30.40708123; -99.67435531, 30.40837186; -99.67265254, 30.40956851; -99.67086308, 30.41066605; -99.66920923, 30.41155293; -99.66558969, 30.41337003; -99.66497058, 30.41391929; -99.66336154, 30.41520979; -99.66165851, 30.41640630; -99.65986880, 30.41750368; -99.65800006, 30.41849724; -99.65606032, 30.41938272; -99.65405787, 30.42015632; -99.65200130, 30.42081472; -99.64989942, 30.42135512; -99.64776124, 30.42177518; -99.64559592, 30.42207312; -99.64341274, 30.42224764; -99.64149517, 30.42229852; -99.63885349, 30.42230298; -99.63719834, 30.42230575; -99.62890505, 30.42231931; -99.62857293, 30.42231984; -99.62857258, 30.42231984; -99.62853563, 30.42231990; -99.62853525, 30.42231990; -99.62470337, 30.42232597; -99.62442926, 30.42232543; -99.62223849, 30.42225114; -99.62005802, 30.42205280; -99.61789721, 30.42173126; -99.61576530, 30.42128789; -99.61367144, 30.42072460; -99.61162461, 30.42004380; -99.60963356, 30.41924840; -99.60770684, 30.41834182; -99.60585269, 30.41732794; -99.60407907, 30.41621111; -99.60239357, 30.41499612; -99.60080340, 30.41368816; -99.59931539, 30.41229284; -99.59793589, 30.41081615; -99.59667082, 30.40926440; -99.59552559, 30.40764425; -99.59450509, 30.40596265; -99.59361371, 30.40422678; -99.59285523, 30.40244409; -99.59223292, 30.40062221; -99.59174942, 30.39876896; -99.59140680, 30.39689226; -99.59120652, 30.39500015; -99.59114919, 30.39313280; -99.59115376, 30.39242220; -99.59118381, 30.38774222; -99.59119754, 30.38560486; -99.59124320, 30.37849283; -99.59124343, 30.37846076; -99.59132974, 30.37656218; -99.59155907, 30.37467255; -99.59193044, 30.37279998; -99.59244224, 30.37095248; -99.59309227, 30.36913795; -99.59387775, 30.36736417; -99.59479530, 30.36563872; -99.59584100, 30.36396900; -99.59701035, 30.36236215; -99.59829835, 30.36082505; -99.59969948, 30.35936428; -99.60120773, 30.35798608; -99.60281665, 30.35669637; -99.60451936, 30.35550064; -99.60540738, 30.35493734; -99.60543809, 30.35491852; -99.60546294, 30.35489406; -99.60555613, 30.35480273; -99.60706423, 30.35342446; -99.60867300, 30.35213467; -99.61037555, 30.35093887; -99.61216459, 30.34984218; -99.61331695, 30.34922964; -99.61385007, 30.34880216; -99.61555250, 30.34760629; -99.61734142, 30.34650953; -99.61808901, 30.34609451; -99.61915992, 30.34551721; -99.62361034, 30.34311791; -99.62473043, 30.34253993; -99.62666892, 30.34165492; -99.62866996, 30.34088175; -99.63072498, 30.34022372; -99.63282520, 30.33968364; -99.63496163, 30.33926383; -99.63712512, 30.33896608; -99.63930642, 30.33879166; -99.64149621, 30.33874132

Figure: 4 TAC §40.6(b)(1)(F)

~~[(F) Containment Zone 6. That portion of the state within the boundaries of a line beginning in Lubbock County where County Road (C.R.) 3600 intersects with E. Division Street in Slaton; thence west along E. Division Street to S. New Mexico Street; thence northwest along S. New Mexico Street to Railroad Avenue; thence northwest along Railroad Avenue to Industrial Drive; thence northwest along Industrial Drive to U.S. Highway (U.S.) 84; thence northwest along U.S. 84 to State Highway (S.H.) Spur 331; thence northwest along S.H. 331 to S.H. Loop 289; thence north along S.H. Loop 289 to Farm to Market (F.M.) 40; thence east along F.M. 40 to C.R. 3650; thence south along C.R. 3650 to C.R. 6840; thence east along C.R. 6840 to C.R. 3700; thence south along C.R. 3700 to C.R. 3600; thence south along C.R. 3600 to E. Division Street.]~~

~~[Figure: 4 TAC §40.6(b)(1)(F)]~~

(G) Containment Zone 7. Those portions of Hunt County and Kaufman County lying within the area described by the following latitude-longitude coordinate pairs: -96.21307575, 32.88628524; -96.20878832, 32.88691497; -96.20833517, 32.88696470; -96.20608501, 32.88708617; -96.20383025, 32.88708316; -96.20319512, 32.88705982; -96.20316015, 32.88705826; -96.20312586, 32.88706427; -96.20167339, 32.88729166; -96.19943744, 32.88753692; -96.19718725, 32.88765823; -96.19493248, 32.88765507; -96.19268278, 32.88752746; -96.19044781, 32.88727594; -96.18823713, 32.88690159; -96.18606022, 32.88640601; -96.18392642, 32.88579133; -96.18184487, 32.88506018; -96.17982448, 32.88421569; -96.17787392, 32.88326149; -96.17600154, 32.88220167; -96.17421536, 32.88104075; -96.17252304, 32.87978373; -96.17216881, 32.87949870; -96.16088265, 32.87028577; -96.15964591, 32.86922294; -96.15816292, 32.86779011; -96.15679420, 32.86627848; -96.15554560, 32.86469452; -96.15442246, 32.86304502; -96.15342960, 32.86133706; -96.15257125, 32.85957793; -96.15185109, 32.85777519; -96.15127220, 32.85593654; -96.15083704, 32.85406988; -96.15054746, 32.85218318; -96.15040471, 32.85028454; -96.15040938, 32.84838208; -96.15056145, 32.84648394; -96.15086024, 32.84459827; -96.15130449, 32.84273312; -96.15189227, 32.84089649; -96.15239458, 32.83965568; -96.15262106, 32.83909624; -96.15348773, 32.83734007; -96.15448856, 32.83563550; -96.15561927, 32.83398984; -96.15687501, 32.83241012; -96.15825039, 32.83090310; -96.15874685, 32.83040588; -96.16087124, 32.82832582; -96.16291634, 32.82631939; -96.16334363, 32.82588076; -96.16336282, 32.82586108; -96.16485180, 32.82443315; -96.16644815, 32.82309048; -96.16814505, 32.82183883; -96.16993522, 32.82068353; -96.17078717, 32.82020484; -96.17022483, 32.81879732; -96.16964582, 32.81695871; -96.16921047, 32.81509206; -96.16892065, 32.81320535; -96.16877758, 32.81130668; -96.16878187, 32.80940417; -96.16893350, 32.80750596; -96.16923180, 32.80562020; -96.16967550, 32.80375494; -96.17026267, 32.80191818; -96.17099080, 32.80011778; -96.17185676, 32.79836144; -96.17285685, 32.79665670; -96.17398676, 32.79501083; -96.17524167, 32.79343089; -96.17661618, 32.79192364; -96.17810442, 32.79049554; -96.17935193, 32.78943091; -96.18603824, 32.78401084; -96.18638627, 32.78373260; -96.18808219, 32.78248065; -96.18987136, 32.78132505; -96.19174612, 32.78027075; -96.19369846, 32.77932226; -96.19572002, 32.77848364; -96.19780214, 32.77775847; -96.19993592, 32.77714986; -96.20211222,

32.77666041; -96.20432174, 32.77629221; -96.20655502, 32.77604685; -96.20880251, 32.77592537; -96.21105458, 32.77592829; -96.21330162, 32.77605560; -96.21553400, 32.77630675; -96.21774217, 32.77668067; -96.21991668, 32.77717576; -96.22204824, 32.77778990; -96.22412772, 32.77852046; -96.22614622, 32.77936432; -96.22809511, 32.78031787; -96.22996604, 32.78137702; -96.23175100, 32.78253725; -96.23344236, 32.78379359; -96.23476600, 32.78490205; -96.24067863, 32.79012861; -96.24094553, 32.79036721; -96.24242856, 32.79179918; -96.24379758, 32.79330999; -96.24504672, 32.79489318; -96.24617063, 32.79654197; -96.24716450, 32.79824931; -96.24802406, 32.80000789; -96.24874563, 32.80181017; -96.24932611, 32.80364845; -96.24976301, 32.80551485; -96.25005444, 32.80740138; -96.25019915, 32.80929997; -96.25019711, 32.81077494; -96.25033341, 32.81086348; -96.25202554, 32.81211955; -96.25361680, 32.81346637; -96.25434916, 32.81414956; -96.25658430, 32.81630215; -96.25733556, 32.81705074; -96.25870519, 32.81856138; -96.25995492, 32.82014440; -96.26107940, 32.82179304; -96.26207381, 32.82350023; -96.26293389, 32.82525868; -96.26365594, 32.82706085; -96.26423687, 32.82889904; -96.26467418, 32.83076536; -96.26496599, 32.83265182; -96.26511104, 32.83455037; -96.26510871, 32.83645285; -96.26495899, 32.83835113; -96.26466252, 32.84023707; -96.26444577, 32.84115198; -96.26422055, 32.84210260; -96.26363497, 32.84393973; -96.26290829, 32.84574060; -96.26204360, 32.84749748; -96.26104460, 32.84920285; -96.25991556, 32.85084941; -96.25866132, 32.85243010; -96.25728724, 32.85393815; -96.25579920, 32.85536709; -96.25420358, 32.85671082; -96.25389991, 32.85694746; -96.25387225, 32.85696876; -96.25278879, 32.85796450; -96.25253227, 32.85819768; -96.25093655, 32.85954136; -96.24924008, 32.86079406; -96.24745012, 32.86195041; -96.24722654, 32.86207676; -96.24715725, 32.86224836; -96.24629211, 32.86400511; -96.24529264, 32.86571035; -96.24416313, 32.86735675; -96.24290840, 32.86893727; -96.24153382, 32.87044514; -96.24004528, 32.87187389; -96.23844915, 32.87321741; -96.23767497, 32.87380943; -96.23616189, 32.87493168; -96.23523916, 32.87559217; -96.23394347, 32.87644436; -96.23248087, 32.87735984; -96.23002989, 32.87893002; -96.22922725, 32.87942891; -96.22755312, 32.88037709; -96.22598258, 32.88121137; -96.22365500, 32.88247551; -96.22316025, 32.88273922; -96.22120604, 32.88368809; -96.21918244, 32.88452705; -96.21709810, 32.88525251; -96.21496196, 32.88586135; -96.21307575, 32.88628524.

Figure: 4 TAC §40.6(b)(1)(G)

(H) Containment Zone 8. That portion of Bexar County lying within the area described by the following latitude-longitude coordinate pairs: -98.48242022, 29.56486861; -98.48393953, 29.56606588; -98.48498476, 29.56684328; -98.48663764, 29.56809152; -98.48676797, 29.56819223; -98.48862363, 29.56962616; -98.49016542, 29.57085278; -98.49076754, 29.57133180; -98.49105903, 29.57156002; -98.49169201, 29.57206281; -98.49315085, 29.57320870; -98.49460960, 29.57436269; -98.49629788, 29.57568988; -98.49779348, 29.57686863; -98.49984953, 29.57844371; -98.50084086, 29.57920238; -98.50259445, 29.58052215; -98.50303480, 29.58087646; -98.50331076, 29.58105022; -98.50360566, 29.58119985; -98.50386406, 29.58130845; -98.50416926, 29.58139324; -98.50449341, 29.58145391; -98.50485534, 29.58147442; -98.50515251, 29.58147793; -98.50552485, 29.58142550; -98.50588841, 29.58134048; -98.50630818, 29.58122365; -98.50690553, 29.58103585; -98.50716731, 29.58092527; -98.50743888, 29.58078234; -98.50774846, 29.58058303; -98.50800270, 29.58035870; -98.50841782, 29.57994142; -98.50905919, 29.57930759; -98.50936952, 29.57905956; -98.50975412, 29.57882839; -98.50996415, 29.57873380; -98.51026252, 29.57863192; -98.51056027, 29.57857057; -98.51095037, 29.57853462; -98.51127480, 29.57854655; -98.51162632, 29.57860743; -98.51206004, 29.57875036; -98.51248374, 29.57894180; -98.51283413, 29.57907564; -98.51329680, 29.57914594; -98.51375095, 29.57916748; -98.51424965, 29.57916260; -98.51546696, 29.58162759; -98.51557807, 29.58191278; -98.51569233, 29.58228120; -98.51583065, 29.58294914; -98.51587396, 29.58347911; -98.51587050, 29.58389975; -98.51585566, 29.58420478; -98.51546908, 29.58648023; -98.51539099, 29.58671783; -98.51530634, 29.58697536; -98.51508775, 29.58741596; -98.51510774, 29.58750273; -98.51491708, 29.58778183; -98.51469520, 29.58805512; -98.51286349, 29.59007744; -98.51252474, 29.59050125; -98.51229674, 29.59085650; -98.51202502, 29.59137885; -98.51183467, 29.59192384; -98.51091007, 29.59587738; -98.51076166, 29.59636738; -98.51060915, 29.59677628; -98.51042469, 29.59719366; -98.51012433, 29.59774282; -98.50983781, 29.59818962; -98.50871029, 29.59977970; -98.50854575, 29.60006194; -98.50825728, 29.60065186; -98.50812453, 29.60111120; -98.50806353, 29.60139823; -98.50800890, 29.60182881; -98.50799361, 29.60226519; -98.50803305, 29.60275321; -98.50835906, 29.60439126; -98.50842592, 29.60490728; -98.50846246, 29.60560624; -98.50844301, 29.60592513; -98.50842119, 29.60645240; -98.50835023, 29.60750376; -98.50832736, 29.60898614; -98.50417219, 29.60869797; -98.50045111, 29.60865395; -98.49820678, 29.60867517; -98.49475485, 29.60892113; -98.49278337, 29.60899333; -98.48757807, 29.60936170; -98.48105488, 29.61000101; -98.47836671, 29.61039917; -98.47502788, 29.61040682; -98.47218836, 29.60998997; -98.46848013, 29.60913209; -98.47061907, 29.60193601; -98.47599804, 29.58358740; -98.48393953, 29.56606588; -98.48498476, 29.56684328; -98.48663764, 29.56809152; -98.48676797, 29.56819223; -98.48862363, 29.56962616; -98.49016542, 29.57085278; -98.49076754, 29.57133180; -98.49105903, 29.57156002; -98.49169201, 29.57206281; -98.49315085, 29.57320870; -98.49460960, 29.57436269; -98.49629788, 29.57568988; -98.49779348, 29.57686863; -98.49984953, 29.57844371; -98.50084086, 29.57920238; -98.50259445, 29.58052215; -98.50303480, 29.58087646; -98.50331076, 29.58105022; -98.50360566, 29.58119985; -98.50386406, 29.58130845; -98.50416926, 29.58139324; -98.50449341, 29.58145391; -98.50485534, 29.58147442; -98.50515251, 29.58147793; -98.50552485, 29.58142550; -98.50588841, 29.58134048; -98.50630818, 29.58122365; -98.50690553, 29.58103585; -98.50716731, 29.58092527; -98.50743888, 29.58078234; -98.50774846, 29.58058303; -98.50800270, 29.58035870; -98.50841782, 29.57994142; -98.50905919, 29.57930759; -98.50936952, 29.57905956; -98.50975412, 29.57882839; -98.50996415, 29.57873380; -98.51026252, 29.57863192; -98.51056027, 29.57857057; -98.51095037, 29.57853462; -98.51127480, 29.57854655; -98.51162632, 29.57860743; -98.51206004, 29.57875036; -98.51248374, 29.57894180; -98.51283413,

29.57907564; -98.51329680, 29.57914594; -98.51375095, 29.57916748; -98.51424965, 29.57916260; -98.51546696, 29.58162759; -98.51557807, 29.58191278; -98.51569233, 29.58228120; -98.51583065, 29.58294914; -98.51587396, 29.58347911; -98.51587050, 29.58389975; -98.51585566, 29.58420478; -98.51546908, 29.58648023; -98.51539099, 29.58671783; -98.51530634, 29.58697536; -98.51508775, 29.58741596; -98.51510774, 29.58750273; -98.51491708, 29.58778183; -98.51469520, 29.58805512; -98.51286349, 29.59007744; -98.51252474, 29.59050125; -98.51229674, 29.59085650; -98.51202502, 29.59137885; -98.51183467, 29.59192384; -98.51091007, 29.59587738; -98.51076166, 29.59636738; -98.51060915, 29.59677628; -98.51042469, 29.59719366; -98.51012433, 29.59774282; -98.50983781, 29.59818962; -98.50871029, 29.59977970; -98.50854575, 29.60006194; -98.50825728, 29.60065186; -98.50812453, 29.60111120; -98.50806353, 29.60139823; -98.50800890, 29.60182881; -98.50799361, 29.60226519; -98.50803305, 29.60275321; -98.50835906, 29.60439126; -98.50842592, 29.60490728; -98.50846246, 29.60560624; -98.50844301, 29.60592513; -98.50842119, 29.60645240; -98.50835023, 29.60750376; -98.50832736, 29.60898614; -98.50417219, 29.60869797; -98.50045111, 29.60865395; -98.49820678, 29.60867517; -98.49475485, 29.60892113; -98.49278337, 29.60899333; -98.48757807, 29.60936170; -98.48105488, 29.61000101; -98.47836671, 29.61039917; -98.47502788, 29.61040682; -98.47218836, 29.60998997; -98.46848013, 29.60913209; -98.47061907, 29.60193601; and -98.47599804, 29.58358740

Figure: 4 TAC §40.6(b)(1)(H)

(2) Surveillance Zone Boundaries:

(A) (No change.)

(B) Surveillance Zone 2. That portion of the state lying within [the boundaries of] a line beginning at the New Mexico state line where U.S. 60 enters Texas; thence northeast along U.S. 60 to U.S. 87 in Randall County; thence south along U.S. 87 to S.H. 217 in Canyon; thence east along S.H. 217 to F.M. 1541; thence north along F.M. 1541 to Loop 335; thence east and north along Loop 335 to S.H. 136; thence northwest along S.H. 136 to N. Lakeside Dr.; thence north along N. Lakeside Dr. to E. Willow Creek Dr.; thence west along E. Willow Creek Dr. to Denton St.; thence north along Denton St. to E. Cherry; thence west along E. Cherry to N. Eastern St.; thence south along N. Eastern St. to E. Willow Creek Dr.; thence west along E. Willow Creek Dr. to U.S. 87; thence north along U.S. 87 to the City of Dumas; thence along the city limits of Dumas to U.S. 287 in Moore County; thence north along U.S. 287 to the Oklahoma state line.

Figure: 4 TAC §40.6(b)(2)(B)

[Figure: 4 TAC §40.6(b)(2)(B)]

(C) Surveillance Zone 3. That portion of the state not within the CZ described in §65.81(1)(C) of this title (relating to Containment Zones; Restrictions) [paragraph (b)(1)(C) of this subsection] lying within a line beginning the intersection of F.M 1250 and U.S. Highway 90 in Hondo in Medina County; thence west along U.S. Highway 90 to [F.M. 1574 in Uvalde County; thence south along F.M. 1574 to F.M. 1023 (Garner Field Road); thence west along F.M. 1023 to County Road 373; thence south along County Road 373 to County Road 374; thence west along County Road 374 to F.M. 140; thence northwest along F.M. 140 to F.M. 117; thence north along F.M. 117 to U.S. Highway 83; thence southwest along U.S. Highway 83 to F.M. 1435; thence north along F.M. 1435 to U.S. Highway 90; thence west along U.S. Highway 90 to F.M. 2369; thence northwest along F.M. 2369 to F.M. 1403; thence north along F.M. 1403 to State Highway 55; thence northwest along S.H. 55 to Indian Creek Road; thence northeast along Indian Creek Road to Lower Frio Ranch Road; thence southeast along Lower Frio Ranch Road to Deep Creek; thence southeast along Deep Creek to the U.S. Highway 83; thence north along U.S. Highway 83 to State Highway 127 in Concan; thence southeast along State Highway 127 to] the Sabinal River in Uvalde County; thence north along the Sabinal River to F.M. 187; thence north along F.M. 187 to F.M. 470 in Bandera County; thence east along F.M. 470 to Tarpley in Bandera County; thence south along F.M. 462 to 18th Street in Hondo; thence east along 18th Street to State Highway 173; thence south along State Highway 173 to U.S. Highway 90; thence west along U.S. Highway 90 to Avenue E (F.M. 462); thence south along Avenue E (F.M. 462) to F.M. 1250; thence west along F.M 1250 to U.S. Highway 90.

Figure: 4 TAC §40.6(b)(2)(C)

[Figure: 4 TAC §40.6(b)(2)(C)]

(D) (No change.)

(E) Surveillance Zone 5. That portion of the state lying within the boundaries of a line beginning on U.S. 83 at the Kerr/Kimble County line; thence north along U.S. 83 to I.H. 10; thence northwest along on I.H. 10 to South State Loop 481; thence west along South State Loop 481 to the city limit of Junction in Kimble County; thence following the Junction city limit so as to circumscribe the city of Junction before intersecting with F.M. 2169; thence east along F.M. 2169 to County Road (C.R.) 410; thence east along C.R. 410 to C.R. 412; thence south along C.R. 412 to C.R. 470; thence east along C.R. 470 to C.R. 420; thence south along C.R. 420 to F.M. 479; thence east along F.M. 479 to C.R. 443; thence south along C.R. 443 to U.S. 290; thence west along U.S. 290 to I.H. 10; thence southeast along I.H. 10 to the Kerr/Kimble County line; thence west along the Kerr/Kimble County line to U.S. 83.

Figure: 4 TAC §40.6(b)(2)(E)

[Figure: 4 TAC §40.6(b)(2)(E)]

(F) Surveillance Zone 6. That portion of the state within the boundaries of a line beginning at the intersection of State Highway (S.H.) 207 and Farm to Market (F.M.) 211 in Garza County; thence west along F.M. 211 to U.S. Highway (U.S.) 87 in Lynn County; thence north along U.S. 87 to F.M. 41 in Lubbock County; thence west along FM 41 to F.M. 179; thence north along F.M. 179 to F.M. 2641; thence east along F.M. 2641 to U.S. 62/82; thence east along U.S. 62/82 to S.H. 207 in Crosby County; thence south along S.H. 207 to F.M. 211 in Garza County.

Figure: 4 TAC §40.6(b)(2)(F)

[Figure: 4 TAC §40.6(b)(2)(F)]

(G) Surveillance Zone 7. That portion of the state lying within the boundaries of a line beginning at the intersection of S.H. 205 and U.S. Hwy. 80 in Kaufman County; [thence southeast along S.H. 205 to U.S. 80;] thence east along U.S. 80 to North 4th Street in Wills Point in Van Zandt County; thence north along North 4th Street to F.M. 751; thence[, then] north along F.M. 751 to the south shoreline of Lake Tawakoni in Hunt County; thence west and north along the Lake Tawakoni shoreline to the confluence of Caddo Creek; thence northwest along Caddo Creek to West Caddo Creek; thence northwest along West Caddo Creek to I.H. 30; thence southwest along I.H. 30 to F.M. 548 in Rockwall County; thence southeast along F.M. 548 to S.H. 205 in Kaufman County; thence southeast along S.H. 205 to U.S. Hwy. 80.

Figure: 4 TAC §40.6(b)(2)(G)

[Figure: 4 TAC §40.6(b)(2)(G)]

(H) Surveillance Zone 8. Those portions of Duval County and Jim Wells County lying within the area described by the following latitude-longitude coordinate pairs: -98.27174932, 27.95642982; -98.27388850, 27.95652171; -98.27601634,

27.95673759; -98.27812373, 27.95707655; -98.28020167, 27.95753714; -98.28224125, 27.95811738; -98.28423375, 27.95881480; -98.28617065, 27.95962640; -98.28804366, 27.96054872; -98.28984475, 27.96157780; -98.29156623, 27.96270926; -98.29320071, 27.96393824; -98.29424069, 27.96481102; -98.30642859, 27.97549504; -98.30692922, 27.97594346; -98.30836947, 27.97735119; -98.30970297, 27.97883952; -98.31092400, 27.98040208; -98.31202734, 27.98203218; -98.31300826, 27.98372285; -98.31386255, 27.98546684; -98.31458655, 27.98725670; -98.31517715, 27.98908476; -98.31563181, 27.99094320; -98.31594859, 27.99282405; -98.31612611, 27.99471927; -98.31616361, 27.99662074; -98.31606092, 27.99852032; -98.31581848, 28.00040988; -98.31543730, 28.00228132; -98.31491902, 28.00412662; -98.31426585, 28.00593788; -98.31348058, 28.00770735; -98.31256657, 28.00942745; -98.31152772, 28.01109080; -98.31036848, 28.01269028; -98.30909381, 28.01421904; -98.30770916, 28.01567053; -98.30652297, 28.01677477; -98.29476414, 28.02715940; -98.29446157, 28.02742312; -98.29287489, 28.02870162; -98.29119733, 28.02988528; -98.28943607, 28.03096903; -98.28759867, 28.03194821; -98.28569300, 28.03281864; -98.28372721, 28.03357658; -98.28216193, 28.03408628; -98.28212907, 28.03409614; -98.28209993, 28.03411285; -98.28209629, 28.03411493; -98.28025876, 28.03509401; -98.27835296, 28.03596433; -98.27638706, 28.03672216; -98.27436947, 28.03736425; -98.27230886, 28.03788785; -98.27021404, 28.03829072; -98.26809400, 28.03857112; -98.26595782, 28.03872786; -98.26381465, 28.03876027; -98.26167369, 28.03866820; -98.25954411, 28.03845206; -98.25743503, 28.03811276; -98.25535550, 28.03765176; -98.25331442, 28.03707105; -98.25132055, 28.03637309; -98.24938243, 28.03556090; -98.24750835, 28.03463794; -98.24570636, 28.03360818; -98.24398417, 28.03247603; -98.24234916, 28.03124634; -98.24113443, 28.03021887; -98.23083476, 28.02104737; -98.23050872, 28.02075285; -98.22906895, 28.01934417; -98.22773613, 28.01785493; -98.22651595, 28.01629151; -98.22541364, 28.01466061; -98.22443393, 28.01296921; -98.22358099, 28.01122456; -98.22285847, 28.00943414; -98.22226947, 28.00760562; -98.22181649, 28.00574682; -98.22150148, 28.00386570; -98.22132577, 28.00197033; -98.22129010, 28.00006883; -98.22139462, 27.99816932; -98.22163888, 27.99627996; -98.22202182, 27.99440882; -98.22254179, 27.99256392; -98.22319656, 27.99075315; -98.22398333, 27.98898427; -98.22489870, 27.98726486; -98.22593877, 27.98560226; -98.22709906, 27.98400360; -98.22837462, 27.98247572; -98.22975997, 27.98102515; -98.23106012, 27.97982198; -98.24826906, 27.96478131; -98.24845806, 27.96461741; -98.25004429, 27.96333954; -98.25172121, 27.96215650; -98.25348165, 27.96107335; -98.25531806, 27.96009472; -98.25722260, 27.95922481; -98.25918710, 27.95846733; -98.26120316, 27.95782553; -98.26326215, 27.95730215; -98.26535527, 27.95689942; -98.26747356, 27.95661908; -98.26960795, 27.95646232; -98.27174932, 27.95642982.

Figure: 4 TAC §40.6(b)(2)(H)

~~[(H) Surveillance Zone 8.]~~

~~[Figure: 4 TAC §40.6(b)(2)(H)]~~

~~*[(i)* That portion of the state within the boundaries of a line beginning at the intersection of Farm to Market (F.M.) Road 624 and U.S. Highway (U.S.) 59 in Live Oak County; thence southwest along U.S. 59 to the intersection of County Road (C.R.) 101 in Duval County; thence southeast along C.R. 101 to North Julian Street in San Diego; thence south along Julian Street to State Highway (S.H.) 44; thence east on S.H. 44 to C.R. 145 in Jim Wells County; thence north along C.R. 145 to C.R. 172; thence east on C.R. 172 to C.R. 170; thence south on C.R. 170 to C.R. 120; thence east on C.R. 120; to U.S. 281; thence north on U.S. 281 to F.M. 624; thence west along F.M. 624 to U.S. 59.]~~

~~*[(ii)* For the purposes of this subchapter, the zone described in clause (i) of this subparagraph includes the following:]~~

~~*[(I)* the area within the city limits of Freer;]~~

~~*[(II)* the area within the city limits of Alice;]~~

~~*[(III)* the roadway and right-of-way of:]~~

~~[(-a-) U.S. 59 between the city of Freer and the intersection with C.R. 101;]~~

~~[(-b-) U.S. 44 between the city of Freer and the city of Alice; and]~~

~~[(-c-) U.S. 281 between the city of Alice and the intersection with F.M. 624.]~~

(I) Surveillance Zone 9. That portion of Gillespie County lying within the area described by the following latitude-longitude coordinate pairs: -99.17353594, 30.39743442; -99.17375688, 30.39743649; -99.18452956, 30.39756726; -99.18650307, 30.39764152; -99.18868707, 30.39784204; -99.19085129, 30.39816591; -99.19298645, 30.39861175; -99.19508343, 30.39917766; -99.19713325, 30.39986120; -99.19912714, 30.40065947; -99.20105657, 30.40156904; -99.20291327, 30.40258602; -99.20468931, 30.40370605; -99.20637708, 30.40492436; -99.20796935, 30.40623571; -99.20893862, 30.40712459; -99.20895081, 30.40713625; -99.20896777, 30.40714184; -99.21010720, 30.40753808; -99.21210135, 30.40833615; -99.21403106, 30.40924552; -99.21588805, 30.41026231; -99.21766438, 30.41138217; -99.21935245, 30.41260030; -99.22094503, 30.41391150; -99.22243530, 30.41531015; -99.22381687, 30.41679026; -99.22474341, 30.41792590; -99.22480835, 30.41796173; -99.22658493, 30.41908146; -99.22827325, 30.42029948; -99.22986608, 30.42161056; -99.23135659, 30.42300911; -99.23273842, 30.42448913; -99.23347804, 30.42537038; -99.23426139, 30.42634143; -99.23478899, 30.42701534; -99.23593618, 30.42863897; -99.23695842, 30.43032414; -99.23785132, 30.43206364; -99.23861105, 30.43385001; -99.23923434, 30.43567561; -99.23971853, 30.43753262; -99.24006154, 30.43941310; -99.24026188, 30.44130899; -99.24031869, 30.44321217; -99.24031523, 30.44347513; -99.24022536, 30.44837009; -99.24014184, 30.45000946; -99.23991143, 30.45190279; -99.23953858, 30.45377901; -99.23902487, 30.45563008; -99.23837249, 30.45744807; -99.23758424, 30.45922521; -99.23666347, 30.46095387; -99.23561413, 30.46262666; -99.23444070, 30.46423640; -99.23314821, 30.46577620; -99.23174219, 30.46723946; -99.23022865, 30.46861991; -99.22861409, 30.46991164; -99.22690541, 30.47110911; -99.22510992, 30.47220719; -99.22323534, 30.47320118; -99.22128967, 30.47408681; -99.21928127, 30.47486029; -99.21721873, 30.47551830; -99.21511090, 30.47605803; -99.21296680, 30.47647716; -99.21079563, 30.47677389; -99.21067633, 30.47678656; -99.21066064, 30.47678820; -99.21064812, 30.47679654; -99.21044462, 30.47693086; -99.20864884, 30.47802871; -99.20677396, 30.47902245; -99.20558508, 30.47958005; -99.20247846, 30.48096772; -99.20228691, 30.48105261; -99.19918067, 30.48241824; -99.19861515, 30.48266110; -99.19660638, 30.48343422; -99.19454350, 30.48409187; -99.19243535, 30.48463123; -99.19029097, 30.48504998; -99.18811953,

30.48534633; -99.18593036, 30.48551900; -99.18373284, 30.48556727; -99.18153637, 30.48549093; -99.17935038, 30.48529029; -99.17718424, 30.48496622; -99.17504722, 30.48452011; -99.17294849, 30.48395387; -99.17089705, 30.48326993; -99.16890168, 30.48247122; -99.16697093, 30.48156116; -99.16511307, 30.48054365; -99.16383762, 30.47975512; -99.16050915, 30.47759396; -99.16032575, 30.47747402; -99.15703384, 30.47530578; -99.15671573, 30.47509363; -99.15502735, 30.47387466; -99.15343468, 30.47256264; -99.15194453, 30.47116318; -99.15056328, 30.46968228; -99.14929685, 30.46812629; -99.14815065, 30.46650187; -99.14790445, 30.46611914; -99.14788832, 30.46609362; -99.14786512, 30.46607258; -99.14672695, 30.46498724; -99.14534587, 30.46350629; -99.14407960, 30.46195024; -99.14293356, 30.46032578; -99.14191266, 30.45863985; -99.14102126, 30.45689968; -99.14026317, 30.45511273; -99.13964163, 30.45328664; -99.13915930, 30.45142925; -99.13881823, 30.44954850; -99.13861988, 30.44765245; -99.13856414, 30.44603638; -99.13855946, 30.44408936; -99.13856041, 30.44380220; -99.13856403, 30.44354532; -99.13859898, 30.44172303; -99.13864758, 30.43800445; -99.13864953, 30.43787930; -99.13878669, 30.43027346; -99.13887258, 30.42859929; -99.13910492, 30.42670615; -99.13947964, 30.42483023; -99.13996436, 30.42308994; -99.14003556, 30.42250974; -99.14041024, 30.42063382; -99.14092566, 30.41878315; -99.14157962, 30.41696566; -99.14236931, 30.41518912; -99.14329134, 30.41346114; -99.14434175, 30.41178912; -99.14551605, 30.41018022; -99.14680920, 30.40864131; -99.14821565, 30.40717899; -99.14972940, 30.40579952; -99.15134395, 30.40450879; -99.15305239, 30.40331234; -99.15484740, 30.40221528; -99.15672131, 30.40122230; -99.15866610, 30.40033766; -99.16067343, 30.39956514; -99.16273472, 30.39890804; -99.16484115, 30.39836918; -99.16698371, 30.39795086; -99.16915323, 30.39765487; -99.17134042, 30.39748248; -99.17353594, 30.39743442.

Figure: 4 TAC §40.6(b)(2)(I)

(J) Surveillance Zone 10. That portion of Limestone County lying within the area described by the following latitude-longitude coordinate pairs: -96.65881805, 31.73430087; -96.66104091, 31.73442055; -96.66324986, 31.73466419; -96.66543545, 31.73503074; -96.66758833, 31.73551864; -96.66969929, 31.73612579; -96.67175930, 31.73684960; -96.67375954, 31.73768698; -96.67569145, 31.73863434; -96.67754676, 31.73968762; -96.67931753, 31.74084232; -96.68099619, 31.74209350; -96.68257554, 31.74343580; -96.68404882, 31.74486349; -96.68462217, 31.74547369; -96.69651116, 31.75847900; -96.69729894, 31.75937568; -96.69854200, 31.76095533; -96.69966152, 31.76260105; -96.70065270, 31.76430580; -96.70151130, 31.76606228; -96.70223362, 31.76786296; -96.70281656, 31.76970015; -96.70325763, 31.77156597; -96.70355493, 31.77345244; -96.70370717, 31.77535148; -96.70371370, 31.77725496; -96.70357448, 31.77915473; -96.70329009, 31.78104265; -96.70286174, 31.78291064; -96.70229126, 31.78475069; -96.70158110, 31.78655493; -96.70073427, 31.78831563; -96.69975440, 31.79002524; -96.69864568, 31.79167645; -96.69741285, 31.79326217; -96.69606120, 31.79477561; -96.69459649, 31.79621030; -96.69302502, 31.79756007; -96.69135350, 31.79881916; -96.68958909, 31.79998216; -96.68773936, 31.80104409; -96.68741119, 31.80121725; -96.68017876, 31.80498498; -96.67857967, 31.80576803; -96.67658324, 31.80661451; -96.67452622, 31.80734764; -96.67241743, 31.80796427; -96.67026590, 31.80846177; -96.66808086, 31.80883800; -96.66587167, 31.80909135; -96.66364780, 31.80922074; -96.66141877, 31.80922561; -96.65919415, 31.80910594; -96.65698347, 31.80886223; -96.65479621, 31.80849555; -96.65264173, 31.80800745; -96.65052927, 31.80740003; -96.64846789, 31.80667590; -96.64646642, 31.80583815; -96.64453342, 31.80489038; -96.64267720, 31.80383665; -96.64090569, 31.80268147; -96.63922649, 31.80142980; -96.63764679, 31.80008699; -96.63617335, 31.79865880; -96.63514114, 31.79753453; -96.63512907, 31.79752070; -96.63511133, 31.79751247; -96.63344919, 31.79668870; -96.63159325, 31.79563481; -96.62982203, 31.79447948; -96.62814312, 31.79322765; -96.62656372, 31.79188471; -96.62509057, 31.79045639; -96.62372999, 31.78894883; -96.62248781, 31.78736847; -96.62219923, 31.78696681; -96.61946414, 31.78308965; -96.61863432, 31.78184492; -96.61764443, 31.78013956; -96.61678727, 31.77838254; -96.61606650, 31.77658138; -96.61548520, 31.77474381; -96.61504584, 31.77287769; -96.61475032, 31.77099101; -96.61459987, 31.76909186; -96.61459514, 31.76718838; -96.61473613, 31.76528870; -96.61502224, 31.76340096; -96.61545224, 31.76153325; -96.61602426, 31.75969357; -96.61673586, 31.75788978; -96.61758398, 31.75612962; -96.61856499, 31.75442061; -96.61967467, 31.75277007; -96.62090827, 31.75118507; -96.62226051, 31.74967239; -96.62372558, 31.74823850; -96.62529723, 31.74688954; -96.62696871, 31.74563128; -96.62873287, 31.74446912; -96.63058216, 31.74340801; -96.63111304, 31.74313021; -96.64027392, 31.73843371; -96.64166941, 31.73775591; -96.64366469, 31.73690995; -96.64572042, 31.73617730; -96.64782778, 31.73556108; -96.64997777, 31.73506394; -96.65216118, 31.73468801; -96.65436867, 31.73443488; -96.65659079, 31.73430565; -96.65881805, 31.73430087.

Figure: 4 TAC §40.6(b)(2)(J)

(K) Surveillance Zone 11. That portion of Uvalde County lying within the area described by the following latitude-longitude coordinate pairs: -99.65125893, 29.37997244; -99.64901352, 29.37941401; -99.64845147, 29.37926298; -99.64642007, 29.37858685; -99.64444354, 29.37779578; -99.64253035, 29.37689314; -99.64068870, 29.37588282; -99.63892647, 29.37476913; -99.63725122, 29.37355686; -99.63567012, 29.37225119; -99.63418993, 29.37085772; -99.63281701, 29.36938243; -99.63155722, 29.36783163; -99.63041596, 29.36621197; -99.62939812, 29.36453038; -99.62890580, 29.36359183; -99.62806121, 29.36305790; -99.62638630, 29.36184549; -99.62480553, 29.36053969; -99.62429303, 29.36007755; -99.62405653, 29.35985950; -99.62381874, 29.35964254; -99.62273208, 29.35860164; -99.62135950, 29.35712623; -99.62010006, 29.35557532; -99.61895913, 29.35395557; -99.61873659, 29.35360973; -99.61862150, 29.35342799; -99.61782653, 29.35209215; -99.61693677, 29.35035578; -99.61617856, 29.34857213; -99.61555516, 29.34674886; -99.61506922, 29.34489377; -99.61503821, 29.34475276; -99.61494625, 29.34432911; -99.61463087, 29.34259115; -99.61442548, 29.34069635; -99.61436197, 29.33879385; -99.61444061, 29.33689178; -99.61466105, 29.33499830; -99.61487321, 29.33380912; -99.61491150, 29.33362019; -99.61506063, 29.33293257; -99.61556121, 29.33108049; -99.61619893, 29.32926107; -99.61697106, 29.32748209; -99.61732421, 29.32676913; -99.61746691, 29.32649127; -99.61801697, 29.32547330; -99.61904741, 29.32379784; -99.61962571, 29.32295978; -99.61999501, 29.32244439; -99.62056993, 29.32166963; -99.62184101, 29.32012634; -99.62322451, 29.31865920; -99.62471449,

29.31727448; -99.62532991, 29.31675242; -99.62534908, 29.31673658; -99.62536140, 29.31671616; -99.62601185, 29.31568933; -99.62716487, 29.31407645; -99.62843575, 29.31253310; -99.62981903, 29.31106589; -99.63130880, 29.30968110; -99.63289868, 29.30838465; -99.63458185, 29.30718209; -99.63635112, 29.30607857; -99.63819890, 29.30507881; -99.64011729, 29.30418708; -99.64209808, 29.30340721; -99.64413280, 29.30274253; -99.64621273, 29.30219588; -99.64832897, 29.30176960; -99.65047248, 29.30146552; -99.65263408, 29.30128493; -99.65480452, 29.30122861; -99.65487588, 29.30122887; -99.65900847, 29.30124789; -99.66110711, 29.30131575; -99.66326739, 29.30150809; -99.66540871, 29.30182382; -99.66752190, 29.30226160; -99.66959792, 29.30281955; -99.67162789, 29.30349528; -99.67360313, 29.30428591; -99.67551517, 29.30518805; -99.67735585, 29.30619784; -99.67911727, 29.30731096; -99.67954559, 29.30760570; -99.67956313, 29.30761798; -99.67958463, 29.30762363; -99.68080892, 29.30796826; -99.68283908, 29.30864382; -99.68481451, 29.30943427; -99.68672676, 29.31033624; -99.68856765, 29.31134587; -99.69032929, 29.31245884; -99.69200416, 29.31367038; -99.69358506, 29.31497531; -99.69506524, 29.31636805; -99.69643836, 29.31784263; -99.69769854, 29.31939275; -99.69884037, 29.32101177; -99.69985897, 29.32269277; -99.70074996, 29.32442854; -99.70150953, 29.32621166; -99.70213441, 29.32803449; -99.70262193, 29.32988924; -99.70296999, 29.33176795; -99.70316259, 29.33347054; -99.70358952, 29.33885328; -99.70360402, 29.33904533; -99.70366928, 29.34094779; -99.70359239, 29.34284991; -99.70337367, 29.34474356; -99.70306776, 29.34634027; -99.70321387, 29.35078288; -99.70322752, 29.35169864; -99.70315061, 29.35360078; -99.70293186, 29.35549443; -99.70257219, 29.35737150; -99.70207314, 29.35922394; -99.70143683, 29.36104382; -99.70066598, 29.36282334; -99.69976390, 29.36455489; -99.69873443, 29.36623103; -99.69758198, 29.36784460; -99.69631148, 29.36938868; -99.69492837, 29.37085666; -99.69343856, 29.37224223; -99.69184845, 29.37353948; -99.69016484, 29.37474283; -99.68839493, 29.37584714; -99.68654632, 29.37684766; -99.68462691, 29.37774012; -99.68264494, 29.37852068; -99.68060890, 29.37918601; -99.67852751, 29.37973324; -99.67640970, 29.38016004; -99.67426453, 29.38046457; -99.67210121, 29.38064554; -99.66992900, 29.38070216; -99.66982079, 29.38070172; -99.66706723, 29.38068663; -99.65998003, 29.38082841; -99.65912069, 29.38083583; -99.65694891, 29.38076768; -99.65478688, 29.38057523; -99.65264386, 29.38025930; -99.65125893, 29.37997244.

Figure: 4 TAC §40.6(b)(2)(K)

(L) Surveillance Zone 12. That portion of Uvalde County lying within the area described by the following latitude-longitude coordinate pairs: -99.77993414, 29.29464496; -99.77999035, 29.29464510; -99.78359396, 29.29465668; -99.78570769, 29.29472252; -99.78786807, 29.29491273; -99.79000964, 29.29522635; -99.79212325, 29.29566204; -99.79419984, 29.29621793; -99.79623054, 29.29689166; -99.79820666, 29.29768034; -99.80011973, 29.29858058; -99.80196158, 29.29958855; -99.80372431, 29.30069993; -99.80540038, 29.30190996; -99.80698262, 29.30321346; -99.80846425, 29.30460486; -99.80983893, 29.30607821; -99.81110077, 29.30762719; -99.81224435, 29.30924517; -99.81326479, 29.31092524; -99.81415770, 29.31266021; -99.81491926, 29.31444263; -99.81554621, 29.31626490; -99.81603584, 29.31811919; -99.81619440, 29.31887664; -99.81620950, 29.31895454; -99.81623278, 29.31903087; -99.81624122, 29.31905863; -99.81673088, 29.32091293; -99.81708112, 29.32279132; -99.81729043, 29.32468576; -99.81735791, 29.32658815; -99.81728326, 29.32849033; -99.81706679, 29.33038416; -99.81670943, 29.33226154; -99.81621268, 29.33411441; -99.81557868, 29.33593484; -99.81481014, 29.33771504; -99.81391032, 29.33944738; -99.81288309, 29.34112444; -99.81173284, 29.34273904; -99.81046449, 29.34428425; -99.80908347, 29.34575346; -99.80850270, 29.34629485; -99.80851508, 29.34630490; -99.80678762, 29.34793866; -99.80657186, 29.34814077; -99.80657138, 29.34814121; -99.80655435, 29.34815700; -99.80597613, 29.34869270; -99.80536412, 29.34927474; -99.80510058, 29.34952246; -99.80509533, 29.34952734; -99.80437562, 29.35017550; -99.80278735, 29.35147413; -99.80110550, 29.35267896; -99.79933726, 29.35378481; -99.79749021, 29.35478694; -99.79557227, 29.35568108; -99.79359165, 29.35646338; -99.79155683, 29.35713048; -99.78947655, 29.35767954; -99.78735970, 29.35810820; -99.78521537, 29.35841461; -99.78305275, 29.35859747; -99.78088110, 29.35865600; -99.77870973, 29.35858994; -99.77654795, 29.35839957; -99.77440502, 29.35808572; -99.77229014, 29.35764972; -99.77208135, 29.35759383; -99.77161615, 29.35752568; -99.76950128, 29.35708963; -99.76742352, 29.35653331; -99.76539177, 29.35585911; -99.76341474, 29.35506990; -99.76150089, 29.35416907; -99.75965843, 29.35316049; -99.75789525, 29.35204848; -99.75621890, 29.35083779; -99.75602128, 29.35068405; -99.75590514, 29.35059297; -99.75578418, 29.35050683; -99.75477992, 29.34976222; -99.75319762, 29.34845804; -99.75171611, 29.34706596; -99.75034174, 29.34559196; -99.74908038, 29.34404235; -99.74793744, 29.34242377; -99.74691780, 29.34074315; -99.74602583, 29.33900769; -99.74526534, 29.33722483; -99.74463959, 29.33540220; -99.74415124, 29.33354762; -99.74380237, 29.33166901; -99.74359448, 29.32977444; -99.74352845, 29.32787201; -99.74360454, 29.32596988; -99.74382244, 29.32407617; -99.74418118, 29.32219902; -99.74442828, 29.32121228; -99.74475468, 29.32000902; -99.74500564, 29.31914318; -99.74564085, 29.31732311; -99.74641051, 29.31554335; -99.74731130, 29.31381150; -99.74833938, 29.31213500; -99.74949032, 29.31052100; -99.75075920, 29.30897642; -99.75214059, 29.30750787; -99.75285890, 29.30681597; -99.75290419, 29.30677372; -99.75294287, 29.30672669; -99.75358175, 29.30597556; -99.75496305, 29.30450698; -99.75645093, 29.30312072; -99.75803903, 29.30182270; -99.75972054, 29.30061847; -99.76148826, 29.29951320; -99.76333462, 29.29851161; -99.76525173, 29.29761799; -99.76723138, 29.29683616; -99.76926510, 29.29616946; -99.77134418, 29.29562075; -99.77345973, 29.29519237; -99.77560270, 29.29488616; -99.77776392, 29.29470343; -99.77993414, 29.29464496.

Figure: 4 TAC §40.6(b)(2)(L)

(M) Surveillance Zone 13. That portion of Zavala County lying within the area described by the following latitude-longitude coordinate pairs: -99.51049107, 28.95090385; -99.51265316, 28.95097451; -99.51480536, 28.95116936; -99.51693849, 28.95148756; -99.51904340, 28.95192775; -99.52111110, 28.95248804; -99.52313273, 28.95316605; -99.52509964, 28.95395887; -99.52700343, 28.95486311; -99.52883593, 28.95587490; -99.53058931, 28.95698991; -99.53225606, 28.95820337; -99.53382905, 28.95951008; -99.53530154, 28.96090446; -99.53666722, 28.96238053; -99.53792024, 28.96393199; -99.53905524, 28.96555219; -99.54006736,

28.96723419; -99.54095224, 28.96897081; -99.54170611, 28.97075459; -99.54232572, 28.97257791; -99.54280841, 28.97443297; -99.54315211, 28.97631181; -99.54335534, 28.97820640; -99.54341747, 28.97994914; -99.54343982, 28.99442460; -99.54343982, 28.99442464; -99.54344056, 28.99490529; -99.54344056, 28.99490532; -99.54346253, 29.00913749; -99.54346228, 29.00929698; -99.54338252, 29.01119871; -99.54316142, 29.01309180; -99.54279994, 29.01496812; -99.54229960, 29.01681964; -99.54166254, 29.01863843; -99.54089149, 29.02041670; -99.53998973, 29.02214683; -99.53896114, 29.02382142; -99.53781009, 29.02543328; -99.53654153, 29.02697551; -99.53516088, 29.02844151; -99.53367405, 29.02982499; -99.53208741, 29.03112002; -99.53040774, 29.03232106; -99.52864226, 29.03342296; -99.52679851, 29.03442099; -99.52488441, 29.03531089; -99.52290814, 29.03608882; -99.52087818, 29.03675147; -99.51880322, 29.03729599; -99.51669217, 29.03772004; -99.51455406, 29.03802182; -99.51239806, 29.03820002; -99.51072237, 29.03825261; -99.50919519, 29.03826650; -99.50904828, 29.03826755; -99.50752105, 29.03827545; -99.50737410, 29.03827593; -99.50594924, 29.03827773; -99.49566970, 29.03834613; -99.49566962, 29.03834613; -99.49473223, 29.03835233; -99.49296109, 29.03836402; -99.49267467, 29.03836600; -99.49226342, 29.03836658; -99.49009941, 29.03829557; -99.48794532, 29.03810029; -99.48581040, 29.03778159; -99.48370377, 29.03734082; -99.48163449, 29.03677988; -99.47961141, 29.03610118; -99.47764320, 29.03530761; -99.47573830, 29.03440259; -99.47390487, 29.03338999; -99.47215076, 29.03227415; -99.47048349, 29.03105985; -99.46891020, 29.02975230; -99.46743762, 29.02835709; -99.46607207, 29.02688021; -99.46481938, 29.02532799; -99.46368491, 29.02370707; -99.46267354, 29.02202441; -99.46178957, 29.02028720; -99.46103678, 29.01850289; -99.46041841, 29.01667913; -99.45993708, 29.01482372; -99.45959485, 29.01294461; -99.45939318, 29.01104985; -99.45933255, 29.00924912; -99.45935507, 28.99505803; -99.45935583, 28.99457734; -99.45937665, 28.98145463; -99.45937701, 28.98135308; -99.45945839, 28.97945142; -99.45968104, 28.97755852; -99.46004399, 28.97568248; -99.46054568, 28.97383132; -99.46118396, 28.97201298; -99.46195609, 28.97023525; -99.46285875, 28.96850572; -99.46388807, 28.96683180; -99.46503964, 28.96522066; -99.46630853, 28.96367920; -99.46768930, 28.96221401; -99.46917604, 28.96083135; -99.47076237, 28.95953716; -99.47244151, 28.95833696; -99.47420627, 28.95723589; -99.47604910, 28.95623867; -99.47701631, 28.95577153; -99.47709899, 28.95573317; -99.47717746, 28.95568850; -99.47874480, 28.95484973; -99.48065775, 28.95396057; -99.48263268, 28.95318333; -99.48466116, 28.95252133; -99.48673450, 28.95197740; -99.48884383, 28.95155386; -99.49098012, 28.95125254; -99.49313423, 28.95107471; -99.49485789, 28.95102194; -99.49502543, 28.95102066; -99.49502566, 28.95102066; -99.49734004, 28.95100291; -99.49734016, 28.95100291; -99.51005236, 28.95090470; -99.51049107, 28.95090385.

Figure: 4 TAC §40.6(b)(2)(M)

(N) Surveillance Zone 14. That portion of Gonzales County lying within the area described by the following latitude-longitude coordinate pairs: -97.34738886, 29.67430305; -97.34956514, 29.67441091; -97.35172869, 29.67464280; -97.35387025, 29.67499772; -97.35598067, 29.67547417; -97.35805090, 29.67607010; -97.36007211, 29.67678295; -97.36203562, 29.67760969; -97.36344026, 29.67828952; -97.36785199, 29.68054765; -97.37349567, 29.68333936; -97.37441330, 29.68381030; -97.37623673, 29.68485357; -97.37797816, 29.68599871; -97.37963013, 29.68724083; -97.38118556, 29.68857462; -97.38263780, 29.68999435; -97.38398063, 29.69149397; -97.38520829, 29.69306704; -97.38631553, 29.69470684; -97.38729759, 29.69640636; -97.38815027, 29.69815830; -97.38886992, 29.69995518; -97.38945344, 29.70178931; -97.38989832, 29.70365282; -97.39020266, 29.70553775; -97.39036514, 29.70743602; -97.39038506, 29.70933950; -97.39026233, 29.71124005; -97.38999746, 29.71312952; -97.38959158, 29.71499982; -97.38904641, 29.71684294; -97.38836430, 29.71865099; -97.38754814, 29.72041623; -97.38660143, 29.72213108; -97.38595242, 29.72316309; -97.38220356, 29.72884797; -97.38177931, 29.72947308; -97.38058405, 29.73106535; -97.37927200, 29.73258598; -97.37784876, 29.73402844; -97.37632042, 29.73538655; -97.37469354, 29.73665450; -97.37297509, 29.73782685; -97.37117241, 29.73889858; -97.36929323, 29.73986509; -97.36734562, 29.74072224; -97.36533790, 29.74146637; -97.36327868, 29.74209427; -97.36117679, 29.74260327; -97.35904123, 29.74299117; -97.35688117, 29.74325632; -97.35470585, 29.74339757; -97.35399482, 29.74341673; -97.35395662, 29.74341740; -97.35391959, 29.74342562; -97.35356363, 29.74350275; -97.35142803, 29.74389052; -97.34926792, 29.74415554; -97.34709257, 29.74429666; -97.34491129, 29.74431329; -97.34273345, 29.74420535; -97.34056836, 29.74397330; -97.33842532, 29.74361814; -97.33631350, 29.74314140; -97.33424196, 29.74254510; -97.33221957, 29.74183182; -97.33025500, 29.74100460; -97.32835667, 29.74006700; -97.32817198, 29.73996796; -97.32492046, 29.73821149; -97.32328126, 29.73726652; -97.32153956, 29.73612061; -97.31988750, 29.73487771; -97.31833217, 29.73354316; -97.31688022, 29.73212267; -97.31553787, 29.73062232; -97.31431087, 29.72904856; -97.31320446, 29.72740811; -97.31222338, 29.72570801; -97.31137184, 29.72395554; -97.31065346, 29.72215820; -97.31007131, 29.72032371; -97.30962789, 29.71845990; -97.30932508, 29.71657478; -97.30916418, 29.71467640; -97.30914586, 29.71277290; -97.30927019, 29.71087243; -97.30953663, 29.70898313; -97.30994404, 29.70711309; -97.31049066, 29.70527031; -97.31117414, 29.70346269; -97.31199155, 29.70169796; -97.31217595, 29.70135935; -97.31222358, 29.70078121; -97.31248994, 29.69889191; -97.31289724, 29.69702187; -97.31344375, 29.69517908; -97.31412710, 29.69337145; -97.31494437, 29.69160670; -97.31589205, 29.68989240; -97.31696608, 29.68823587; -97.31816186, 29.68664422; -97.31947425, 29.68512425; -97.32089764, 29.68368247; -97.32242593, 29.68232504; -97.32405258, 29.68105779; -97.32577063, 29.67988612; -97.32757271, 29.67881506; -97.32945111, 29.67784918; -97.33139780, 29.67699262; -97.33340444, 29.67624905; -97.33546245, 29.67562164; -97.33756301, 29.67511308; -97.33969715, 29.67472555; -97.34185574, 29.67446070; -97.34402952, 29.67431967; -97.34541018, 29.67429469; -97.34658982, 29.67429469; -97.34738886, 29.67430305; -97.34738886, 29.67430305; -97.34956514, 29.67441091; -97.35172869, 29.67464280; -97.35387025, 29.67499772; -97.35598067, 29.67547417; -97.35805090, 29.67607010; -97.36007211, 29.67678295; -97.36203562, 29.67760969; -97.36344026, 29.67828952; -97.36785199, 29.68054765; -97.37349567, 29.68333936; -97.37441330, 29.68381030; -97.37623673, 29.68485357; -97.37797816, 29.68599871; -97.37963013, 29.68724083; -97.38118556, 29.68857462; -97.38263780, 29.68999435; -97.38398063,

29.69149397; -97.38520829, 29.69306704; -97.38631553, 29.69470684; -97.38729759, 29.69640636; -97.38815027, 29.69815830; -97.38886992, 29.69995518; -97.38945344, 29.70178931; -97.38989832, 29.70365282; -97.39020266, 29.70553775; -97.39036514, 29.70743602; -97.39038506, 29.70933950; -97.39026233, 29.71124005; -97.38999746, 29.71312952; -97.38959158, 29.71499982; -97.38904641, 29.71684294; -97.38836430, 29.71865099; -97.38754814, 29.72041623; -97.38660143, 29.72213108; -97.38595242, 29.72316309; -97.38220356, 29.72884797; -97.38177931, 29.72947308; -97.38058405, 29.73106535; -97.37927200, 29.73258598; -97.37784876, 29.73402844; -97.37632042, 29.73538655; -97.37469354, 29.73665450; -97.37297509, 29.73782685; -97.37117241, 29.73889858; -97.36929323, 29.73986509; -97.36734562, 29.74072224; -97.36533790, 29.74146637; -97.36327868, 29.74209427; -97.36117679, 29.74260327; -97.35904123, 29.74299117; -97.35688117, 29.74325632; -97.35470585, 29.74339757; -97.35399482, 29.74341673; -97.35395662, 29.74341740; -97.35391959, 29.74342562; -97.35356363, 29.74350275; -97.35142803, 29.74389052; -97.34926792, 29.74415554; -97.34709257, 29.74429666; -97.34491129, 29.74431329; -97.34273345, 29.74420535; -97.34056836, 29.74397330; -97.33842532, 29.74361814; -97.33631350, 29.74314140; -97.33424196, 29.74254510; -97.33221957, 29.74183182; -97.33025500, 29.74100460; -97.32835667, 29.74006700; -97.32817198, 29.73996796; -97.32492046, 29.73821149; -97.32328126, 29.73726652; -97.32153956, 29.73612061; -97.31988750, 29.73487771; -97.31833217, 29.73354316; -97.31688022, 29.73212267; -97.31553787, 29.73062232; -97.31431087, 29.72904856; -97.31320446, 29.72740811; -97.31222338, 29.72570801; -97.31137184, 29.72395554; -97.31065346, 29.72215820; -97.31007131, 29.72032371; -97.30962789, 29.71845990; -97.30932508, 29.71657478; -97.30916418, 29.71467640; -97.30914586, 29.71277290; -97.30927019, 29.71087243; -97.30953663, 29.70898313; -97.30994404, 29.70711309; -97.31049066, 29.70527031; -97.31117414, 29.70346269; -97.31199155, 29.70169796; -97.31217595, 29.70135935; -97.31222358, 29.70078121; -97.31248994, 29.69889191; -97.31289724, 29.69702187; -97.31344375, 29.69517908; -97.31412710, 29.69337145; -97.31494437, 29.69160670; -97.31589205, 29.68989240; -97.31696608, 29.68823587; -97.31816186, 29.68664422; -97.31947425, 29.68512425; -97.32089764, 29.68368247; -97.32242593, 29.68232504; -97.32405258, 29.68105779; -97.32577063, 29.67988612; -97.32757271, 29.67881506; -97.32945111, 29.67784918; -97.33139780, 29.67699262; -97.33340444, 29.67624905; -97.33546245, 29.67562164; -97.33756301, 29.67511308; -97.33969715, 29.67472555; -97.34185574, 29.67446070; -97.34402952, 29.67431967; -97.34541018, 29.67429469; -97.34658982, 29.67429469; -97.34738886, 29.67430305.

Figure: 4 TAC §40.6(b)(2)(N)

(O) Surveillance Zone 15. Those portions of Hamilton County and Mills County lying within the area described by the following latitude-longitude coordinate pairs: -98.29832004, 31.45683101; -98.30053822, 31.45692253; -98.30274468, 31.45713818; -98.30492997, 31.45747704; -98.30708475, 31.45793765; -98.30919980, 31.45851805; -98.31038658, 31.45890239; -98.31669362, 31.46106098; -98.31757314, 31.46137430; -98.31958188, 31.46218621; -98.32152441, 31.46310897; -98.32339241, 31.46413863; -98.32517789, 31.46527078; -98.32687319, 31.46650058; -98.32847108, 31.46782275; -98.32996470, 31.46923166; -98.33134765, 31.47072126; -98.33261402, 31.47228518; -98.33375838, 31.47391673; -98.33477582, 31.47560893; -98.33566198, 31.47735452; -98.33641306, 31.47914604; -98.33665926, 31.47982828; -98.33754324, 31.48238871; -98.33827257, 31.48389251; -98.33842953, 31.48417633; -98.33930782, 31.48590739; -98.34005903, 31.48769889; -98.34067194, 31.48952865; -98.34114389, 31.49138885; -98.34147287, 31.49327150; -98.34160905, 31.49463708; -98.34170158, 31.49532212; -98.34188349, 31.49719938; -98.34192290, 31.49910272; -98.34181693, 31.50100420; -98.34156604, 31.50289566; -98.34117128, 31.50476902; -98.34063435, 31.50661624; -98.33995753, 31.50842941; -98.33914372, 31.51020077; -98.33819639, 31.51192273; -98.33711959, 31.51358792; -98.33591793, 31.51518919; -98.33459656, 31.51671969; -98.33316112, 31.51817287; -98.33161777, 31.51954249; -98.32997310, 31.52082268; -98.32823418, 31.52200797; -98.32640843, 31.52309328; -98.32450370, 31.52407394; -98.32252812, 31.52494576; -98.32082827, 31.52558836; -98.31529088, 31.52752825; -98.31495278, 31.52764488; -98.31286112, 31.52828820; -98.31072479, 31.52881293; -98.30855295, 31.52921682; -98.30635491, 31.52949815; -98.30414008, 31.52965569; -98.30191796, 31.52968879; -98.29969808, 31.52959729; -98.29748994, 31.52938159; -98.29530301, 31.52904261; -98.29314668, 31.52858181; -98.29103016, 31.52800116; -98.28896255, 31.52730315; -98.28774691, 31.52682831; -98.28364524, 31.52514181; -98.28322840, 31.52502741; -98.28116091, 31.52432928; -98.27915118, 31.52351678; -98.27720783, 31.52259339; -98.27569722, 31.52177212; -98.27487099, 31.52129631; -98.27451295, 31.52108726; -98.27272703, 31.51995442; -98.27103146, 31.51872393; -98.26943352, 31.51740106; -98.26794004, 31.51599147; -98.26655743, 31.51450121; -98.26529158, 31.51293666; -98.26414793, 31.51130452; -98.26313137, 31.50961178; -98.26224625, 31.50786570; -98.26149634, 31.50607376; -98.26125159, 31.50539420; -98.26103721, 31.50477207; -98.26067049, 31.50362151; -98.26022400, 31.50187220; -98.26019758, 31.50175089; -98.26016347, 31.50163099; -98.25975004, 31.49996785; -98.25959479, 31.49917802; -98.25948771, 31.49858334; -98.25946172, 31.49843651; -98.25934394, 31.49775950; -98.25919780, 31.49681330; -98.25918143, 31.49668976; -98.25908514, 31.49594870; -98.25891856, 31.49417507; -98.25888083, 31.49227170; -98.25898845, 31.49037029; -98.25924095, 31.48847898; -98.25963726, 31.48660587; -98.26017566, 31.48475897; -98.26085383, 31.48294621; -98.26166887, 31.48117533; -98.26261729, 31.47945392; -98.26369501, 31.47778934; -98.26489741, 31.47618873; -98.26621934, 31.47465892; -98.26679534, 31.47405293; -98.26681607, 31.47403171; -98.26682930, 31.47400646; -98.26759061, 31.47264847; -98.26866816, 31.47098385; -98.26987040, 31.46938319; -98.27119216, 31.46785333; -98.27262778, 31.46640083; -98.27417112, 31.46503189; -98.27581557, 31.46375239; -98.27755408, 31.46256779; -98.27937922, 31.46148316; -98.28128317, 31.46050315; -98.28325778, 31.45963194; -98.28529460, 31.45887328; -98.28738491, 31.45823039; -98.28951978, 31.45770603; -98.29169006, 31.45730245; -98.29388648, 31.45702138; -98.29609963, 31.45686400; -98.29832004, 31.45683101.

Figure: 4 TAC §40.6(b)(2)(O)

(P) Surveillance Zone 16. That portion of Washington County lying within the area described by the following latitude-longitude coordinate pairs: -96.37818601, 30.18191727; -96.38037261, 30.18204179; -96.38126142, 30.18214344; -96.38183665,

30.18217619; -96.38400921, 30.18242463; -96.38615844, 30.18279594; -96.38827512, 30.18328855; -96.39035022, 30.18390033; -96.39237485, 30.18462869; -96.39434034, 30.18547049; -96.39623829, 30.18642214; -96.39677558, 30.18671848; -96.39737631, 30.18705681; -96.39866130, 30.18781788; -96.40040012, 30.18897655; -96.40204804, 30.19023151; -96.40359798, 30.19157740; -96.40504332, 30.19300845; -96.40637787, 30.19451853; -96.40759591, 30.19610120; -96.40869221, 30.19774966; -96.40966209, 30.19945688; -96.41050137, 30.20121553; -96.41120647, 30.20301809; -96.41177436, 30.20485685; -96.41220260, 30.20672393; -96.41248933, 30.20861134; -96.41263334, 30.21051100; -96.41263400, 30.21241478; -96.41249128, 30.21431451; -96.41220581, 30.21620207; -96.41177878, 30.21806937; -96.41121202, 30.21990842; -96.41101164, 30.22042153; -96.41096546, 30.22057140; -96.41026138, 30.22237431; -96.40942300, 30.22413337; -96.40845391, 30.22584103; -96.40735824, 30.22749000; -96.40614068, 30.22907319; -96.40480645, 30.23058383; -96.40336125, 30.23201544; -96.40181128, 30.23336189; -96.40016316, 30.23461742; -96.39842397, 30.23577663; -96.39660114, 30.23683457; -96.39470249, 30.23778670; -96.39273616, 30.23862893; -96.39071056, 30.23935767; -96.38863437, 30.23996978; -96.38665406, 30.24043453; -96.38629455, 30.24050872; -96.38615699, 30.24053684; -96.38400651, 30.24090835; -96.38196210, 30.24114560; -96.37956349, 30.24135891; -96.37943403, 30.24137020; -96.37724607, 30.24149469; -96.37505342, 30.24149463; -96.37286548, 30.24137002; -96.37069161, 30.24112139; -96.36854115, 30.24074981; -96.36642330, 30.24025688; -96.36434713, 30.23964469; -96.36232156, 30.23891589; -96.36035526, 30.23807359; -96.35845664, 30.23712140; -96.35663386, 30.23606340; -96.35489471, 30.23490412; -96.35324665, 30.23364854; -96.35169673, 30.23230204; -96.35025159, 30.23087038; -96.34891742, 30.22935969; -96.34769993, 30.22777646; -96.34660433, 30.22612746; -96.34563531, 30.22441976; -96.34479700, 30.22266068; -96.34409301, 30.22085774; -96.34389251, 30.22026011; -96.34343697, 30.21884608; -96.34307079, 30.21760465; -96.34264385, 30.21573733; -96.34235847, 30.21384976; -96.34221584, 30.21195002; -96.34221658, 30.21004625; -96.34236068, 30.20814660; -96.34264751, 30.20625920; -96.34307582, 30.20439213; -96.34364379, 30.20255339; -96.34434897, 30.20075085; -96.34518834, 30.19899223; -96.34615829, 30.19728505; -96.34725467, 30.19563662; -96.34847277, 30.19405400; -96.34980738, 30.19254396; -96.35125278, 30.19111296; -96.35280278, 30.18976713; -96.35445074, 30.18851223; -96.35618961, 30.18735362; -96.35801194, 30.18629627; -96.35990994, 30.18534470; -96.36187547, 30.18450297; -96.36390014, 30.18377470; -96.36597526, 30.18316299; -96.36809197, 30.18267047; -96.37024121, 30.18229924; -96.37241378, 30.18205089; -96.37460039, 30.18192649; -96.37543875, 30.18191180; -96.37683307, 30.18190253; -96.37818601, 30.18191727.

Figure: 4 TAC §40.6(b)(2)(P)

(Q) Surveillance Zone 17. Those portions of Uvalde County, Medina County, Zavala County, and Frio County lying within the area described by the following latitude-longitude coordinate pairs: -99.36629570, 28.98651966; -99.36840629, 28.98609813; -99.37054371, 28.98579885; -99.37269881, 28.98562308; -99.37457901, 28.98557124; -99.39771126, 28.98550985; -99.39799462, 28.98551014; -99.40015739, 28.98558273; -99.40231013, 28.98577951; -99.40444365, 28.98609962; -99.40565242, 28.98635347; -99.41151732, 28.98633887; -99.41178778, 28.98633916; -99.41395058, 28.98641152; -99.41610337, 28.98660806; -99.41823694, 28.98692794; -99.42034218, 28.98736979; -99.42241006, 28.98793172; -99.42443174, 28.98861133; -99.42639856, 28.98940570; -99.42830212, 28.99031145; -99.43013427, 28.99132470; -99.43188715, 28.99244110; -99.43355328, 28.99365589; -99.43512552, 28.99496386; -99.43659712, 28.99635942; -99.43796180, 28.99783659; -99.43921371, 28.99938906; -99.44034748, 29.00101018; -99.44135825, 29.00269301; -99.44224170, 29.00443034; -99.44299403, 29.00621475; -99.44361201, 29.00803859; -99.44409300, 29.00989406; -99.44443492, 29.01177320; -99.44449215, 29.01219557; -99.44450034, 29.01225994; -99.44451689, 29.01232306; -99.44475929, 29.01332772; -99.44510124, 29.01520687; -99.44530264, 29.01710165; -99.44536304, 29.01884947; -99.44536322, 29.01937485; -99.44536281, 29.01952935; -99.44528112, 29.02143103; -99.44505809, 29.02332395; -99.44475642, 29.02488126; -99.44476655, 29.03161243; -99.44476617, 29.03179688; -99.44468445, 29.03369858; -99.44446139, 29.03559151; -99.44418254, 29.03703079; -99.44426315, 29.03734169; -99.44460517, 29.03922086; -99.44480661, 29.04111567; -99.44486682, 29.04277116; -99.44487857, 29.04574449; -99.44487858, 29.04574806; -99.44490723, 29.05326856; -99.44508156, 29.07206778; -99.44508224, 29.07245062; -99.44506122, 29.07293977; -99.44502522, 29.07658552; -99.44507753, 29.08488228; -99.44507804, 29.08504920; -99.44507647, 29.09190192; -99.44507605, 29.09204196; -99.44499430, 29.09394371; -99.44481401, 29.09555051; -99.44475814, 29.09593795; -99.44471522, 29.09622414; -99.44435153, 29.09810025; -99.44384888, 29.09995145; -99.44320944, 29.10176982; -99.44243593, 29.10354756; -99.44153165, 29.10527706; -99.44050047, 29.10695091; -99.43934681, 29.10856193; -99.43807560, 29.11010323; -99.43669228, 29.11156821; -99.43520278, 29.11295058; -99.43361347, 29.11424443; -99.43193115, 29.11544420; -99.43016304, 29.11654476; -99.42831670, 29.11754139; -99.42640006, 29.11842982; -99.42442131, 29.11920624; -99.42238894, 29.11986733; -99.42031166, 29.12041025; -99.41819837, 29.12083267; -99.41605812, 29.12113278; -99.41390010, 29.12130930; -99.41173354, 29.12136147; -99.40956774, 29.12128907; -99.40741198, 29.12109241; -99.40734269, 29.12108400; -99.40258844, 29.12050256; -99.40251013, 29.12049289; -99.40022873, 29.12020893; -99.39720636, 29.11986781; -99.39692727, 29.11983525; -99.39479084, 29.11951498; -99.39268286, 29.11907268; -99.39208583, 29.11891917; -99.39061689, 29.11878496; -99.39045904, 29.11876559; -99.39030879, 29.11874684; -99.38833026, 29.11844583; -99.38622233, 29.11800342; -99.38415189, 29.11744086; -99.38212782, 29.11676056; -99.38015877, 29.11596544; -99.37825320, 29.11505890; -99.37641926, 29.11404484; -99.37466482, 29.11292760; -99.37299738, 29.11171196; -99.37142410, 29.11040314; -99.36995170, 29.10900674; -99.36858649, 29.10752875; -99.36733432, 29.10597549; -99.36620054, 29.10435364; -99.36519001, 29.10267012; -99.36430705, 29.10093216; -99.36355544, 29.09914720; -99.36293838, 29.09732288; -99.36245851, 29.09546703; -99.36211788, 29.09358758; -99.36191794, 29.09169259; -99.36185899, 29.08994923; -99.36185979, 29.08759978; -99.36185468, 29.08021473; -99.36179777, 29.07578925; -99.36179620, 29.07529296; -99.36181412, 29.07448936; -99.36183449, 29.07395395; -99.36175088, 29.05314345; -99.35996291, 29.05242064; -99.35805877, 29.05151383; -99.35622624, 29.05049951; -99.35447317, 29.04938202;

-99.35280708, 29.04816615; -99.35123509, 29.04685712; -99.34976395, 29.04546053; -99.34839994, 29.04398236; -99.34714891, 29.04242896; -99.34601621, 29.04080696; -99.34500669, 29.03912334; -99.34412467, 29.03738529; -99.34337391, 29.03560026; -99.34275764, 29.03377591; -99.34227847, 29.03192003; -99.34193845, 29.03004059; -99.34173904, 29.02814563; -99.34168123, 29.02661115; -99.34159160, 29.01485148; -99.34159144, 29.01448360; -99.34167515, 29.01258199; -99.34190017, 29.01068926; -99.34226551, 29.00881353; -99.34276962, 29.00696281; -99.34341032, 29.00514504; -99.34418486, 29.00336800; -99.34508992, 29.00163929; -99.34612162, 28.99996631; -99.34727554, 28.99835622; -99.34854672, 28.99681592; -99.34992974, 28.99535199; -99.35141865, 28.99397071; -99.35300709, 28.99267798; -99.35468826, 28.99147933; -99.35645495, 28.99037990; -99.35829961, 28.98938439; -99.36021433, 28.98849705; -99.36219093, 28.98772168; -99.36422095, 28.98706161; -99.36629570, 28.98651966.

Figure: 4 TAC §40.6(b)(2)(Q)

(R) Surveillance Zone 18. That portion of Bexar County lying within the area described by the following latitude-longitude coordinate pairs: -98.41854190, 29.60199171; -98.41827532, 29.60036441; -98.41820173, 29.59946325; -98.41935723, 29.59934829; -98.42007975, 29.59930339; -98.42022196, 29.59928360; -98.42033977, 29.59924733; -98.42065142, 29.59905174; -98.42202496, 29.59804750; -98.42236018, 29.59768809; -98.42276917, 29.59705691; -98.42378914, 29.59510019; -98.42409289, 29.59454344; -98.42429120, 29.59410349; -98.42435498, 29.59385557; -98.42421065, 29.59263608; -98.42403694, 29.59149198; -98.42359397, 29.58835539; -98.42353507, 29.58796200; -98.42359840, 29.58659898; -98.42353773, 29.58606800; -98.42347607, 29.58559760; -98.42336292, 29.58509626; -98.42335201, 29.58470224; -98.42323663, 29.58433722; -98.42284944, 29.58363552; -98.42194833, 29.58256384; -98.42164384, 29.58210555; -98.42140767, 29.58170873; -98.42122424, 29.58126711; -98.42088955, 29.58053576; -98.42037267, 29.57928706; -98.42017216, 29.57883008; -98.41963723, 29.57762660; -98.41900256, 29.57616433; -98.41851816, 29.57505238; -98.41828869, 29.57451270; -98.41816393, 29.57408326; -98.41811464, 29.57364380; -98.41811312, 29.57335305; -98.41813580, 29.57311746; -98.41817130, 29.57286556; -98.41822562, 29.57261390; -98.41828558, 29.57240072; -98.41900922, 29.57097946; -98.41939967, 29.57015092; -98.41958715, 29.56953305; -98.41963876, 29.56908791; -98.41960615, 29.56837038; -98.41950418, 29.56782642; -98.41927746, 29.56677697; -98.41908810, 29.56615439; -98.41901084, 29.56545568; -98.41908462, 29.56501082; -98.41918007, 29.56479118; -98.41926892, 29.56458673; -98.41983604, 29.56379917; -98.42175866, 29.56145859; -98.42902286, 29.55268827; -98.43074139, 29.55072216; -98.43213227, 29.54931344; -98.43357650, 29.54787449; -98.43582561, 29.54622488; -98.44892509, 29.53755560; -98.45141126, 29.53593596; -98.45203902, 29.53552516; -98.45283089, 29.53492322; -98.45357662, 29.53432875; -98.45438957, 29.53355805; -98.45539005, 29.53256833; -98.45740100, 29.53053667; -98.46002663, 29.52782186; -98.46306721, 29.52467998; -98.46495711, 29.52266145; -98.46740469, 29.52025102; -98.46879769, 29.51887705; -98.46944470, 29.51823662; -98.47694841, 29.51997173; -98.48392424, 29.51953000; -98.48410956, 29.52033579; -98.48413838, 29.52049974; -98.49925779, 29.52028083; -98.50344619, 29.52039156; -98.50489026, 29.52038139; -98.50594879, 29.52044841; -98.50684240, 29.52043170; -98.51263177, 29.52029887; -98.51263081, 29.52036086; -98.51264406, 29.52046001; -98.51266734, 29.52054638; -98.51271010, 29.52064588; -98.51275752, 29.52076265; -98.51280553, 29.52084070; -98.51287290, 29.52094049; -98.51295522, 29.52102754; -98.51306681, 29.52113216; -98.51316255, 29.52121154; -98.51325059, 29.52127440; -98.51358302, 29.52148688; -98.51424016, 29.52195946; -98.51431311, 29.52201628; -98.51440069, 29.52208187; -98.51448335, 29.52214740; -98.51455989, 29.52221500; -98.51463254, 29.52228502; -98.51469500, 29.52234464; -98.51474074, 29.52239649; -98.51476915, 29.52243384; -98.51510338, 29.52287321; -98.51526609, 29.52310138; -98.51543165, 29.52331903; -98.51573653, 29.52371652; -98.51575023, 29.52377640; -98.51712304, 29.52558068; -98.52265287, 29.53284773; -98.52511432, 29.53608202; -98.52552347, 29.53665562; -98.52583210, 29.53712119; -98.52623029, 29.53779520; -98.52667568, 29.53860461; -98.52701349, 29.53931309; -98.52766675, 29.54078926; -98.52831179, 29.54224682; -98.52875100, 29.54328933; -98.52947491, 29.54494010; -98.53057153, 29.54744073; -98.53071091, 29.54754991; -98.53090146, 29.54796821; -98.53119734, 29.54863768; -98.53160204, 29.54995847; -98.53198543, 29.55078819; -98.53239785, 29.55172559; -98.53274677, 29.55252355; -98.53301648, 29.55313407; -98.53334439, 29.55387440; -98.53348700, 29.55401478; -98.53371821, 29.55453551; -98.53426914, 29.55574731; -98.53428112, 29.55595135; -98.53460329, 29.55671073; -98.53525341, 29.55821044; -98.53535875, 29.55847949; -98.53562914, 29.55904697; -98.53581903, 29.55925251; -98.53606583, 29.55982027; -98.53699931, 29.56189856; -98.53766571, 29.56323724; -98.53773350, 29.56336013; -98.53841514, 29.56459571; -98.53907187, 29.56570118; -98.54061198, 29.56829355; -98.54161191, 29.56997659; -98.54226243, 29.57106885; -98.54229558, 29.57123289; -98.54313658, 29.57268820; -98.54345042, 29.57322058; -98.54392499, 29.57395127; -98.54432185, 29.57453700; -98.54466018, 29.57503504; -98.54414186, 29.57539420; -98.54102062, 29.57845360; -98.54058866, 29.57894640; -98.54031185, 29.57945005; -98.54014754, 29.58004550; -98.53998516, 29.58051427; -98.53973082, 29.58090052; -98.53936205, 29.58132164; -98.53892095, 29.58173288; -98.53461964, 29.58474230; -98.53405509, 29.58509778; -98.53354353, 29.58537243; -98.53267736, 29.58581493; -98.53164512, 29.58628265; -98.53091476, 29.58664525; -98.53037006, 29.58705526; -98.52992808, 29.58752076; -98.52968403, 29.58790711; -98.52945780, 29.58848373; -98.52923918, 29.58924146; -98.52897789, 29.59008014; -98.52795026, 29.59338014; -98.52750103, 29.59457929; -98.52710718, 29.59528067; -98.52660826, 29.59608038; -98.52615338, 29.59670864; -98.52573023, 29.59729201; -98.52498375, 29.59802548; -98.52382570, 29.59926099; -98.52309700, 29.60018471; -98.52260796, 29.60101168; -98.52223255, 29.60185807; -98.52196798, 29.60290488; -98.52189298, 29.60374573; -98.52190055, 29.60460564; -98.52198392, 29.60524922; -98.52212018, 29.60582101; -98.52241686, 29.60673860; -98.52282360, 29.60791091; -98.52288266, 29.60804489; -98.52303891, 29.60841300; -98.52318735, 29.60878355; -98.52332796, 29.60915644; -98.52346069, 29.60953153; -98.52358549, 29.60990870; -98.52361954, 29.61001634; -98.52362784, 29.61007672; -98.52364610, 29.61025083; -98.52365600, 29.61042547; -98.52365751, 29.61060030; -98.52365066, 29.61077504; -98.52363543, 29.61094938; -98.52361814, 29.61108234; -98.52358718, 29.61120299; -98.52353955,

29.61135933; -98.52348394, 29.61151365; -98.52342046,
29.61166563; -98.52334924, 29.61181497; -98.52327043,
29.61196136; -98.52318417, 29.61210453; -98.52309067,
29.61224416; -98.52299008, 29.61237999; -98.52288261,
29.61251174; -98.52276850, 29.61263913; -98.52264794,
29.61276193; -98.52252122, 29.61287988; -98.52238856,
29.61299275; -98.52225024, 29.61310029; -98.52210654,
29.61320231; -98.52195775, 29.61329859; -98.52180415,
29.61338894; -98.52178251, 29.61340098; -98.52162100,
29.61347209; -98.52078501, 29.61383531; -98.51994536,
29.61419202; -98.51950615, 29.61437541; -98.51936473,
29.61442394; -98.51920039, 29.61448758; -98.51903961,
29.61455783; -98.51888274, 29.61463454; -98.51873013,
29.61471754; -98.51858211, 29.61480665; -98.51843898,
29.61490169; -98.51830107, 29.61500244; -98.51816868,
29.61510869; -98.51804209, 29.61522021; -98.51792157,
29.61533676; -98.51780738, 29.61545807; -98.51769978,
29.61558390; -98.51759900, 29.61571396; -98.51750525,
29.61584798; -98.51741874, 29.61598567; -98.51733965,
29.61612673; -98.51726816, 29.61627084; -98.51720442,
29.61641772; -98.51715172, 29.61655792; -98.51704941,
29.61682831; -98.51687088, 29.61728177; -98.51668449,
29.61773281; -98.51649032, 29.61818134; -98.51628839,
29.61862724; -98.51611754, 29.61898987; -98.51606973,
29.61906617; -98.51599606, 29.61917071; -98.51591535,
29.61927122; -98.51582791, 29.61936733; -98.51573405,
29.61945869; -98.51563411, 29.61954499; -98.51552843,
29.61962590; -98.51541742, 29.61970116; -98.51530144,
29.61977047; -98.51518093, 29.61983360; -98.51505632,
29.61989032; -98.51492804, 29.61994043; -98.51482283,
29.61997572; -98.51469659, 29.62001830; -98.51457140,
29.62006830; -98.51444994, 29.62012489; -98.51433265,
29.62018784; -98.51421997, 29.62025692; -98.51411232,
29.62033188; -98.51401010, 29.62041242; -98.51391368,
29.62049827; -98.51382345, 29.62058909; -98.51375582,
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Figure: 4 TAC §40.6(b)(2)(R)

(S) Surveillance Zone 19. That portion of Sutton County lying within the area described by the following latitude-longitude coordinate pairs: -100.4812107, 30.62351294; -100.4766784, 30.62401893; -100.4747603, 30.62408038; -100.4747226, 30.62408050; -100.4449845, 30.62415852; -100.4428218, 30.62410376; -100.4406301, 30.62392471; -100.4384567, 30.62362205; -100.4363109, 30.62319707; -100.4342018, 30.62265159; -100.4321385, 30.62198794; -100.4301298, 30.62120898; -100.4281844, 30.62031804; -100.4263105, 30.61931894; -100.4245163, 30.61821596; -100.4228094, 30.61701382; -100.4211970, 30.61571768; -100.4196862, 30.61433310; -100.4182834, 30.61286600; -100.4169945, 30.61132267; -100.4158251, 30.60970972; -100.4147803, 30.60803407; -100.4138644, 30.60630289; -100.4130814, 30.60452360; -100.4124346, 30.60270382; -100.4119269, 30.60085134; -100.4115603, 30.59897410; -100.4113364, 30.59708015; -100.4112563, 30.59517758; -100.4112561, 30.59499196; -100.4112585, 30.59420991; -100.4111092, 30.59408980; -100.4095989, 30.59270510; -100.4081965, 30.59123789; -100.4069081, 30.58969446; -100.4057392, 30.58808142; -100.4046947, 30.58640569; -100.4037792, 30.58467444; -100.4029966, 30.58289509; -100.4023502, 30.58107526; -100.4021445, 30.58038747; -100.4021412, 30.58037597; -100.4021309, 30.58036814; -100.4006766, 30.57919086; -100.3991667, 30.57780603; -100.3977647, 30.57633871; -100.3964766, 30.57479518; -100.3953081, 30.57318205; -100.3949081, 30.57254771; -100.3934337, 30.57234174; -100.3912892, 30.57191601; -100.3891815, 30.57136978; -100.3871196, 30.57070541; -100.3851124, 30.56992575; -100.3831684, 30.56903412; -100.3825034, 30.56869570; -100.3818753, 30.56836762; -100.3806680, 30.56770627; -100.3788752, 30.56660265; -100.3771698, 30.56539990; -100.3755589, 30.56410319; -100.3740496, 30.56271807; -100.3726482, 30.56125047; -100.3713608, 30.55970669; -100.3701928, 30.55809333; -100.3691493, 30.55641731; -100.3690076, 30.55616761; -100.3690024, 30.55615835; -100.3689916, 30.55615400; -100.3684000, 30.55590980; -100.3664565, 30.55501792; -100.3645846, 30.55401792; -100.3627923, 30.55291407; -100.3610873, 30.55171111; -100.3594769, 30.55041420; -100.3579680, 30.54902889; -100.3565670, 30.54756112; -100.3552800, 30.54601717; -100.3541125, 30.54440366; -100.3530694, 30.54272751; -100.3521553, 30.54099590; -100.3513740, 30.53921623; -100.3507289, 30.53739614; -100.3502226, 30.53554342; -100.3498575, 30.53366601; -100.3496350, 30.53177195; -100.3495625, 30.53035268; -100.3495093,

30.52802466; -100.3495029, 30.52754133; -100.3495178, 30.52657937; -100.3495506, 30.52563085; -100.3495879, 30.52191022; -100.3494917, 30.51758390; -100.3494868, 30.51728228; -100.3494655, 30.51521228; -100.3494643, 30.51504532; -100.3495293, 30.51314233; -100.3497372, 30.51125373; -100.3496837, 30.50474358; -100.3496830, 30.50462838; -100.3496829, 30.50448128; -100.3497078, 30.49307201; -100.3497264, 30.47148975; -100.3497915, 30.46970040; -100.3500000, 30.46780516; -100.3503512, 30.46592579; -100.3508434, 30.46407034; -100.3514747, 30.46224675; -100.3522423, 30.46046283; -100.3531429, 30.45872621; -100.3541727, 30.45704433; -100.3553271, 30.45542439; -100.3566014, 30.45387331; -100.3579900, 30.45239774; -100.3594869, 30.45100400; -100.3610858, 30.44969805; -100.3627799, 30.44848547; -100.3645618, 30.44737145; -100.3664239, 30.44636077; -100.3683584, 30.44545774; -100.3703568, 30.44466624; -100.3724106, 30.44398964; -100.3745111, 30.44343084; -100.3766493, 30.44299224; -100.3788159, 30.44267570; -100.3810019, 30.44248259; -100.3831977, 30.44241373; -100.3833054, 30.44241356; -100.4211769, 30.44239956; -100.4232655, 30.44245480; -100.4254530, 30.44263413; -100.4276222, 30.44293701; -100.4297640, 30.44336214; -100.4318691, 30.44390769; -100.4339286, 30.44457133; -100.4359336, 30.44535023; -100.4378756, 30.44624104; -100.4397461, 30.44723997; -100.4415373, 30.44834273; -100.4432415, 30.44954461; -100.4448513, 30.45084046; -100.4463600, 30.45222473; -100.4477609, 30.45369151; -100.4490481, 30.45523452; -100.4502161, 30.45684715; -100.4512600, 30.45852250; -100.4521751, 30.46025340; -100.4529577, 30.46203244; -100.4536042, 30.46385201; -100.4541121, 30.46570431; -100.4544790, 30.46758141; -100.4547034, 30.46947528; -100.4547843, 30.47137782; -100.4547215, 30.47328086; -100.4545275, 30.47509013; -100.4539130, 30.47936729; -100.4539005, 30.47945343; -100.4538376, 30.47985820; -100.4535052, 30.48188829; -100.4532190, 30.48336317; -100.4530995, 30.48387047; -100.4525533, 30.48608961; -100.4521823, 30.48743815; -100.4515528, 30.48926224; -100.4507868, 30.49104677; -100.4502451, 30.49209451; -100.4505488, 30.49222515; -100.4509297, 30.49239158; -100.4553328, 30.49434605; -100.4566410, 30.49495876; -100.4609753, 30.49709719; -100.4610213, 30.49711994; -100.4610497, 30.49713402; -100.4642991, 30.49874659; -100.4643307, 30.49876226; -100.4674004, 30.50028934; -100.4705812, 30.50183564; -100.4708096, 30.50194766; -100.4709103, 30.50199773; -100.4730119, 30.50304645; -100.4747832, 30.50399480; -100.4765759, 30.50509707; -100.4782815, 30.50629849; -100.4798928, 30.50759390; -100.4802048, 30.50786526; -100.4811328, 30.50868309; -100.4823308, 30.50979558; -100.4837332, 30.51126197; -100.4850217, 30.51280462; -100.4861911, 30.51441693; -100.4862772, 30.51454559; -100.4866978, 30.51517737; -100.4881254, 30.51648543; -100.4895279, 30.51795176; -100.4908167, 30.51949436; -100.4919862, 30.52110661; -100.4930315, 30.52278163; -100.4939480, 30.52451223; -100.4947318, 30.52629102; -100.4953796, 30.52811038; -100.4958886, 30.52996252; -100.4962566, 30.53183951; -100.4963389, 30.53240340; -100.4963417, 30.53242464; -100.4963529, 30.53244371; -100.4964511, 30.53261281; -100.4973678, 30.53434340; -100.4981518, 30.53612217; -100.4987997, 30.53794151; -100.4993088, 30.53979364; -100.4996769, 30.54167062; -100.4998941, 30.54346535; -100.4998954, 30.54348042; -100.4999047, 30.54349321; -100.5005000, 30.54434266; -100.5015456, 30.54601761; -100.5024625, 30.54774816; -100.5032467, 30.54952690; -100.5038948, 30.55134622; -100.5044041, 30.55319832; -100.5047723, 30.55507529; -100.5049980, 30.55696909; -100.5050792, 30.55877167; -100.5051018, 30.56121145; -100.5056428, 30.56223238; -100.5064272, 30.56401110; -100.5070755, 30.56583041; -100.5075849, 30.56768250; -100.5079533, 30.56955946; -100.5081790, 30.57145325; -100.5082611, 30.57335576; -100.5082612, 30.57338157; -100.5082841, 30.57872056; -100.5082827, 30.57911370; -100.5082225, 30.58441892; -100.5082469, 30.59493311; -100.5081847, 30.59676084; -100.5079790, 30.59865635; -100.5076305, 30.60053616; -100.5071406, 30.60239222; -100.5065113, 30.60421659; -100.5057455, 30.60600145; -100.5048463, 30.60773915; -100.5038175, 30.60942226; -100.5026637, 30.61104356; -100.5013897, 30.61259610; -100.5000011, 30.61407324; -100.4985036, 30.61546864; -100.4969038, 30.61677632; -100.4952085, 30.61799069; -100.4934249, 30.61910653; -100.4915607, 30.62011907; -100.4896239, 30.62102397; -100.4876228, 30.62181735; -100.4855660, 30.62249581; -100.4834622, 30.62305643; and -100.4813205, 30.62349683.

Figure: 4 TAC §40.6(b)(2)(S)

(T) Surveillance Zone 20. That portion of Zavala County lying within the area described by the following latitude-longitude coordinate pairs: -99.52095362, 28.97441019; -99.52311623, 28.97448068; -99.52526898, 28.97467535; -99.52740265, 28.97499337; -99.52950812, 28.97543339; -99.53157637, 28.97599353; -99.53359857, 28.97667138; -99.53556604, 28.97746404; -99.53747039, 28.97836813; -99.53930344, 28.97937978; -99.54079805, 28.98031998; -99.54725024, 28.98462158; -99.54750957, 28.98479625; -99.54785821, 28.98503677; -99.54985880, 28.98643602; -99.55117764, 28.98740873; -99.55275135, 28.98871523; -99.55422455, 28.99010940; -99.55559093, 28.99158530; -99.55684463, 28.99313659; -99.55798029, 28.99475664; -99.55899303, 28.99643852; -99.55987852, 28.99817502; -99.56063296, 28.99995872; -99.56125311, 29.00178198; -99.56133034, 29.00204440; -99.56133273, 29.00205269; -99.56134113, 29.00205700; -99.56316032, 29.00306085; -99.56491495, 29.00417540; -99.56658293, 29.00538843; -99.56815715, 29.00669475; -99.56963084, 29.00808876; -99.57099770, 29.00956450; -99.57225188, 29.01111565; -99.57338801, 29.01273558; -99.57440121, 29.01441735; -99.57528713, 29.01615376; -99.57604199, 29.01793738; -99.57666255, 29.01976058; -99.57714613, 29.02161554; -99.57749066, 29.02349434; -99.57769466, 29.02538892; -99.57775724, 29.02729117; -99.57772470, 29.02847436; -99.57699091, 29.04294972; -99.57694433, 29.04366831; -99.57672382, 29.04556148; -99.57636286, 29.04743793; -99.57586299, 29.04928961; -99.57522635, 29.05110860; -99.57445565, 29.05288711; -99.57355420, 29.05461751; -99.57252583, 29.05629240; -99.57137496, 29.05790459; -99.57010651, 29.05944719; -99.56872590, 29.06091358; -99.56723905, 29.06229748; -99.56565233, 29.06359295; -99.56397252, 29.06479446; -99.56220683, 29.06589685; -99.56036281, 29.06689539; -99.55844837, 29.06778580; -99.55647171, 29.06856428; -99.55444130, 29.06922748; -99.55236584, 29.06977256; -99.55025422, 29.07019719; -99.54811550, 29.07049954; -99.54595885, 29.07067831; -99.54379349, 29.07073276; -99.54368348, 29.07073220; -99.54367904, 29.07073217; -99.54367064, 29.07073211; -99.54160517, 29.07071812; -99.54160515, 29.07071812; -99.52332602, 29.07059281; -99.52135033, 29.07057911; -99.52004080, 29.07057001; -99.51799446, 29.07050011; -99.51583960,

29.07030531; -99.51370387, 29.06998707; -99.51159643, 29.06954676; -99.50952630, 29.06898628; -99.50750235, 29.06830801; -99.50553327, 29.06751487; -99.50362748, 29.06661025; -99.50179315, 29.06559804; -99.50003814, 29.06448257; -99.49836996, 29.06326862; -99.49679578, 29.06196140; -99.49532231, 29.06056650; -99.49395588, 29.05908990; -99.49270233, 29.05753793; -99.49156702, 29.05591724; -99.49055483, 29.05423477; -99.48967007, 29.05249773; -99.48891652, 29.05071356; -99.48829742, 29.04888990; -99.48781540, 29.04703457; -99.48747252, 29.04515550; -99.48727023, 29.04326076; -99.48720909, 29.04153365; -99.48714961, 29.00389591; -99.48714993, 29.00372072; -99.48723079, 29.00181902; -99.48745294, 28.99992605; -99.48781544, 28.99804990; -99.48831672, 28.99619861; -99.48895463, 28.99438011; -99.48972642, 28.99260219; -99.49062880, 28.99087244; -99.49165788, 28.98919828; -99.49280926, 28.98758687; -99.49407800, 28.98604510; -99.49545867, 28.98457959; -99.49694535, 28.98319659; -99.49853168, 28.98190203; -99.50021086, 28.98070145; -99.50114533, 28.98009924; -99.50172517, 28.97973912; -99.50255555, 28.97923985; -99.50439850, 28.97824220; -99.50631167, 28.97735265; -99.50828688, 28.97657499; -99.51031567, 28.97591257; -99.51238936, 28.97536821; -99.51449908, 28.97494424; -99.51663581, 28.97464247; -99.51879039, 28.97446420; -99.52095362, 28.97441019.

Figure: 4 TAC §40.6(b)(2)(T)

(U) Surveillance Zone 21. That portion of Frio County lying within the area described by the following latitude-longitude coordinate pairs: -99.10947651, 28.69215145; -99.11163256, 28.69222899; -99.11377824, 28.69243067; -99.11590438, 28.69275562; -99.11800189, 28.69320245; -99.12006179, 28.69376926; -99.12207526, 28.69445361; -99.12403368, 28.69525258; -99.12592869, 28.69616275; -99.12659659, 28.69651843; -99.12668014, 28.69656412; -99.12676773, 28.69660349; -99.12850325, 28.69744239; -99.13032677, 28.69845983; -99.13140943, 28.69914300; -99.13209387, 28.69945609; -99.13322398, 28.69999795; -99.13329078, 28.70003149; -99.13336135, 28.70005836; -99.13510257, 28.70077519; -99.13699779, 28.70168519; -99.13882148, 28.70270251; -99.14003655, 28.70346643; -99.14007660, 28.70349283; -99.14012119, 28.70351279; -99.14190599, 28.70437350; -99.14372978, 28.70539075; -99.14391923, 28.70551213; -99.14539722, 28.70594455; -99.14585189, 28.70608083; -99.14786580, 28.70676477; -99.14982468, 28.70756334; -99.15172017, 28.70847313; -99.15354414, 28.70949024; -99.15528879, 28.71061032; -99.15694666, 28.71182857; -99.15851063, 28.71313979; -99.15997403, 28.71453837; -99.16133057, 28.71601831; -99.16257445, 28.71757328; -99.16370035, 28.71919663; -99.16470342, 28.72088142; -99.16557939, 28.72262042; -99.16632448, 28.72440620; -99.16693550, 28.72623111; -99.16740983, 28.72808734; -99.16774543, 28.72996695; -99.16794085, 28.73186187; -99.16799525, 28.73376401; -99.16790840, 28.73566521; -99.16768064, 28.73755734; -99.16731295, 28.73943229; -99.16680690, 28.74128203; -99.16616464, 28.74309864; -99.16538893, 28.74487433; -99.16448306, 28.74660151; -99.16345093, 28.74827276; -99.16229694, 28.74988094; -99.16102603, 28.75141915; -99.15964364, 28.75288080; -99.15843742, 28.75401215; -99.14737087, 28.76385008; -99.13313233, 28.77650664; -99.13284766, 28.77675657; -99.13125982, 28.77804637; -99.12957959, 28.77924189; -99.12781417, 28.78033801; -99.12597112, 28.78133003; -99.12405834, 28.78221370; -99.12208401, 28.78298524; -99.12005661, 28.78364133; -99.11798482, 28.78417916; -99.11587752, 28.78459644; -99.11374373, 28.78489136; -99.11159261, 28.78506268; -99.10943338, 28.78510964; -99.10727528, 28.78503206; -99.10512757, 28.78483026; -99.10299946, 28.78450511; -99.10090005, 28.78405800; -99.09883836, 28.78349085; -99.09682322, 28.78280609; -99.09486325, 28.78200665; -99.09296687, 28.78109597; -99.09149583, 28.78028691; -99.09125380, 28.78014587; -99.09090016, 28.77993690; -99.08929360, 28.77891066; -99.07971469, 28.77239504; -99.07957611, 28.77230024; -99.07816804, 28.77127527; -99.07498786, 28.76882661; -99.07453642, 28.76847900; -99.07108466, 28.76582097; -99.07083483, 28.76562661; -99.06927120, 28.76431426; -99.06780836, 28.76291459; -99.06718210, 28.76224126; -99.06683123, 28.76197652; -99.06632774, 28.76158877; -99.06476423, 28.76027637; -99.06330151, 28.75887665; -99.06194586, 28.75739561; -99.06070308, 28.75583961; -99.05957848, 28.75421530; -99.05857687, 28.75252964; -99.05770255, 28.75078986; -99.05695925, 28.74900341; -99.05635014, 28.74717794; -99.05587784, 28.74532127; -99.05554434, 28.74344135; -99.05535108, 28.74154623; -99.05529887, 28.73964404; -99.05538793, 28.73774291; -99.05561786, 28.73585099; -99.05598768, 28.73397637; -99.05649580, 28.73212709; -99.05714003, 28.73031105; -99.05791760, 28.72853605; -99.05882518, 28.72680966; -99.05985888, 28.72513928; -99.06101426, 28.72353207; -99.06228639, 28.72199490; -99.06366980, 28.72053435; -99.06483003, 28.71944545; -99.08575213, 28.70078859; -99.08608054, 28.70049975; -99.08766772, 28.69921058; -99.08934708, 28.69801568; -99.09111144, 28.69692015; -99.09295325, 28.69592869; -99.09486463, 28.69504554; -99.09683738, 28.69427447; -99.09886308, 28.69361879; -99.10093306, 28.69308130; -99.10303845, 28.69266429; -99.10517025, 28.69236957; -99.10731933, 28.69219837; -99.10947651, 28.69215145.

Figure: 4 TAC §40.6(b)(2)(U)

(c) - (f) (No change.)

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

Filed with the Office of the Secretary of State on September 7, 2023.

TRD-202303271
Jeanine Coggeshall
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 719-0718

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER C. PREVIOUS PARTICIPATION AND EXECUTIVE AWARD REVIEW AND ADVISORY COMMITTEE

10 TAC §§1.301 - 1.303

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Definitions and Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC).

The purpose of the proposed repeal is to make changes that result from passage of HB 3591 (83rd Regular Legislature) which removed §2306.1112 from our statutes, thereby eliminating EARAC.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program but relates to changes to existing guidance for program subrecipients.

2. The repeal does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The repeal does not require additional future legislative appropriations.

4. The repeal will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The repeal will not expand, limit, or repeal an existing regulation.

7. The repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated the repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the changed sections would be an updated and more germane rule compliant with legislative actions taken by the 83rd Texas Legislature. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, to October 23, 2023, to receive input on the proposed action. Written comments may be submitted by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 23, 2023.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed amended sections affect no other code, article, or statute.

§1.301. Definitions and Previous Participation Reviews for Multifamily Awards and Ownership Transfers.

§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter.

§1.303. Executive Award and Review Advisory Committee (EARAC).

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303336
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 475-3959

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SUBCHAPTER C. PREVIOUS PARTICIPATION REVIEW OF DEPARTMENT AWARDS

10 TAC §§1.301 - 1.303

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter C, Previous Participation Review of Department Awards, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC).

The purpose of the proposed rule is to make changes that result from passage of HB 3591 (83rd Regular Legislature) which removed §2306.1112 from our statutes, thereby eliminating EARAC.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson has determined that, for the first five years the new sections would be in effect:

1. The new sections do not create or eliminate a government program but relate to changes to existing regulations applicable to Department subrecipients.

2. The new sections do not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The new sections do not require additional future legislative appropriations.

4. The new sections will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new sections are not creating a new regulation, except that they are replacing sections being repealed simultaneously to provide for revisions.

6. The new sections will not expand, limit, or repeal an existing regulation.

7. The new sections will not increase or decrease the number of individuals subject to the rule's applicability.

8. The new sections will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated the proposed new sections and determined that the proposed actions will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed new sections do not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the new sections as to their possible effects on local economies and has determined that for the first five years the proposed new sections would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections would be an updated and more germane rule compliant with legislative actions taken by the 83rd Texas Legislature. There will not be economic costs to individuals required to comply with the new sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, to October 23, 2023, to receive input on the proposed action. Comments may be submitted by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 23, 2023.

STATUTORY AUTHORITY. The proposed new sections are made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§1.301. Definitions and Previous Participation Reviews for Multifamily Awards and Ownership Transfers.

(a) Purpose and Applicability. The purpose of this rule is to provide the procedures used by the Department to comply with Tex. Gov't Code §§2306.057, and 2306.6713 which require the Compliance Division to assess the compliance history of the Applicant and any Affiliate, the compliance issues associated with the proposed or existing Development, and provide such assessment to the Board. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c) and Texas Grant Management Standards (TxGMS), where applicable.

(b) Definitions. The following definitions apply only as used in this subchapter. Other capitalized terms used in this section have the meaning assigned in the specific chapters and rules of this title that govern the program associated with the request, or assigned by federal or state laws.

(1) Actively Monitored Development--A Development that within the last three years has been monitored by the Department, either through a NSPIRE inspection, an onsite or desk file monitoring review, an Affirmative Marketing Plan review, or a Written Policies and Procedures Review. NSPIRE inspections include inspections completed by Department staff, Department contractors and inspectors from the Real Estate Assessment Center through federal alignment efforts.

(2) Affiliate--Persons are Affiliates of each other or are "affiliated" if they are under common Control by each other or by one or more third parties. "Control" is as defined in §11.1 of this title (relating to General items relating to Pre-Application, Definitions, Threshold Requirements and Competitive Scoring). For Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, for purposes of assurance that the Affiliate is not on the Federal Suspended or Debarred Listing, Affiliate is also defined as required by 2 CFR Part 180 and 2 CFR Part 2424.

(3) Applicant--In addition to the definition of applicant in §11.1 of this title, in this subchapter, the term applicant includes Persons requesting approval to acquire a Department monitored Development.

(4) Combined Portfolio--Actively Monitored Developments within the Control of Persons affiliated with the Application as identified by the Previous Participation Review and as limited by subsection (c) of this section.

(5) Corrective Action Period--The timeframe during which an Owner may correct an Event of Noncompliance, as permitted in §10.602 or §10.803 of this title (relating to Notice to Owners and Corrective Action Periods and Compliance and Events of Noncompliance, respectively), including any permitted extension or deficiency period.

(6) Events of Noncompliance--Any event for which an Actively Monitored Development may be found to be in noncompliance for monitoring purposes as further provided for in §10.803 of this title or in the table provided at §10.625 of this title (relating to Events of Noncompliance).

(7) Monitoring Event--An onsite or desk monitoring review, an NSPIRE inspection, the submission of the Annual Owner's Compliance Report, Final Construction Inspection, a Written Policies and Procedures Review, or any other instance when the Department's Compliance Division or other reviewing area provides written notice to an Owner or Contact Person requesting a response by a certain date. This would include, but not be limited to, responding to a tenant complaint.

(8) National Standards for the Physical Inspection of Real Estate (NSPIRE)--As developed by the Real Estate Assessment Center of HUD.

(9) Person--"Person" is as defined in 10 TAC Chapter 11 (relating Qualified Allocation Plan (QAP)). For Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, for purposes of assurance that the Applicant or Affiliate is not on the Federal Suspended or Debarred Listing, Person is also defined and includes Principal as required by 2 CFR Part 180 and 2 CFR Part 2424.

(10) Single Audit--As used in this rule, the term relates specifically to an audit required by 2 CFR §200.501 or the Texas Single Audit Circular.

(c) Items Not Considered. When conducting a previous participation review the items in paragraphs (1) through (10) of this subsection will not be taken into consideration:

(1) Events of Noncompliance, Findings, Concerns, and Deficiencies (as described in 10 TAC §6.2, 10 TAC §7.2, 10 TAC §10.625, 10 TAC §10.803 and 10 TAC §20.3 or by Contract) that were corrected over three years from the date the Event is closed;

(2) Events of Noncompliance with an "out of compliance date" prior to the Applicant's period of Control if the event(s) is currently corrected;

(3) Events of Noncompliance with an "out of compliance date" prior to the Applicant's period of Control if the event(s) is currently uncorrected and the Applicant has had Control for less than one year, or if the Owner is still within the timeframe of a Department-approved corrective action from the Department's Enforcement Committee;

(4) The Event of Noncompliance "Failure to provide Fair Housing Disclosure notice";

(5) The Event of Noncompliance "Program Unit not leased to Low income Household" sometimes referred to as "Household Income above income limit upon initial Occupancy" for units at Developments participating in U.S. Department of Housing and Urban Development programs (or used as HOME Match) or U.S. Department of Agriculture, if the household resided in the unit prior to an allocation of Department resources and Federal Regulations prevent the Owner from correcting the issue, provided that the household is below the program's upper income limit and otherwise qualifies for the Unit;

(6) The Event of Noncompliance "Casualty loss" if the restoration period has not expired;

(7) Events of Noncompliance that the Applicant believes can never be corrected and the Department agrees in writing that such item should not be considered;

(8) Events of Noncompliance corrected within their Corrective Action Period;

(9) Events of failure to respond within the Corrective Action Period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under subsection (e)(2)(C) and (e)(3)(C) of this section;

(10) Events of Noncompliance precluded from consideration by Tex. Gov't Code §2306.6719(e); and

(11) Except for Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, Events of Noncompliance associated with a Development that has submitted documentation, using the appropriate Department form, that the responsibility for the Development's compliance has been delegated to another participant in the project (defined as a member of the Development Team), and the Applicant is not in Control of the Development with Events of Noncompliance for purposes of management and compliance. The term "Combined Portfolio" used in this section does not include those properties with such documentation. The Department may require additional information to support the Control Form including but not limited to partnership agreements or other legal documents.

(d) Applicant Process. Persons affiliated with an Application or an Ownership Transfer request must complete the Department's Uniform Previous Participation Review Form and respond timely to staff inquiries regarding apparent errors or omissions, but for Applications no later than the Administrative Deficiency deadline. For an Ownership Transfer request, a recommendation will be delayed until the required forms or responsive information is provided.

(e) Determination of Compliance Status. Through a review of the form, Department records, and the compliance history of the Affiliated multifamily Developments, staff will determine the applicable category for the Application or Ownership Transfer request using the criteria in paragraphs (1) through (3) of this subsection. Combined

Portfolios will not be designated as a Category 3 if both Applicants are considered a Category 2 when evaluated separately. For example, if each Applicant is a Category 2 and their Combined Portfolio is a Category 3, the Application will be considered a Category 2.

(1) Category 1. An Application will be considered a Category 1 if the Actively Monitored Developments in the Combined Portfolio have no issues that are currently uncorrected, all Monitoring Events were responded to during the Corrective Action Period, and the Application does not meet any of the criteria of Category 2 or 3.

(2) Category 2. An Application will be considered a Category 2 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period totals at least three but is less than 50% of the number of Actively Monitored Developments in the Combined Portfolio; or

(B) There are uncorrected Events of Noncompliance but the number of Events of Noncompliance is 10% or less than the number of Actively Monitored Developments in the Combined Portfolio. Corrective action uploaded to the Department's Compliance Monitoring and Tracking System (CMTS) or submitted during the seven day period referenced in subsection (f) of this section will be reviewed and the Category determination may change as appropriate; or

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period to a Monitoring Event; however, the number of times is less than 25% of the number of Actively Monitoring Developments in the Combined Portfolio; or

(D) The Applicant is required to have a Single Audit and a relevant issue was identified in the Single Audit (e.g. Notes to the Financial Statements), or the required Single Audit is past due.

(3) Category 3. An Application will be considered a Category 3 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three and equal or exceed 50% of the number of Actively Monitored Developments in the Combined Portfolio;

(B) The number of Events of Noncompliance that are currently uncorrected total 10% or more than the number of Actively Monitored Developments in the Combined Portfolio. Corrective action uploaded to CMTS or submitted during the seven day period referenced in subsection (f) of this section will be reviewed and the Category determination may change as appropriate;

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period to a Monitoring Event and the number of times is equal to or greater than 25% of the number of Actively Monitored Developments in the Combined Portfolio;

(D) Any Development Controlled by the Applicant has been the subject of an agreed final order entered by the Board and the terms have been violated;

(E) Any Person subject to previous participation review failed to meet the terms and conditions of a prior condition of approval imposed by the EARAC, the Governing Board, voluntary compliance agreement, or court order;

(F) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable documents for any Development currently Controlled by the Applicant or that was Controlled by the Applicant at the time the payment was due and a repayment plan has not been executed with the Department, or an executed repayment plan has been violated;

(G) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department related to any Development Controlled by the Applicant;

(H) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department related to any Development Controlled by the Applicant;

(I) Fees or other amounts owed to the Department by any Person subject to previous participation review are 30 days or more past due and a repayment plan has not been executed with the Department, or an executed repayment plan has been violated;

(J) Despite past condition(s) agreed upon by any Person subject to previous participation review to improve their compliance operations, three or more new Events of Noncompliance have since been identified by the Department, and have not been resolved during the corrective action period;

(K) Any Person subject to previous participation review has or had Control of a TDHCA funded Development that has gone through a foreclosure; or

(L) Any Person subject to previous participation review or the proposed incoming owner is currently debarred by the Department or currently on the federal debarred and suspended listing.

(f) Compliance Notification to Applicant. The Compliance Division will notify Applicants of their compliance status from the categories identified in paragraphs (1) to (4) of this subsection.

(1) Previously approved. If the Executive Director or the Board previously approved the compliance history of an Applicant, with or without conditions (including approvals resulting from a Dispute under §1.303(g) of this subchapter such conditions have not been violated, and no new Events of Noncompliance have occurred since the last approval, the compliance history will be deemed acceptable without further review or discussion and recommended as approved or approved with the same prior conditions. For 4% Housing Tax Credit Applications (without other Department resources), where it has been determined by staff that the Determination Notice can be issued administratively, and for which the Board previously approved a set of conditions associated with a prior Application of the Applicant's, and those same conditions are to be applied to the new 4% Application by Program or Compliance, or if an Application only has underwriting conditions, then the new 4% Application does not need to be approved by the Executive Director and is not required to be presented to the Board.

(2) Category 1. The compliance history of Category 1 applications will be deemed acceptable (for Compliance purposes only) without further review or discussion.

(3) Category 2 and Category 3. Category 2 and 3 Applicants will be informed by the Compliance Division that the Application is a Category 2 or 3 and provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for considera-

tion before the Compliance Division makes its final submission to the Executive Director.

(4) The Department will not make an award or approve an Ownership Transfer to any entity who has an Affiliate, Board member, or a Person identified in the Application that is currently on the Federal Debarred and Suspended Listing. An Applicant or entity requesting an Ownership Transfer will be notified of the debarred status and will be given the opportunity (subject to other Department rules) to remove and replace the Affiliate, Board member, or Person so that the transfer or award may proceed.

(g) Compliance Recommendation to Executive Director for Awards.

(1) After taking into consideration the information received during the seven-day period, Category 2 Applications will be recommended for approval or approval with conditions (for compliance purposes only). Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be notified if their award is recommended for approval with conditions.

(2) After taking into consideration the information received during the seven-day period, Category 3 applications will be recommended for approval, approval with conditions (for compliance purposes only) or denial. Any recommendation for an award or ownership transfer with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be notified if their award is recommended for denial or approval with conditions.

(3) An Applicant that will be recommended for denial or awarded with conditions will be informed of their right to file a Dispute under §1.303 of this subchapter.

(4) In the case of 4% Housing Tax Credit Applications where it has been determined by staff that the Determination Notice can be issued administratively, Category 2 and 3 applications being approved with conditions that are specifically listed in §1.303 of this subchapter and that have been previously approved by the Board for the Applicant, do not require approval of the Executive Director or the Board unless the Applicant is requesting to Dispute the Compliance Recommendation.

(h) Compliance Recommendation for Ownership Transfers. After taking into consideration the information received during the seven-day period the results will be reported to the Executive Director with a recommendation of approval, approval with conditions, or denial. If the Executive Director determines that the request should be denied, or approved with conditions and the requesting entity disagrees, the matter may be appealed to the Board under §1.7 of this title (relating to Appeals).

§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter.

(a) Purpose and applicability. This section applies to program awards not covered by §1.301 of this subchapter (relating to Previous Participation Reviews for Multifamily Awards and Ownership Transfers). With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

(b) Capitalized terms used in this subchapter herein have the meaning assigned in the specific chapters and rules of this title that govern the program associated with the request, or assigned by federal or state laws. For this section, the word Applicant means the entity that the Department's Board will consider for an award of funds or a Contract. As used in this section, the term Single Audit relates specifically to the audit required by 2 CFR §200.501 or the Texas Single Audit Act.

(c) Upon Department request, Applicant will be required to submit:

(1) A listing of the members of its board of directors, council, or other governing body as applicable or certification that the same relevant information has been submitted in accordance with §1.22 of this subchapter (relating to Providing Contact Information to the Department), and if applicable with §6.6 of this title (relating to Subrecipient Contact Information and Required Notifications);

(2) A list of any multifamily Developments owned or Controlled by the Applicant that are monitored by the Department;

(3) Identification of all Department programs that the Applicant has participated in within the last three years;

(4) An Audit Certification Form for the Applicant or entities identified by the Applicant's Single Audit, or a certification that the form has been submitted to the Department in accordance with §1.403 of this chapter (relating to Single Audit Requirements). If a Single Audit is only required by the State Single Audit Act and not by a federal requirement, a copy of the State Single Audit must be submitted to the Department;

(5) In addition to direct requests for information from the Applicant, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a NOFA or Application for funding; and

(6) Applicants will be provided a reasonable period of time, but not less than seven calendar days, to provide the requested information.

(d) The Applicant's/Affiliate's financial obligations to the Department will be reviewed to determine if any of the following conditions exist:

(1) The Applicant or Affiliate entities identified by the Applicant's Single Audit owes an outstanding balance in accordance with §1.21 of this chapter (relating to Action by Department if Outstanding Balances Exist), and a repayment plan has not been executed between the Subrecipient and the Department or the repayment plan has been violated;

(2) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department; or

(3) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department.

(e) The Single Audit of an Applicant, or Affiliate entities identified by the Applicant's Single Audit, subject to a Single Audit, and not currently contracting for funds with the Department will be reviewed. In evaluating the Single Audit, the Department will consider both audit findings, and management responses in its review to identify concerns that may affect the organization's ability to administer the award. The Department will notify the Applicant of any Deficiencies, findings or other issues identified through the review of the Single Audit that requires additional information, clarification, or documentation, and will provide a deadline to respond.

(f) The Compliance Division will make a recommendation of award, award with conditions, or denial based on:

(1) The information provided by the Applicant;

(2) Information contained in the most recent Single Audit;

(3) Issues identified in subsection (d) of this section;

(4) The Deficiencies, Findings and Concerns identified during any monitoring visits conducted within the last three years (whether or not the Findings were corrected during the Corrective Action Period); and

(5) The Department's record of complaints concerning the Applicant.

(g) Compliance Recommendation to the Executive Director.

(1) If the Applicant has no history with Department programs, and Compliance staff has not identified any issues with the Single Audit or other required disclosures, the Application will be deemed acceptable (for Compliance purposes) without further review or discussion.

(2) An Applicant with no history of monitoring Findings, Concerns, and/or Deficiencies or with a history of monitoring Findings, Concerns, and/or Deficiencies that have been awarded without conditions subsequent to those identified Findings, Concerns, and/or Deficiencies, will be deemed acceptable without further review or discussion for Compliance purposes, if there are no new monitoring Findings, Concerns, or Deficiencies or complaint history, and if the Compliance Division determines that the most recent Single Audit or other required disclosures indicate that there is no significant risk to the Department funds being considered for award.

(3) The Compliance Division will notify the Applicant when an intended recommendation is an award with conditions or denial. Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration by the Board.

(4) After review of materials submitted by the Applicant during the seven day period, the Compliance Division will make a final recommendation regarding the award. If recommending denial or award with conditions, the Applicant will be notified of their right to file a dispute under §1.303 of this subchapter.

(h) Consistent with §1.403 of Subchapter D of this chapter, (relating to Single Audit Requirements), the Department may not enter into a Contract or extend a Contract with any Applicant who is delinquent in the submission of their Single Audit unless an extension has been approved in writing by the cognizant federal agency except as required by law, and in the case of certain programs, funds may be reserved for the Applicant or the service area covered by the Applicant.

(i) Except as required by law, the Department will not enter into a Contract with any Applicant or entity who has an Affiliate, Board member, or person identified in the Application that is currently debarred by the Department or is currently on the Federal Suspended or Debarred Listing. Applicants will be notified of the debarred status of an Affiliate, Board Member or Person and will be given an opportunity to remove and replace that Affiliate, Board Member or Person so that funding may proceed. However, individual Board Member's participation in other Department programs is not required to be disclosed, and will not be taken into consideration by the Executive Director.

(j) Previous Participation reviews will not be conducted for Contract extensions. However, if the Applicant is delinquent in submission of its Single Audit, the Contract will not be extended except as required by law, unless the submission is made, and the Single Audit has been reviewed and found acceptable by the Department.

(k) For CSBG funds required to be distributed to Eligible Entities by formula, the recommendation of the Compliance Division will only take into consideration subsection (i) of this section.

(l) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve, although federal and state requirements will still be affirmed, including but not limited to Single Audit, debarment and suspension, litigation disclosures, and §1.21 of this chapter (relating to Action by the Department if Outstanding Balances Exist).

§1.303. Executive Director Review.

(a) Authority and Purpose. The Executive Director will make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. The Department utilizes this process to consider funding and allocation recommendations to the Board related to other programs, and to consider an awardee under the requirements of 2 CFR §200.331(b) and (c) and TxGMS, which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs and as described in §1.403 of Subchapter D of this chapter (relating to Single Audit Requirements). It is also the purpose of this rule to provide for the considerations and processes of award approvals, and to address actions of the Board relating to the Executive Director's recommendations. Capitalized terms used in this section herein have the meaning assigned in the specific chapters and rules of this title that govern the program associated with the request, or assigned by federal or state laws.

(b) Award Recommendation Process.

(1) A positive recommendation by the Executive Director represents a determination that, at the time of the recommendation and based on available information, the Department has not identified a rule or statutory-based impediment that would prohibit the Board from making an award.

(2) A positive recommendation may have conditions placed on it. Conditions placed on an award will be limited to those conditions noted in subsection (e) of this section, or as suggested by the Applicant and agreed upon by the Department.

(3) The Applicant will be notified of proposed conditions. If the Applicant does not concur with the applicability of one or more of the conditions, it will be provided an opportunity to dispute the conditions as described in subsection (g) of this section, regarding Disputes.

(4) Category 3 applicants that will be recommended for denial will be notified and informed of their right to dispute the negative recommendation as described in subsection (g) of this section, regarding Disputes.

(5) Applications for 4% credits that do not include other resources from TDHCA and that are only being issued a Determination Notice are not considered awards for purposes of this rule and do not require approval by the Executive Director prior to issuance of such Notice, even if being presented to the Board in relation to public comment or possible requests for waivers.

(c) Conditions to an award may be placed on a single Development, a Combined Portfolio, or a portion of a Combined Portfolio if applicable (e.g., one region of a management company is having issues, while other areas are not). The conditions listed in subsection (e) of this section may be customized to provide specificity regarding affected Developments, Persons or dates for meeting conditions. Category 2 or Category 3 Applications may be awarded with the imposition of one or more of the conditions listed in subsection (e) of this section.

(d) Possible Conditions.

(1) Applicant/Owner is required to ensure that each Person subject to previous participation review for the Combined Portfolio will correct all applicable issues of non-compliance identified by the previous participation review on or before a specified date and provide the Department with evidence of such correction within 30 calendar days of that date.

(2) Owner is required to have qualified personnel or a qualified third party perform a one-time review of an agreed upon percentage of files and complete the recommended actions of the reviewer on or before a specified deadline for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(3) The Applicant or the management company contracted by the Applicant is required to prepare or update its internal procedures to improve compliance outcomes and to provide copies of such new or updated procedures to the Department upon request or by a specified date.

(4) Owner agrees to hire a third party to perform reviews of an agreed upon percentage of their resident files on a quarterly basis, and complete the recommended actions of the reviewer for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(5) Owner is required to designate a person or persons to receive Compliance correspondence and ensure that this person or persons will provide timely responses to the Department for and on behalf of the proposed Development and all other Development subject to TDHCA LURAs over which the Owner has the power to exercise Control.

(6) Owner agrees to replace the existing management company, consultant, or management personnel, with another of its choosing.

(7) Owner agrees to establish an email distribution group in CMTS (or other Department required system), to be kept in place until no later than a given date, and include agreed upon employee positions and/or designated Applicant members.

(8) Owner is required to revise or develop policies regarding the way that it will handle situations where persons under its control engage in falsification of documents. This policy must be submitted to TDHCA on or before a specified date and revised as required by the Department.

(9) Owner or Subrecipient is required to ensure that agreed upon persons attend and/or review the trainings listed in subparagraphs (A), (B), (C) and/or (D) of this paragraph (only for Applications made and reviewed under §1.301 of this subchapter (relating to Definitions and Previous Participation Reviews for Multifamily Awards and Ownership Transfers)) and/or (E) for applications made and reviewed under §1.302 of this subchapter (relating to Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter) and provide TDHCA with certification of attendance or completion no later than a given date.

(A) Housing Tax Credit Training sponsored by the Texas Apartment Association;

(B) Income Determination Training conducted by TDHCA staff;

(C) Review one or more of the TDHCA Compliance Training Presentation webinars:

(i) 2012 Income and Rent Limits Webinar Video;

(ii) 2023 Supportive Services Webinar Video;

(iii) Income Eligibility Presentation Video;

(iv) 2013 Annual Owner's Compliance Report (AOCR) Webinar Video;

(v) Most current Tenant Selection Criteria Presentation;

(vi) Most current Affirmative Marketing Requirements Presentation;

(vii) Fair Housing Webinars (including but not limited to the 2017 FH webinars);

(viii) Multifamily Direct Loan Presentation Video;

(ix) 2022 Housing Tax Credit Monitoring after the Compliance Period Presentation Video;

(x) 2022 Section 811 Project Rental Assistance Presentation Video; and

(xi) 2023 Utility Allowance Training Presentation Video;

(D) Training for Certified Occupancy Specialist or Blended Occupancy Specialist; or

(E) Any other training deemed applicable and appropriate by the Department, which may include but is not limited to, weatherization related specific trainings such as OSHA, Lead Renovator, or Building Analyst training.

(10) Owner is required to submit the written policies and procedures for all Developments subject to a TDHCA LURA for review and will correct them as directed by the Department.

(11) Owner is required to have qualified personnel or a qualified third party perform NSPIRE inspections of 5% of their Units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Different Units must be selected every quarter. Evidence of inspections and corrections must be submitted to the Department upon request.

(12) Within 60 days of the condition issuance date the Owner will contract for a third party Property Needs Assessment and will submit to the Department a plan for addressing noted issues along with a budget and timeframe for completion.

(13) Owner agrees to have a third party accessibility review of the Development completed at a time to be determined by the Applicant, but no later than prior to requesting a TDHCA final construction inspection. Evidence of review must be submitted to the Department upon request.

(14) Applicant/Owner is required to provide all documentation relating to a Single Audit on or before a specified date.

(15) Any of the conditions identified in 2 CFR §200.207 which may include but are not limited to requiring additional, more detailed financial reports; requiring additional project monitoring; or establishing additional prior approvals. If such conditions are utilized, the Department will adhere to the notification requirements noted in 2 CFR §200.207(b).

(16) Applicant is required to have qualified personnel or a qualified third party perform an assessment of its operations and/or processes and complete the recommended actions of the reviewer on or before a specified deadline.

(17) Applicant is required to have qualified personnel or a qualified third party performs DOE required Quality Control Inspec-

tions of 5% of its Units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Different Units must be selected every quarter. Evidence of inspections and corrections must be submitted upon request.

(18) Applicant is required to provide evidence that reserves for physical repairs are fully funded as required by §10.404 of this title (relating to Replacement Reserves).

(19) In the case of a Development being funded with direct Grant funds (where an ongoing compliance agreement is a requirement) or Loan funds, Applicant is required to provide evidence of invoices and a lien waiver from the contractor, subcontractor, materials supplier, equipment lessor or other party to the construction project stating they have received payment and waive any future lien rights to the property for the amount paid at the time of every draw request submitted.

(f) Failure to meet conditions.

(1) The Executive Director may, for good cause and as limited by federal commitment, expenditure, or other deadlines, grant one extension to a deadline specified in a condition, with no fee required, for up to six months, if requested prior to the deadline. Any subsequent extension, or extensions requested after the deadline, must be approved by the Board.

(2) If any condition agreed upon by the Applicant and imposed by the Board is not met as determined by the evidence submitted (or lack thereof) when requested, the Applicant may be referred to the Enforcement Committee for debarment.

(g) Dispute of Recommendations or Compliance Recommendations for 4% Applications Eligible for Administrative Approval.

(1) The Appeal provisions in §1.7 of this title (relating to Appeals Process), relating to the appeals of a staff decision to the Executive Director, are not applicable.

(2) If an Applicant does not agree with any of the following items, an Applicant or potential Subrecipient of an award may file a dispute that may be considered by Compliance, program area, or underwriting staff, (as applicable) or may be presented to the Board without further Department consideration consistent with paragraph (3) of this subsection.

(A) Their category as determined under §1.301(f) of this subchapter;

(B) Any conditions proposed by the program area, underwriting or Compliance; or

(C) A negative recommendation by the program area, underwriting or Compliance.

(3) Prior to the Board meeting at which the award recommendation is scheduled to be made, or within seven days of the notification of Compliance Conditions for 4% Application Eligible for Administrative Approval an Applicant or potential Subrecipient may submit to the Department (to the attention of Compliance staff), their Dispute detailing:

(A) The condition or determination with which the Applicant or potential Subrecipient disagrees;

(B) The reason(s) why the Applicant/potential Subrecipient disagrees with program, underwriting, or Compliance's recommendation or conditions;

(C) If the Dispute relates to conditions, any suggested alternate condition language;

(D) If the Dispute relates to a negative recommendation, any suggested conditions that the Applicant believes would allow a positive recommendation to be made; and

(E) Any supporting documentation not already submitted to the Department.

(4) An Applicant must file a written Dispute not later than the seventh calendar day after notice recommendation of denial or award with conditions has been provided. The Dispute must include any materials that the Applicant wishes Department staff and/or the Board to consider. An Applicant may request to meet with Department staff and staff is not obligated to meet with the Applicant.

(5) Department staff is not required to consider a Dispute prior to making its recommendation to the Board.

(6) If an Applicant proposes alternative conditions staff may provide the Board with a recommendation to accept, reject, or modify such proposed alternative conditions.

(7) A Dispute will be included on the Board agenda if received at least seven calendar days prior to the required posting date of that agenda. If the Applicant desires to submit additional materials for Board consideration, it may provide the Department with such materials, provided in pdf form, to be included in the presentation of the matter to the Board if those materials are provided not later than close of business of the fifth calendar day before the date on which notice of the relevant Board meeting materials must be posted, allowing staff sufficient time to review the Applicant's materials and prepare a presentation to the Board reflecting staff's assessment and recommendation. The agenda item will include the materials provided by the Applicant and may include a staff response to the dispute and/or materials. It is within the Board chair's discretion whether or not to allow an applicant to supplement its response. An Applicant who wishes to provide supplemental materials at the time of the Board meeting must comply with the requirements of §1.10 of this chapter (relating to Public Comment Procedures). There is no assurance the Board chair will permit the submission, inclusion, or consideration of any such supplemental materials.

(8) The Board will make reasonable efforts to accommodate properly and timely filed Disputes under this subsection.

(h) Board Discretion. Subject to limitations in federal statute or regulation or in TxGMS, the Board has the discretion to accept, reject, or modify any recommendations in response to a recommendation for an award or in response to a Dispute. The Board may impose other conditions not noted or contemplated in this rule as recommended by the Department, or as requested by the Applicant; in such cases the conditions noted will have the force and effect of an order of the Board.

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303338
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 475-3959

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CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 11, Qualified Allocation Plan (QAP), §§11.1- 11.10, 11.101, 11.201- 11.207, 11.301- 11.306, 11.901- 11.907, and 11.1001- 11.1009. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous adoption of the subchapters in 10 TAC Chapter 11, the Qualified Allocation Plan, in order to better address the requirements of Tex Gov't Code Ch. 2306 Subchapter DD.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043.

The proposed repeal does not contemplate nor authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5).

Mr. Wilkinson has also determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the allocation of LIHTC. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4).

Mr. Wilkinson has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, and October 13, 2023 to receive stakeholder comment on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Dominic DeNiro, QAP Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895, attn: Dominic DeNiro, QAP Public Comments, or by email to dominic.deniro@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local (Central) time OCTOBER 13, 2023.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.1. General.

§11.2. Program Calendar for Housing Tax Credits.

§11.3. Housing De-Concentration Factors.

§11.4. Tax Credit Request and Award Limits.

§11.5. Competitive HTC Set-Asides. (§2306.111(d)).

§11.6. Competitive HTC Allocation Process.

§11.7. Tie Breaker Factors.

§11.8. Pre-Application Requirements (Competitive HTC Only).

§11.9. Competitive HTC Selection Criteria.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

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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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.101. Site and Development Requirements and Restrictions.

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

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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.
§11.202. Ineligible Applicants and Applications.
§11.203. Public Notifications (§2306.6705(9)).
§11.204. Required Documentation for Application Submission.
§11.205. Required Third Party Reports.
§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).
§11.207. Waiver of Rules.

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

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SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.301. General Provisions.
§11.302. Underwriting Rules and Guidelines.
§11.303. Market Analysis Rules and Guidelines.
§11.304. Appraisal Rules and Guidelines.
§11.305. Environmental Site Assessment Rules and Guidelines.
§11.306. Property Condition Assessment Guidelines.

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

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SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.901. Fee Schedule.
§11.902. Appeals Process.
§11.903. Adherence to Obligations.
§11.904. Alternative Dispute Resolution (ADR) Policy.
§11.905. General Information for Commitments or Determination Notices.
§11.906. Commitment and Determination Notice General Requirements and Required Documentation.

§11.907. Carryover Agreement General Requirements and Required Documentation.

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

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SUBCHAPTER F. SUPPLEMENTAL HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1009

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.1001. General.

§11.1002. Program Calendar for Supplemental Housing Tax Credits.

§11.1003. Maximum Supplemental Housing Tax Credits, Requests, and Award Limits.

§11.1004. Competitive HTC Set-Asides.

§11.1005. Supplemental Credit Allocation Process.

§11.1006. Procedural Requirements for Supplemental Credit Application Submission.

§11.1007. Required Documentation for Supplemental Credit Application Submission.

§11.1008. Supplemental Credit Applications Underwriting and Loan Policy.

§11.1009. Supplemental Credit Fee Schedule.

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 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 11, Qualified Allocation Plan (QAP). This chapter is comprised of subchapter A, §§11.1 - 11.10; subchapter B, §11.101; subchapter C, §§11.201 - 11.207; subchapter D, §§11.301 - 11.306; subchapter E, §§11.901 - 11.907; and Subchapter F §§11.1001 - 11.1009. The purpose of the proposed new subchapters is to provide compliance with Tex. Gov't Code §2306.67022 and to update the rule to: clarify multiple definitions; update the Program Calendar; introduce a new tenant-focused tie breaker; revise underserved area and opportunity index so more potential Development sites will be competitive; increase Eligible building costs to respond to inflation; create a new scoring item to incentivize larger developments; eliminate Experience Certificates; Add automatic High-Quality Pre-Kindergarten awards for specified regions of the State; and provide for the use of 2024 State Housing Tax Credits.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action for two reasons: 1) the state's adoption of the QAP is necessary to comply with IRC §42; and 2) the state's adoption of the QAP is necessary to comply with Tex. Gov't Code §2306.67022. The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The rule changes will not result in any increases or decreases in fees.

5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rule will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because the proposed rule has sought to clarify Application requirements.

Some "expansions" are offset by corresponding "contractions" in the rules, compared to the 2023 QAP. Notably, the Department has sought to remove superfluous language wherever possible and to consolidate rules to reflect current process. These additions, removals, and revisions to the QAP are necessary to ensure compliance with IRC §42 and Tex. Gov't Code §2306.67022.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed rule will not negatively affect the state's economy, and may be considered to have a positive effect on the

state's economy because changes at 10 TAC §11.9(c)(7), Proximity to Job Areas, may help to encourage the Development of affordable multifamily housing in robust markets with strong and growing economies.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.67022. Some stakeholders have reported that their average cost of filing an Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are approximately 100 to 150 small or micro-businesses subject to the proposed rule for which the economic impact of the rule may range from $480 to many thousands of dollars, just to submit an Application for Competitive or non-Competitive HTCs. The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for LIHTC. The fee for submitting an Application for LIHTC is $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units. While, in theory, there is no limit to the number of Units that could be proposed in a single Application, practically speaking, the Department sees few proposed Developments larger than 350 Units, which, by way of example, would carry a fee schedule of $10,500. These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are 1,376 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0. The proposed rule places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. If anything, a rural community securing a LIHTC Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a large multifamily Development.

3. The Department has determined that because there are rural tax credit awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive LIHTC awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043. The proposed rule does not contemplate or authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since LIHTC Developments often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies. However, because the exact location of where program funds and development are directed is not determined in rule, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until a proposed Development is actually awarded LIHTC, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule…" Considering that significant construction activity is associated with any LIHTC Development and that each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive LIHTC awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the allocation of LIHTC with considerations made for applicants as it relates to the impact of the COVID-19 pandemic on the application process. Other than the fees mentioned in section a4 above, there is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing an application remains between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

F. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(A)(4).

Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed. Any state fiscal impact created by the introduction of State Housing Tax Credits (addressed in subchapter F of the

proposed rule) was detailed by the Legislative Budget Board in its Fiscal Note on HB 1058, dated May 23, 2023. If anything, Departmental revenues may increase due to a comparatively higher volume of Applications, which slightly increases the amount of fees TDHCA receives.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, and October 13, 2023 to receive stakeholder comment on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Dominic DeNiro, QAP Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895, attn: Dominic DeNiro, QAP Public Comments, or by email to dominic.deniro@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local (Central) time October 13, 2023.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the Department) of Competitive Housing Tax Credits, the state Housing Tax Credit, and the issuance of Determination Notices for non-Competitive Housing Tax Credits. The federal laws providing for the awarding and allocation of Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Tex. Gov't Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity and pursuant to Tex. Gov't Code, Chapters 171 and 233, the Department is assigned responsibility for the adoption of rules relating to the State Housing Tax Credit. As required by Internal Revenue Code (the Code), §42(m)(1), the Department has developed this Qualified Allocation Plan (QAP) and it has been duly approved to establish the procedures and requirements relating to an award and allocation of Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive Housing Tax Credits. All requirements herein and all those applicable to a Housing Tax Credit Development or an Application under Chapter 10 of this title (relating to Post Award and Asset Management Requirements, Compliance Monitoring, and Incomes and Rents rules) collectively constitute the QAP required by Tex. Gov't Code §2306.67022 and §42(m)(1)(B) of the Code. Unless otherwise specified, certain provisions in this section and §§11.2 - §11.4 of this title also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Subchapters B - E of this chapter also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Applicants are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program including, but not limited to, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), and other Department rules. This subchapter does not apply to operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program, except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter.

(b) Due Diligence and Applicant Responsibility.

(1) Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP, or may be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature, and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. The *Multifamily Programs Procedures Manual* is not a rule and is provided as good faith guidance and assistance, but in all respects the statutes and rules governing the Low Income Housing Tax Credit program supersede these guidelines and are controlling. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be considered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to perform independently the necessary due diligence to research, confirm, and verify any data, opinions, interpretations, or other information upon which an Applicant bases an Application or includes in any submittal in connection with an Application.

(2) Developments with Existing LURAs. Applicants proposing to submit an Application requesting an award of Housing Tax Credits or a Direct Loan for a Development that already has a LURA in place should review the existing LURA(s) on the property to ensure there are no conflicts with the proposed Application. Where an Applicant has identified a potential conflict, it is incumbent upon the Applicant to consult with staff regarding the steps that may be necessary to resolve the conflicts. This may include, but is not limited to, an Application amendment or LURA amendment, a waiver, or other action that may necessitate additional staff time for review or a Board determination. Depending on the timing constraints associated with the proposed Application, Applicants should be mindful that resolving issues relating to the existing LURA and for Direct Loans the existing Contract may not coincide with the timing needed for a new award if such requests are not submitted early in the process. A copy of the existing LURA must be included in the Application.

(c) Competitive Nature of Program. Applying for Competitive Housing Tax Credits is a technical process that must be followed completely and correctly. Any person who desires to request any reasonable accommodation for any aspect of this process is directed to §1.1 of this title (relating to Reasonable Accommodation Requests to the Department). As a result of the highly competitive nature of applying for Competitive Housing Tax Credits, an Applicant should proceed on the assumption that deadlines are fixed and firm as further provided for in subsection (f) of this section.

(d) Definitions. The capitalized terms or phrases used herein are defined below. Any capitalized terms not specifically mentioned in this section or any section referenced in this document shall have the meaning as defined in Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, and other federal or

Department rules, as applicable. Defined terms, when not capitalized, are to be read in context and construed according to common usage.

(1) Adaptive Reuse--The change-in-use of an existing building not, at the time of Application, being used, in whole or in part, for residential purposes, into a building which will be used, in whole or in part, for residential purposes. Adaptive Reuse requires that at least 75% of the original building remains at completion of the proposed Development. Ancillary non-residential buildings, such as a clubhouse, leasing office, or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site. Adaptive Reuse Developments will be considered as New Construction.

(2) Administrative Deficiency--Information requested by Department staff to clarify, explain, confirm, or restrict the Development proposal to a logical and definitive plan or to provide missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application is under consideration by the Department, including at any time after award or allocation and throughout the Affordability Period. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency. Applicants must intend that the pre-Application or Application is the final version to be reviewed by staff, and should not rely on the Administrative Deficiency process when applying for funding.

(A) The following issues will be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process only if the issues, when taken as a whole, do not constitute a Material Deficiency as defined in §11.1(d) of this chapter:

(i) For Applications that are substantially complete, a minor quantity of missing signatures, documents, or similar clerical matters, the curing of which will not create change within the Application, unless the missing documentation is required to have existed as of the appropriate deadline and did not, or is otherwise not susceptible to resolution. For Competitive HTC or Direct Loan Applications, this may include documents submitted to substantiate points claimed in the Application only if:

(I) The documents can be readily identified to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points; or

(II) For scoring items that are predicated solely on third-party data, characteristics inherent to the proposed Development Site, or are otherwise not influenced by the actions of the Applicant, the Application's eligibility for these points can be clearly established to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points.

(ii) Inconsistencies that exist between facts presented in the Application and/or its supporting documentation. A discrepancy between the requested points and the points supported by the Application will not be treated as an inconsistency if the facts presented within the Application are otherwise consistent.

(iii) At the Department's sole discretion, additional information that is necessary to assist in the review of the Application.

(B) The following issues will not be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process:

(i) Any matter that will materially change the Application, except for matters that must be addressed in accordance with 10 TAC §11.1(d) (relating to the definition of Administrative Deficiency) , in which case staff will direct the Applicant to resolve the inconsistency in the manner that creates the least change within the Application. Under no circumstance can the resolution of an Administrative Deficiency increase the Application's score from what was initially requested.

(ii) Changes to the Application that are submitted only to qualify for points claimed in the Application.

(iii) Except at staff's written request, changes to the Application that alter the amount of Housing Tax Credits or Direct Loan requested.

(C) In all cases, final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Department Staff and Board.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative, or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(4) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA) or federal regulation, or commences on the first day of the Compliance Period as defined by the Code §42(i)(1), and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction, and in some circumstances may be terminated upon foreclosure or deed in lieu of foreclosure. The Department reserves the right to extend the Affordability Period for Developments that fail to meet program requirements. During the Affordability Period, the Department shall monitor to ensure compliance with programmatic rules, as applicable, regulations, and Application representations.

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development, as defined more fully in Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be:

(i) nine percent for 70% present value credits; or

(ii) four percent for 30% present value credits.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Any Person or a group of Persons and any Affiliates of those Persons who file an Application with the Department requesting funding or a tax credit allocation subject to the requirements

of this chapter or Chapters 12 or 13 of this title and who have undertaken or may contemplate the later formation of one or more business entities, such as a limited partnership, that is to be engaged in the ownership of a Development.

(7) Application Acceptance Period--That period of time during which Applications may be submitted to the Department. For Tax-Exempt Bond Developments it is the date the Application is submitted to the Department.

(8) Award Letter --A document that may be issued to an awardee of a Direct Loan before the issuance of a Contract which preliminarily sets forth the terms and conditions under which the Direct Loan will be made available. An Award Letter will typically be contingent on the awardee satisfying certain requirements prior to executing a Contract.

(9) Bank Trustee--A federally insured bank with the ability to exercise trust powers in the State of Texas.

(10) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than eight feet; is self-contained with a door (or the Unit contains a second level sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than two feet deep and three feet wide and high enough to accommodate five feet of hanging space. A den, study, or other similar space that could reasonably function as a Bedroom and meets this definition is considered a Bedroom. Rehabilitation (excluding Reconstruction) Developments in which Unit configurations are not being altered will be exempt from the bedroom and closet width, length, and square footage requirements. Supportive Housing Developments will be exempt from the bedroom and closet width, length, and square footage requirements.

(11) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(12) Building Costs--Cost of the materials and labor for the vertical construction or rehabilitation of buildings and amenity structures.

(13) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and U.S. Treasury Regulations, §1.42-6.

(14) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §11.907 of this title (relating to Carryover Agreement General Requirements and Required Documentation).

(15) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(16) Certificate of Reservation or Traditional Carryforward Designation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the private activity bond state ceiling for a specific Development.

(17) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements, or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(18) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(19) Commitment Notice (also referred to as Commitment)--An agreement issued pursuant to §11.905(a) of this title (relating to General Information for Commitments or Determination Notices), setting forth the terms and conditions under which Competitive Housing Tax Credits from the Department will be made available. A Commitment or Commitment Notice does not mean commitment of federal funds under the Direct Loan Program.

(20) Commitment of Funds--Occurs after the Development is approved by the Board and once a Contract is executed between the Department and Development Owner. The Department's Commitment of Funds may not align with commitments made by other financing parties.

(21) Common Area--Enclosed space outside of Net Rentable Area, whether conditioned or unconditioned, to include such area contained in: property management offices, resident service offices, 24-hour front desk office, clubrooms, lounges, community kitchens, community restrooms, exercise rooms, laundry rooms, mailbox areas, food pantry, meeting rooms, libraries, computer labs, classrooms, break rooms, flex space programmed for resident use, interior corridors, common porches and patios, and interior courtyards. Common Area does not include individualized garages, maintenance areas, equipment rooms, or storage.

(22) Comparable Unit--A Unit, when compared to the subject Unit, is similar in net rentable square footage, number of Bedrooms, number of bathrooms, overall condition, location (with respect to the subject Property based on proximity to employment centers, amenities, services, and travel patterns), age, Unit amenities, utility structure, and common amenities.

(23) Competitive Housing Tax Credits --Sometimes referred to as Competitive HTC. Tax credits available from the State 9% Housing Credit Ceiling.

(24) Compliance Period--With respect to a building financed, in part with proceeds of Housing Tax Credits, the period of 15 taxable years, beginning with the first taxable year of the credit period, pursuant to Code, §42(i)(1).

(25) Continuously Occupied--The same household has resided in the Unit for at least 12 months.

(26) Contract--A legally binding agreement between the Development Owner and the Department, setting forth the terms and conditions under which Multifamily Direct Loan Program funds will be made available.

(27) Contract Rent--Net rent based upon current and executed rental assistance contract(s), typically with a federal, state, or local governmental agency.

(28) Contractor--See General Contractor.

(29) Control (including the terms "Controlling," "Controlled by," and "under common Control with")--The power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein "acting in concert" involves more than merely serving as a single member of a multi-member body. A member of a multi-member body is not acting in concert and therefore does not exercise control in that role, but may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Persons with Control of a Development must be identified in the Application.

Controlling individuals and entities are set forth in subparagraphs (A) - (E) of this paragraph. Multiple Persons may be deemed to have Control simultaneously.

(A) For for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stockholder.

(B) For nonprofit corporations or governmental instrumentalities (such as housing authorities), any officer authorized by the board, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, the Audit committee chair, the Board chair, and anyone identified as the executive director or equivalent.

(C) For trusts, all beneficiaries that have the legal ability to Control the trust who are not just financial beneficiaries.

(D) For limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company.

(E) For partnerships, Principals include all General Partners, and Principals with ownership interest and special limited partners with ownership interest who also possess factors or attributes that give them Control.

(30) Debt Coverage Ratio (DCR)--Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." Calculated as Net Operating Income for any period divided by scheduled debt service required to be paid during the same period, and as described in §11.302(d)(4) of this chapter (relating to Operating Feasibility).

(31) Deferred Developer Fee--The portion of the Developer Fee used as a source of funds to finance the development and construction of the Property, and as described in §11.302(i)(2) of this chapter (relating to Feasibility Conclusion).

(32) Deobligated Funds--The funds released by the Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and a Development Owner or Applicant.

(33) Determination Notice--A notice issued by the Department to the Development Owner of a Tax- Exempt Bond Development which specifies the Department's preliminary determination as to the amount of tax credits that the Development may be eligible to claim pursuant to the Code, §42(m)(1)(D).

(34) Developer--Any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, except if the Person is acting as a consultant with no Control. The Developer may or may not be a Related Party or Principal of the Owner.

(35) Developer Fee--Compensation in amounts defined in §11.302(e)(7) of this chapter (relating to Total Housing Development Costs) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member, or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee. A person who is entitled to a Developer Fee assumes the risk that it may not be paid if the anticipated sources of repayment prove insufficient.

(36) Developer Services--A scope of work relating to the duties, activities, and responsibilities for pre-development, development, design coordination, and construction oversight of the Property generally including, but not limited to:

(A) Site selection and purchase or lease contract negotiation;

(B) Identifying and negotiating sources of construction and permanent financing, including financing provided by the Department;

(C) Coordination and administration of activities, including the filing of applications to secure such financing;

(D) Coordination and administration of governmental permits, and approvals required for construction and operation;

(E) Selection and coordination of development consultants including architect(s), engineer(s), third- party report providers, attorneys, and other design or feasibility consultants;

(F) Selection and coordination of the General Contractor and construction contract(s);

(G) Construction oversight;

(H) Other consultative services to and for the Owner;

(I) Guaranties, financial, or credit support if a Related Party or Affiliate; and

(J) Any other customary and similar activities determined by the Department to be Developer Services.

(37) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a proposed qualified low income housing project, as defined by Code, §42(g), that consists of one or more buildings containing multiple Units that is financed under a common plan, and that is owned by the same Person for federal tax purposes, and may consist of multiple buildings that are located on scattered sites and contain only rent restricted Units. (§2306.6702(a)(6)).

(A) Development will be considered to be a scattered site if the property where buildings or amenities are located do not share a common boundary and there is no accessible pedestrian route that the Development Owner controls (transportation in a motor vehicle will not meet the requirement for an accessible route).

(B) A Development for which several parcels comprise the Development Site and are separated only by a private road controlled by the Development Owner, or a public road or similar barrier where the Development Owner has a written agreement with the public entity for at least the term of the LURA stating that the accessible pedestrian route will remain, is considered contiguous. The written agreement with the public entity must be in place by the earlier of the 10% Test for Competitive HTC, the Determination Notice date for a Tax-Exempt Bond Development issued by the Department, Cost Certification for Tax-Exempt Bond Developments where the Determination Notice is issued administratively, or the execution of the Multifamily Direct Loan Contract, as applicable.

(38) Development Consultant or Consultant--Any Person who provides professional or consulting services relating to the filing of an Application, or post award documents, as required by the program.

(39) Development Owner (also referred to as "Owner")--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department

and is responsible for performing under the allocation or Commitment with the Department. (§2306.6702(a)(7)).

(40) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA, including access to that area or areas through ingress and egress easements.

(41) Development Team--All Persons and Affiliates thereof that play a role in the development, construction, rehabilitation, management, or continuing operation of the Development, including any Development Consultant and Guarantor.

(42) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program (NSP), National Housing Trust Fund (NHTF), HOME American Rescue Plan (HOME-ARP), Tax Credit Assistance Program Repayment Funds (TCAP RF), Texas Housing Trust Fund (THTF), or other programs available through the Department for multifamily development. The terms and conditions for Direct Loans will be determined by provisions in Chapter 13 of this title (relating to Multifamily Direct Loan Rule), the NOFA under which they are awarded, the Contract, and the loan documents. The tax-exempt bond program is specifically excluded.

(43) Educational Provider-- A school district; open-enrollment charter school; or Education Service Center. Private schools and private childcare providers, whether nonprofit or for profit, are not eligible parties, unless the private school or private childcare provider has entered into a partnership with a school district or open-enrollment charter school to provide a HQ Pre-K program in accordance with Texas Education Code Chapter 29, Subchapter E-1.

(44) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75% or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g., a water district), the Development Site must be within the jurisdiction of the political subdivision.

(45) Effective Gross Income (EGI)--As provided for in §11.302(d)(1)(D) of this chapter (relating to Operating Feasibility). The sum total of all sources of anticipated or actual income for a rental Development, less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(46) Efficiency Unit--A Unit without a separately enclosed Bedroom.

(47) Elderly Development--A Development that either meets the requirements of the Housing for Older Persons Act (HOPA) under the Fair Housing Act, or a Development that receives federal funding that has a requirement for a preference or limitation for elderly persons or households, but must accept qualified households with children.

(48) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation.

(49) Environmental Site Assessment (ESA)--An environmental report that conforms to the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(50) Existing Residential Development--Any Development Site which contains any type of existing residential dwelling at any time as of the beginning of the Application Acceptance Period.

(51) Extended Use Period--With respect to an HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) The date specified in the LURA; or

(B) The date which is 15 years after the close of the Compliance Period.

(52) First Lien Lender--A lender whose lien has first priority as a matter of law or by operation of a subordination agreement or other intercreditor agreement.

(53) Forward Commitment--the issuance of a Commitment of Housing Tax Credits from the State Housing Credit Ceiling for the calendar year following the year of issuance, made subject to the availability of State Housing Credit Ceiling in the calendar year for which the Commitment has been made.

(54) General Contractor (including "Contractor")--One who contracts to perform the construction or rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. A prime subcontractor will also be treated as a General Contractor, and any fees payable to the prime subcontractor will be treated as fees to the General Contractor, in the scenarios described in subparagraphs (A) or (B) of this paragraph:

(A) Any subcontractor, material supplier, or equipment leasor receiving more than 50% of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) If more than 75% of the contract sum in the construction contract is subcontracted to three or fewer subcontractors, material suppliers, and equipment leasors, such parties will be deemed prime subcontractors.

(55) General Partner--Any person or entity identified as a general partner in a certificate of formation for the partnership or is later admitted to an existing partnership as a general partner that is the Development Owner and that Controls the partnership. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager or managing member of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(56) Governing Body--The elected or appointed body of public or tribal officials responsible for the enactment, implementation, and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(57) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments, and other similar entities.

(58) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand, and as described in §11.302(i)(1) of this chapter (relating to Feasibility Conclusion).

(59) Gross Demand--The sum of Potential Demand from the Primary Market Area (PMA) and demand from other sources, as described in §11.303(d)(9)(E)(ii) of this chapter (relating to Market Analysis Rules and Guidelines).

(60) Gross Program Rent--Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance, which are developed by program and by county or Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) or national non-metro area.

(61) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

(62) Hard Costs--The sum total of Building Costs, Site Work costs, Off-Site Construction costs, and contingency.

(63) Historically Underutilized Businesses (HUB)--An entity that is certified as such under and in accordance with Tex. Gov't Code, Chapter 2161.

(64) HOME Match Eligible Unit--A Unit in the Development that may or may not be assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92 and CPD Notice 97-03 or subsequent HUD guidance.

(65) Housing Contract System (HCS)--The electronic information system established by the Department for tracking, funding, and reporting Department Contracts and Developments. The HCS is primarily used for Direct Loan Programs administered by the Department.

(66) Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner as provided for in Code.

(67) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount of Housing Tax Credits the Department and the Board, if applicable, determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the Affordability Period.

(68) HTC Development (also referred to as HTC Property)--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(69) HTC Property--See HTC Development.

(70) Initial Affordability Period--The Compliance Period or such longer period as shall have been elected by the Owner as the minimum period for which Units in the Development shall be retained for low-income tenants and rent restricted, as set forth in the LURA.

(71) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME and NHTF funding and progress, and which may be used for other sources of funds as established by HUD.

(72) Land Use Restriction Agreement (LURA)--An agreement, regardless of its title, between the Department and the Development Owner which is a binding covenant upon the Development Owner and successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds. (§2306.6702)

(73) Low-Income Unit (also referred to as a Rent Restricted Unit)--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department utilizing its published income limits.

(74) Managing General Partner--A general partner of a partnership (or, as provided for in the definition of General Partner in this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also refer to a manager or managing member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(75) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand, and rental rates conducted in accordance with §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(76) Market Analyst--A real estate appraiser or other professional satisfying the qualifications in §11.303(c) of this chapter, and familiar with the subject property's market area who prepares a Market Analysis.

(77) Market Rent--The achievable rent at the subject Property for a Unit without rent and income restrictions determined by the Market Analyst or Underwriter after adjustments are made to actual rents on Comparable Units to account for differences in net rentable square footage, functionality, overall condition, location (with respect to the subject Property based on proximity to primary employment centers, amenities, services, and travel patterns), age, Unit amenities, utility structure, and Common Area amenities. The achievable rent conclusion must also consider the proportion of market Units to total Units proposed in the subject Property.

(78) Market Study--See Market Analysis.

(79) Material Deficiency--Any deficiency in a pre-application or an Application or other documentation that exceeds the scope of an Administrative Deficiency. Inability to provide documentation that existed prior to submission of an Application to substantiate claimed points or meet threshold requirements may be considered material and may result in denial of the requested points or a termination in the case of threshold items. It is possible that multiple deficiencies that could individually be characterized as Administrative Deficiencies, when taken as a whole, would create a need for substantial re-review of the Application and as such would be characterized as constituting a Material Deficiency.

(80) Multifamily Programs Procedures Manual--The manual produced and amended from time to time by the Department which reiterates and implements the rules and provides guidance for the filing of multifamily related documents. The Manual is not a rule and is provided only as good faith guidance and assistance.

(81) National Standards for the Physical Inspection of Real Estate (NSPIRE)-- As developed by the Real Estate Assessment Center of HUD.

(82) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid, as provided for in §11.302(d)(3) of this chapter (relating to Operating Feasibility).

(83) Net Program Rent--Calculated as Gross Program Rent less Utility Allowance.

(84) Net Rentable Area (NRA)--The Unit space that is available exclusively to the tenant and is heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a Unit or to the middle of walls in common with other Units. If the construction does not use studs, NRA is measured to the outside of the material to which the drywall is affixed. Remote Storage of no more than 25 square feet per Unit may be included in NRA. For Developments using Multifamily Direct Loan funds the Remote Storage may only be included in NRA if the storage area shares a wall with

the residential living space. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(85) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(86) Notice of Funding Availability (NOFA)--A notice issued by the Department that announces funding availability, usually on a competitive basis, for multifamily rental programs requiring Application submission from potential Applicants.

(87) Office of Rural Affairs--An office established within the Texas Department of Agriculture; formerly the Texas Department of Rural Affairs.

(88) Off-Site Construction--Improvements up to the Development Site such as the cost of roads, water, sewer, and other utilities to provide access to and service the Site.

(89) One Year Period (1YP)--The period commencing on the date on which the Department and the Owner agree to the Qualified Contract price in writing and continuing for 12 calendar months.

(90) Owner--See Development Owner.

(91) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality, or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(92) Person or Persons with Disabilities--With respect to an individual, means that such person has:

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(93) Physical Needs Assessment--See Scope and Cost Review.

(94) Place--An area defined as such by the United States Census Bureau which, in general, includes an incorporated city, town, or village, as well as unincorporated areas known as Census Designated Places. Any part of a Census Designated Place that, at the time of Application, is within the boundaries of an incorporated city, town, or village will be considered as part of the incorporated area. Areas that are annexed by a city, town, or village through limited-purpose annexation are considered to be part of the incorporated area of that city, town, or village for purposes of this chapter. The Department may provide a list of Places for reference.

(95) Post Award Activities Manual--The manual produced and amended from time to time by the Department which explains the post award requirements and provides guidance for the filing of such documentation.

(96) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(97) Preservation--Activities that extend the Affordability Period for rent-restricted Developments that are at risk of losing low-income use restrictions or subsidies.

(98) Primary Market--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(99) Primary Market Area (PMA)--See Primary Market.

(100) Principal--Persons that will be capable of exercising Control pursuant to §11.1(d) of this chapter (relating to the definition of Control) over a partnership, corporation, limited liability company, trust, or any other private entity.

(101) Pro Forma Rent--For a restricted Unit, the lesser of the Net Program Rent or the Market Rent. For an unrestricted Unit, the Market Rent. Contract Rents, if applicable, will be used as the Pro Forma Rent.

(102) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built or rehabilitated thereon in connection with the Application.

(103) Qualified Census Tract (QCT)--those tracts designated as such by the U.S. Department of Housing and Urban Development.

(104) Qualified Contract (QC)--A bona fide contract to acquire the non-low-income portion of the building for fair market value and the low-income portion of the building for an amount not less than the Applicable Fraction (specified in the LURA) of the calculation as defined within §42(h)(6)(F) of the Code.

(105) Qualified Contract Price (QC Price)--Calculated purchase price of the Development as defined within Code, §42(h)(6)(F) and as further delineated in §10.408 of this title (relating to Qualified Contract Requirements).

(106) Qualified Contract Request (Request)--A request containing all information and items required by the Department relating to a Qualified Contract.

(107) Qualified Entity--Any entity permitted under Code, §42(i)(7)(A) and any entity controlled by such a qualified entity.

(108) Qualified Nonprofit Development--A Development which meets the requirements of Code, §42(h)(5), includes the required involvement of a Qualified Nonprofit Organization, and is seeking Competitive Housing Tax Credits.

(109) Qualified Nonprofit Organization--An organization that meets the requirements of Code §42(h)(5)(C) for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, when applicable, meets the requirements of Tex. Gov't Code §2306.6706, and §2306.6729, and Code, §42(h)(5), including having a Controlling interest in the Development.

(110) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the construction of Units on the same or another Development Site. At least one Unit must be reconstructed in order to qualify as Reconstruction. The total number of Units to be reconstructed will be determined by program requirements. Developments using Multifamily Direct Loan funds are required to follow the applicable federal requirements.

(111) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition, or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of any Development Units on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) Reconstructed Units will be considered New Construction for purposes of calculating the Replacement Reserves under §11.302(d)(2)(I) (relating to Operating Feasibility). More specifically, Rehabilitation is the repair, refurbishment, or replacement of existing mechanical or structural components, fixtures, and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible, and may include the addition of: energy efficient components and appliances; life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(112) Relevant Supply--The supply of Comparable Units in proposed and Unstabilized Developments targeting the same population including:

(A) The proposed subject Units; and

(B) Comparable Units in previously approved but Unstabilized Developments in the PMA.

(113) Report--See Underwriting Report.

(114) Request--See Qualified Contract Request.

(115) Reserve Account--An individual account:

(A) Created to fund any necessary repairs or other needs for a Development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(116) Right of First Refusal (ROFR)--An Agreement to provide a series of priority rights to negotiate for the purchase of a Property by a Qualified Entity or a Qualified Nonprofit Organization at a negotiated price at or above the minimum purchase price as defined in Code §42(i)(7) or as established in accordance with an applicable LURA.

(117) Rural Area--

(A) A Place that is located:

(i) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(iii) within the boundaries of a local political subdivision that is outside the boundaries of an Urban Area.

(B) For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5)(A) of this chapter (relating to Required Documentation for Application Submission) or as requested in accordance with §11.204(5)(B) of this chapter.

(118) Scope and Cost Review (SCR)--Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The SCR provides an evaluation of the physical condition of an existing Property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the Property. The SCR must be prepared in accordance with §11.306 of this chapter (relating to Scope and Cost Review Guidelines), as it relates to a specific Development.

(119) Scoring Notice--Notification provided to an Applicant of the score for their Application after staff review. More than one Scoring Notice may be issued for a Competitive HTC or a Direct Loan Application.

(120) Single Room Occupancy (SRO)--An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site.

(121) Site Control--Ownership or a current contract or series of contracts that meets the requirements of §11.204(9) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the Owner or anyone else, to develop and operate a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

(122) Site Work--Materials and labor for the horizontal construction generally including excavation, grading, paving, underground utilities, and site amenities.

(123) State Housing Credit Ceiling--The aggregate amount of Competitive Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including Code, §42(h)(3)(C), and Treasury Regulation §1.42-14.

(124) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(125) Supportive Housing--A residential rental Development and Target Population meeting the requirements of subparagraphs (A) - (E) of this paragraph:

(A) Be intended for and targeting occupancy for households in need of specialized and specific non- medical services in order to maintain housing or transition into independent living;

(B) Be owned and operated by an Applicant or General Partner that must:

(i) have supportive services provided by the Applicant, an Affiliate of the Applicant, or a Third Party provider if the service provider is able to demonstrate a record of providing substantive services similar to those proposed in the Application in residential settings for at least three years prior to the beginning of the Application Acceptance Period, or Application Acceptance Date for Multifamily Direct Loan Applications;

(ii) secure sufficient funds necessary to maintain the Supportive Housing Development's operations throughout the entire Affordability Period;

(iii) provide evidence of a history of fundraising activities reasonably deemed to be sufficient to address any unanticipated operating losses;

(iv) provide a fully executed guaranty agreement whereby the Applicant or its Affiliate assume financial responsibility of any outstanding operating deficits, as they arise, and throughout the entire Affordability Period; and

(v) have Tenant Selection Criteria that fully comply with §10.802 of this title (regarding Written Policies and Procedures), which require a process for evaluation of prospective residents against

a clear set of credit, criminal conviction, and prior eviction history that may disqualify a potential resident. This process must also follow §1.204 of this title (regarding Reasonable Accommodations), and:

(I) The criminal screening criteria must not allow residents to reside in the Development who are subject to a lifetime sex offender registration requirement; and provide at least, for:

(-a-) Temporary denial for a minimum of seven years from the date of conviction based on criminal history at application or recertification of any felony conviction for murder related offense, sexual assault, kidnapping, arson, or manufacture of a controlled substance as defined in §102 of the Controlled Substances Act (21 U.S.C. 802); and

(-b-) Temporary denial for a minimum of three years from the date of conviction based on criminal history at application or recertification of any felony conviction for aggravated assault, robbery, drug possession, or drug distribution;

(II) The criminal screening criteria must include provisions for approving applications and recertification despite the tenant's criminal history on the basis of mitigation evidence. Applicants/tenants must be provided written notice of their ability to provide materials that support mitigation. Mitigation may be provided during initial tenant application or upon appeal after denial. Mitigation may include personal statements/certifications, documented drug/alcohol treatment, participation in case management, letters of recommendation from mental health professionals, employers, case managers, or others with personal knowledge of the tenant. In addition, the criteria must include provision for individual review of permanent or temporary denials if the conviction is more than 7 years old, or if the applicant/resident is over 50 years of age, and the prospective resident has no additional felony convictions in the last 7 years. The criteria must prohibit consideration of any previously accepted criminal history or mitigation at recertification, unless new information becomes available. Criminal screening criteria and mitigation must conform to federal regulations and official guidance, including HUD's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records; and

(III) Disqualifications in a property's Tenant Selection Criteria cannot be a total prohibition, unless such a prohibition is required by federal statute or regulation (i.e. the Development must have an appeal process for other required criteria). As part of the appeal process the prospective resident must be allowed to demonstrate that information in a third party database is incorrect;

(C) Where supportive services are tailored for members of a household with specific needs, such as:

(i) homeless or persons at-risk of homelessness;

(ii) persons with physical, intellectual, or developmental disabilities;

(iii) youth aging out of foster care;

(iv) persons eligible to receive primarily non-medical home or community-based services;

(v) persons transitioning out of institutionalized care;

(vi) persons unable to secure permanent housing elsewhere due to specific, non-medical, or other high barriers to access and maintain housing;

(vii) Persons with Special Housing Needs including households where one or more individuals have alcohol or drug addictions, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, or is a veteran with a disability; or

(viii) other target populations that are served by a federal or state housing program in need of the type and frequency of supportive services characterized herein, as represented in the Application and determined by the Department on a case-by-case basis;

(D) Supportive services must meet the minimum requirements provided in clauses (i) - (iv) of this subparagraph:

(i) regularly and frequently offered to all residents, primarily on-site;

(ii) easily accessible and offered at times that residents are able to use them;

(iii) must include readily available resident services or service coordination that either aid in addressing debilitating conditions, or assist residents in securing the skills, assets, and connections needed for independent living; and

(iv) a resident may not be required to access supportive services in order to qualify for or maintain tenancy in a rent restricted Unit that the household otherwise qualifies for; and

(E) Supportive Housing Developments must meet the criteria of either clause (i) or (ii) of this subparagraph:

(i) not financed, except for construction financing, or a deferred-forgivable or deferred-payable construction-to-permanent Direct Loan from the Department, with any debt containing foreclosure provisions or debt that contains scheduled or periodic repayment provisions. A loan from a local government or instrumentality of local government is permissible if it is a deferred-forgivable or deferred-payable construction-to-permanent loan, with no foreclosure provisions or scheduled or periodic repayment provisions, and a maturity date after the end of the Affordability Period. For tax credit applications only, permanent foreclosable debt that contains scheduled or periodic repayment provisions (including payments subject to available cash-flow) is permissible if sourced by federal funds and otherwise structured to meet valid debt requirements for tax credit eligible basis considerations. In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government funds and the foreclosure provisions are triggered only by default on non-monetary default provisions. Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of Work Out Development approved by the Asset Management Division; or

(ii) financed with debt that meets feasibility requirements under Subchapter D of this chapter without exemptions and must also be supported by project-based rental or project-based operating subsidies for 25% of the Units evidenced by an executed agreement with an unaffiliated or governmental third party able to make that commitment, and meet all of the criteria in subclauses (I) - (VI) of this clause:

(I) the Application includes documentation of how resident feedback has been incorporated into design of the proposed Development;

(II) the Development is located less than 1/2 mile from regularly-scheduled public transportation, including evenings and weekends;

(III) at least 10% of the Units in the proposed Development meet the 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 Federal Register 29671 for persons with mobility impairments;

(IV) multiple systems will be in place for residents to provide feedback to Development staff;

(V) the Development will have a comprehensive written eviction prevention policy that includes an appeal process; and

(VI) the Development will have a comprehensive written services plan that describes the available services, identifying whether they are provided directly or through referral linkages, by whom, and in what location and during what days and hours. A copy of the services plan will be readily accessible to residents.

(F) Supportive housing Units included in an otherwise non-Supportive Housing Development do not meet the requirements of this definition.

(126) Target Population--The designation of types of housing populations shall include Elderly Developments and those that are Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations, although the Application may request that any other populations required for targeting, preference, or limitation by a federal or state fund source are identified.

(127) Tax-Exempt Bond Development--A Development requesting or having been issued a Determination Notice for Housing Tax Credits and which receives a portion of its financing from the proceeds of Tax-Exempt Bonds which are subject to the state volume cap as described in Code, §42(h)(4).

(128) Tax-Exempt Bond Process Manual--The manual produced and amended from time to time by the Department which explains the process and provides guidance for the filing of a Housing Tax Credit Application utilizing Tax-Exempt Bonds.

(129) TDHCA Operating Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual income and operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 10, Subchapter F of this title (relating to Compliance Monitoring), and published on the Department's website (www.tdhca.state.tx.us).

(130) Third Party--A Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor;

(B) An Affiliate to the Applicant, General Partner, Developer, or General Contractor;

(C) Anyone receiving any portion of the administration, contractor, or Developer Fee from the Development; or

(D) In Control with respect to the Development Owner.

(131) Total Housing Development Cost--The sum total of the acquisition cost, Hard Costs, soft costs, Developer Fee, and General Contractor fee incurred or to be incurred through lease-up by the Development Owner in the acquisition, construction, rehabilitation, and financing of the Development.

(132) Transitional Housing--A Supportive Housing Development funded with HOME, NSP, or TCAP RF, and not layered with Housing Tax Credits that includes living Units with more limited individual kitchen facilities and is:

(A) Used exclusively to facilitate the transition of homeless individuals and those at-risk of becoming homeless to independent living within 24 months; and

(B) Is owned by a Development Owner that includes a Governmental Entity or a nonprofit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common kitchen facilities.

(133) Underwriter--The author(s) of the Underwriting Report.

(134) Underwriting Report--Sometimes referred to as the Report. A decision making tool prepared by the Department's Real Estate Analysis Division that contains a synopsis of the proposed Development and that reconciles the Application information, including its financials and market analysis, with the underwriter's analysis. The Report allows the Department and Board to determine whether the Development will be financially feasible as required by Code §42(m), or other federal or state regulations.

(135) Uniform Multifamily Application Templates--The collection of sample resolutions and form letters, produced by the Department, as may be required under this chapter or Chapters 12 and 13 of this title (relating to Multifamily Housing Bond Rules and Multifamily Direct Loan Rule, respectively) that may, but are not required to, be used to satisfy the requirements of the applicable rule.

(136) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

(137) Unit Type--Units will be considered different Unit Types if there is any variation in the number of Bedrooms, bathrooms, features, or a square footage difference equal to or more than 120 square feet.

(138) U.S. Department of Agriculture (USDA)--Texas Rural Development Office (TRDO) serving the State of Texas.

(139) U.S. Department of Housing and Urban Development (HUD)-regulated Building--A building for which the rents and utility allowances of the building are reviewed by HUD.

(140) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the Department's Board of Directors or is currently under construction or has not maintained a 90% occupancy level for at least 90 days following construction completion. A development may be deemed stabilized by the Underwriter based on factors relating to a development's lease-up velocity, Sub-Market rents, Sub-Market occupancy trends, and other information available to the Underwriter. The Market Analyst may not consider such development stabilized in the Market Study.

(141) Urban Area--A Place that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than a Place described in paragraph (116)(A) of this subsection, definition of Rural Area. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5) of this chapter.

(142) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this title (relating to Utility Allowances).

(143) Work Out Development--A financially distressed Development for which the Owner or a primary financing participant is seeking a change in the terms of Department funding or program restrictions.

(e) Data. Where this chapter requires the use of American Community Survey or Housing & Urban Development data, the Department shall use the most current data available as of August 1 of the year prior to Application, unless specifically otherwise provided in federal or state law or in the rules, with the exception of census tract boundaries for which 2020 Census boundaries will be used, unless otherwise noted. All references to census tracts throughout this chapter will mean the 2020 Census tracts, unless otherwise noted. Applicants may need to provide Census tract information based on the 2020 boundaries as well as the ones defined by 2010 boundaries, if data based on 2020 tract boundaries are not available as of August 1, 2023 for the specific item in question. All American Community Survey (ACS) data must be 5-year estimates, unless otherwise specified and it is the ACS data that will be used for population determination. The availability of more current data shall be disregarded. Where other data sources are specifically required, such as NeighborhoodScout, the data available after August 1, but before Pre-Application Final Delivery Date, will be permissible. The NeighborhoodScout report submitted in the Application must include the report date. All references to QCTs throughout this chapter mean the 2024 QCTs designated by HUD to be effective in 2024.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be received by the Department on or before 5:00 p.m. Austin local time on the day of the deadline. If the deadline falls on a weekend or holiday, the deadline is 5:00 p.m. Austin local time on the next day which is not a weekend or holiday and on which the Department is open for general operation. Unless otherwise noted or provided in statute, deadlines are based on calendar days. Deadlines, with respect to both date and time, cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that could not have been anticipated and makes timely adherence impossible. Applicants should further ensure that all required documents are included, legible, properly organized, and tabbed, and that materials in required formats involving digital media are complete and fully readable. Applicants are strongly encouraged to submit the required items well in advance of established deadlines.

(g) Documentation to Substantiate Items and Representations in a Competitive HTC Application. In order to ensure the appropriate level of transparency in this highly competitive program, Applications and all correspondence and other information relating to each Application are posted on the Department's website and updated on a regular basis. Applicants must use the Application form posted online to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, meeting of threshold requirements, or timely requesting a waiver or determination. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the Deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Although a responsive narrative will be created after Application submission, all facts and materials to substantiate any item in response to such an Administrative Deficiency must have been clearly established at the time of submission of the Application.

(h) Board Standards for Review. Some issues may require or benefit from Board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(i) Scattered Site Applications. As it relates to calculating any distances (tie determinations, proximity to features, etc.), year of initial construction, or determining satisfaction of scoring, the site that scores or ranks the lowest will be the site used for that analysis. There is no opportunity for higher scoring or performing sites to elevate the score or performance of other sites in the scattered site Application.

(j) Public Information Requests. Pursuant to Tex. Gov't Code §2306.6717, any pre-application and any full Application, including all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits. As part of its certifications, the Applicant shall certify that the authors of the reports and other information and documents submitted with the Application have given their consent to the Applicant to submit all reports and other information and documents to the Department, and for the Department to publish anything submitted with the Application on its website and use such information and documents for authorized purposes.

(k) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

(l) Request for Staff Determinations. Where the requirements of this chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to a term or definition, a common usage of the particular term, or other issues relevant to a rule or requirement. All such requests and determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application, using the Appeal Process provided for in §11.902 of this chapter (relating to Appeals Process), if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff or Executive Director determination not timely appealed cannot be further appealed or challenged.

§11.2. Program Calendar for Housing Tax Credits.

(a) Comptitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Figure: 10 TAC §11.2(a)

(b) Tax-Exempt Bond and Direct Loan-only Application Dates and Deadlines. Applicants are strongly encouraged to submit the required items well in advance of published deadlines. Other deadlines may be found in Chapters 12 and 13 or a NOFA.

(1) Full Application Delivery Date. The deadline by which the Application must be received by the Department. For Direct Loan Applications, deadlines including the Application Acceptance Date will be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §11.201 of this chapter (relating to Procedural Requirements for Application Submission).

(2) Administrative Deficiency Response Deadline. Such deadline shall be five business days after the date on the deficiency notice, unless extended as provided for in §11.201(6) of this chapter (relating to Deficiency Process).

(3) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Scope and Cost Review (SCR), Appraisal (if applicable), Market Analysis and the Feasibility Report (if applicable)). For Direct Loan Applications, the Third Party reports meeting the requirements described in §11.205 of this title (relating to Required Third Party Reports) must be submitted in order for the Application to be considered complete, unless the Application is made in conjunction with an Application for Housing Tax Credits or Tax-Exempt Bond, in which case the Delivery Date for those programs will apply. For Tax-Exempt Bond Developments, the Third Party Reports must be received by the Department pursuant to §11.201(2) of this chapter.

(4) Resolutions Delivery Date. Resolutions required for Tax-Exempt Bond Developments must be received by the Department no later than 14 calendar days before the Board meeting or prior to the issuance of the Determination Notice, as applicable. If the Direct Loan Application is made in conjunction with an Application for Housing Tax Credits, or Tax-Exempt Bond Developments, the Resolution Delivery Date for those programs will apply to the Direct Loan Application.

(5) Challenges to Neighborhood Organization Opposition Delivery Date. Challenges must be received by the Department no later than 45 calendar days prior to the Board meeting at which consideration of the award will occur.

§11.3. Housing De-Concentration Factors.

(a) Rules reciting statutory limitations are provided as a convenient reference only, and to the extent there is any deviation from the provisions of statute, the statutory language is controlling.

(b) Two Mile Same Year Rule (Competitive HTC Only).

(1) As required by Tex. Gov't Code §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million, if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application within said county that is awarded in the same calendar year. If two or more Applications are submitted that would violate §2306.6711(f), the lower scoring of the Applications, including consideration of tie-breakers, will not be reviewed unless the higher scoring Application is terminated or withdrawn. The higher scoring Application will take priority regardless of the Set-Asides under which the Applications are submitted.

(2) This subsection does not apply if an Application is located in an area that meets the requirements of Tex. Gov't Code §2306.6711(f-1), which excludes any municipality with a population of two million or more where a federal disaster has been declared by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), and the governing body of the municipality containing the Development has by vote specifically authorized the allocation of housing tax credits for the Development in a resolution submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, and the municipality is authorized to administer disaster recovery funds as a subgrant recipient.

(c) Twice the State Average Per Capita (Competitive HTC and Tax-Exempt Bond Only). As provided for in Tex. Gov't Code §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Acceptance Period Begins (or for Tax-Exempt Bond Developments, Applications submitted after the Application Acceptance Period Begins), then the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must include a resolution adopted by the Governing Body of the municipality or county, as applicable, setting forth a written statement of support, specifically citing Tex. Gov't Code §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines) or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Application Dates and Deadlines), as applicable.

(d) One Mile Three Year Rule (Competitive HTC and Tax-Exempt Bond Only). (§2306.6703(a)(3)).

(1) An Application that proposes the New Construction or Adaptive Reuse of a Development that is located one linear mile or less (measured between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) A Development that serves the same Target Population as the proposed Development, regardless of whether the Development serves general, Elderly, or Supportive Housing; and

(B) A Development that has received an allocation of Housing Tax Credits or private activity bonds, or a Supplemental Allocation of credits, for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Certificate of Reservation is issued); and

(C) The Development in subparagraph (B) of this paragraph has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a proposed Development:

(A) That is using federal HOPE VI (or successor program) funds received through HUD;

(B) That is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) That is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) That is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) That is located in a county with a population of less than one million;

(F) That is located outside of a metropolitan statistical area; or

(G) That the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable.

(3) Where a specific source of funding is referenced in paragraphs (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application.

(e) Limitations on Developments in Certain Census Tracts. An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as reflected in the Department's current Site Demographic Characteristics Report shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has adopted a resolution that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable.

(f) Proximity of Development Sites. (Competitive HTC Only) In a county with a population that is less than one million, if two or more HTC Applications, regardless of the Applicant(s), are proposing Developments serving the same Target Population on sites separated by 1,000 feet or less, the lower scoring of the Application(s), including consideration of tie-breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(g) One Award per Census Tract Limitation (Competitive HTC Only). If two or more Competitive HTC Applications are proposing Developments in the same census tract in an urban subregion, the lower scoring of the Application(s), including consideration of tie breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn. This subsection does not apply to Applications submitted under §11.5(2) of this chapter (relating to USDA Set-Aside) or §11.5(3) (relating to At-Risk Set-Aside).

§11.4. Tax Credit Request, Award Limits, and Increase in Eligible Basis.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate, or Guarantor (unless the Guarantor is also the General Contractor or provides the guaranty only during the construction period, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than $6 million in a single Application Round. Prior to posting the agenda for the last Board meeting in June, an Applicant that has Applications pending for more than $6 million in credit may notify staff in writing or by email of the Application(s) they will not pursue in order to bring their request within the $6 million cap. Any other Applications they do not wish to pursue will remain on the waiting list if not otherwise terminated. If the Applicant has not made this self-selection by this date, staff will first select the Application(s) that will enable the Department to comply with the state and federal non-profit set-asides, and will then select the highest scoring Application, including consideration of tie-breakers if there are tied scores. The Application(s) that does not meet Department criteria will not be reviewed unless the Applicant withdraws an Application that is eligible for an award and has been reviewed. All entities that are under common Control are Affiliates. For purposes of determining the $6 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate, or Guarantor solely because it:

(1) Raises or provides equity;

(2) Provides "qualified commercial financing";

(3) Is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) Receives fees as a consultant or advisor that do not exceed $200,000.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150% of the credit amount available in the subregion based on estimates released by the Department on December 1, or $2,000,000 whichever is less. In addition, for Elderly Developments in a Uniform State Service Region containing a county with a population that exceeds one million, the request may not exceed the final amount published on the Department's website after the annual release of the Internal Revenue Service notice regarding the credit ceiling (2306.6711(h)). For all Applications, the Department will consider the amount in the funding request of the pre-application and Application to be the amount of Housing Tax Credits requested and will reduce the Applicant's request to the maximum allowable under this subsection through the underwriting process. While the Housing Tax Credit request amount for an Application may be reduced through the underwriting process or at the written request of staff, the Department shall otherwise consider the request amount final. The Tax Credit request amount cannot be changed through the Administrative Deficiency process. Regardless of the credit amount requested or any subsequent changes to the request made by staff, the Board may not award to any individual Development more than $2 million in a single Application Round. (§2306.6711(b)).

(c) Increase in Eligible Basis (30% Boost). Applications will be evaluated for an increase of up to 30% in Eligible Basis provided they meet any one of the criteria identified in paragraphs (1) - (4) of this subsection. Staff will recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as determined by the Department, in which case a credit amount necessary to fill the gap in financing will be recommended. In no instance will the boost exceed more than the amount

of credits required to create the HTC rent-restricted Units. The criteria in paragraph (3) of this subsection are not applicable to Tax-Exempt Bond Developments.

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as reflected in the Department's current Site Demographic Characteristics Report. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households are not eligible for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution acknowledging the Development is located in a census tract that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments where this rule is triggered are eligible for the boost and are not required to obtain such a resolution from the Governing Body. An acceptable, but not required, form of resolution may be obtained in the Multifamily Uniform Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Application Dates and Deadlines), as applicable. The Application must include a census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT.

(2) The Development is located in a Small Area Difficult Development Area (SADDA)) (based on Small Area Fair Market Rents as determined by the Secretary of HUD) or for Rural areas located in a Difficult Development Area (DDA) that has high construction, land and utility costs relative to the AMGI. The Application must include the SADDA or DDA map that clearly shows the proposed Development is located within the boundaries of a SADDA or DDA as applicable.

(3) For Competitive HTC only, Development meets one of the criteria described in subparagraphs (A) - (F) of this paragraph pursuant to Code, §42(d)(5)(B)(v):

(A) The Development is located in a Rural Area;

(B) The Development is entirely Supportive Housing and is in accordance with §11.1(d) of this chapter (relating to the definition of Supportive Housing);

(C) The Development meets the criteria for the Opportunity Index as defined in §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria);

(D) The Applicant elects to restrict 10% of the proposed low income Units for households at or below 30% of AMGI. These Units may not be used to meet any scoring criteria, or used to meet any Multifamily Direct Loan program requirement;

(E) The Development is in an area covered by a concerted revitalization plan, is not an Elderly Development, and is not located in a QCT. A Development will be considered to be in an area covered by a concerted revitalization plan if it is eligible for and elects points under §11.9(d)(7) of this chapter; or

(F) The Development is located in a Qualified Opportunity Zone designated under the Bipartisan Budget Act of 2018 (H.R. 1892). Pursuant to Internal Revenue Service Announcement 2021-10, the boundaries of the Opportunity Zone are unaffected by 2020 Decennial Census changes.

(4) For Tax-Exempt Bond Developments, as a general rule, a QCT, non-metro DDA or SADDA designation would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. The Department acknowledges guidance contained in the Federal Register regarding effective dates of QCT, non-metro DDA and SADDA designations. Pursuant to the Federal Register Notice, unless federal guidance states otherwise, complete Applications (including all Third Party Reports) with a corresponding Certificate of Reservation that are submitted to the Department in the year the QCT, non-metro DDA or SADDA designation is not effective may be underwritten to include the 30% boost, provided a complete application was submitted to the bond issuer in the year the QCT, non-metro DDA or SADDA designation was effective. Where this is the case, the Application must contain a certification from the issuer that speaks to the date on which such complete application (as defined in the Notice) was submitted. If the issuer is a member of the organizational structure then such certification must come from the bond counsel to the issuer.

§11.5. Competitive HTC Set-Asides. (§2306.111(d)).

This section identifies the statutorily-mandated Set-asides which the Department is required to administer. An Applicant may elect to compete in each of the Set-asides for which the proposed Development qualifies. In order to be eligible to compete in the Set-aside, the Application must meet the requirements of the Set-aside as of the Full Application Delivery Date. Election to compete in a Set-aside does not constitute eligibility to compete in the Set-aside, and Applicants who are ultimately deemed not to qualify to compete in the Set-aside will be considered not to be participating in the Set- aside for purposes of qualifying for points under §11.9(e)(3) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability). Commitments of Competitive HTCs issued by the Board in the current program year will be applied to each Set-aside, Rural regional allocation, Urban regional allocation, and USDA Set-aside for the current Application round as appropriate.

(1) Nonprofit Set-Aside. (§2306.6729 and §2306.6706(b)). At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of Code, §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b). Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this Set-aside (i.e., greater than 50% ownership in the General Partner). If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the manager of the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the Manager of the controlling Managing Member. Additionally, for Qualified Nonprofit Development in the Nonprofit Set-aside the nonprofit entity or its nonprofit Affiliate or subsidiary must be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Nonprofit Set-aside is deemed to be applying under that Set-aside unless their Application specifically includes an affirmative election to not be treated under that Set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this election or to not recommend credits for those unwilling to change elections if insufficient Applications in the Nonprofit Set-Aside are received. Applicants may not use different organizations to satisfy the state and federal requirements of the Set-aside.

(2) USDA Set-Aside. (§2306.111(d-2)). 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through USDA. If an Applica-

tion in this Set-aside involves Rehabilitation it will be attributed to and come from the At- Risk Development Set-aside; if an Application in this set-aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region and will compete within the applicable subregion unless the Application is receiving USDA Section 514 funding. Applications must also meet all requirements of Tex. Gov't Code §2306.111(d-2).

(A) Eligibility of Certain Developments to Participate in the USDA or Rural Set-asides. (§2306.111 (d-4)). A proposed or Existing Residential Development that, before September 1, 2013, has been awarded or has received federal financial assistance provided under §§514, 515, or 516 of the Housing Act of 1949 (42 U.S.C. §§1484, 1485, or 1486) may be attributed to and come from the At-Risk Development Set-aside or the Uniform State Service Region in which the Development is located, regardless of whether the Development is located in a Rural Area.

(B) All Applications that are eligible to participate under the USDA Set-aside will be considered Rural for all scoring items under this chapter. If a Property receiving USDA financing is unable to participate under the USDA Set-aside and it is located in an Urban subregion, it will be scored as Urban.

(3) At-Risk Set-Aside. (§2306.6714; §2306.6702).

(A) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional allocation formula required under §11.6 of this chapter (relating to Competitive HTC Allocation Process). Through this Set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) 5% of the State Housing Credit Ceiling associated with this Set- aside will be given as priority to Rehabilitation Developments under the USDA Set-aside; any Applications submitted under the USDA Set-Aside in excess of this 5% priority may compete within the At-Risk Set-Aside only if they meet the definition for an At-Risk Development and have submitted sufficient supporting documentation within the Application to demonstrate qualification as an At-Risk Development. Applications submitted under the USDA Set-Aside in excess of the 5% priority that do not meet the definition for an At-Risk Development do not qualify for the At-Risk Set-Aside.

(B) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(A) must meet the following requirements:

(i) Pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(i), a Development must have received the benefit of a subsidy in the form of a qualified below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive from any of the programs provided in subclauses (I) to (VIII) of this clause. Applications participating in the At-Risk Set-Aside must include evidence of the qualifying subsidy.

(I) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §1715l);

(II) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(III) Section 202, Housing Act of 1959 (1 2 U.S.C. §1701q);

(IV) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(V) the Section 8 Additional Assistance Program for housing developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart A;

(VI) the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart C; (VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486);

(VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(VIII) §42, Internal Revenue Code of 1986.

(ii) Any stipulation to maintain affordability in the contract granting the subsidy or any HUD-insured or HUD-held mortgage as described in §2306.6702(a)(5)(A)(ii)(a) will be considered to be nearing expiration or nearing the end of its term if the contract expiration will occur or the term will end within two years of July 31 of the year the Application is submitted. Developments with HUD-insured or HUD-held mortgages qualifying as At-Risk under §2306.6702(a)(5)(A)(ii)(b) will be considered eligible if the HUD-insured or HUD-held mortgage is eligible for prepayment.

(iii) Developments with existing Department LI-HTC LURAs must have completed all applicable Right of First Refusal procedures prior to the pre-application Final Delivery Date.

(C) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(B) must meet one of the requirements under clause (i), (ii) or (iii) of this subparagraph and also meet the stipulations noted in clause (iv) of this subparagraph:

(i) Units to be Rehabilitated or Reconstructed must be owned by a public housing authority or a public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(ii) Units to be Rehabilitated or Reconstructed must have been proposed to be disposed of or demolished, or already disposed or demolished within the two-year period preceding the date the Application is submitted, by a public housing authority or public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(iii) To the extent that an Application is eligible under Tex. Gov't Code §2306.6702(a)(5)(B)(iii), the Development must receive assistance through the Rental Assistance Demonstration (RAD) program administered by the United States Department of Housing and Urban Development (HUD). Applications must include evidence that RAD participation is included in the applicable public housing plan that was most recently approved by HUD, and evidence that HUD has approved the Units proposed for Rehabilitation or Reconstruction for participation in the RAD program; and

(iv) Notwithstanding any other provision of law, an At-Risk Development described by Tex. Gov't Code §2306.6702(a)(5)(B) that was previously allocated housing tax credits set aside under subsection (a) of this section does not lose eligibility for those credits if the portion of Units reserved for public housing as a condition of eligibility for the credits under Tex. Gov't Code §2306.6714 (a-1)(2) are later converted under RAD.

(D) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Tex. Gov't Code §2306.6702(a)(5)(i) will not qualify

as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, pursuant to Tex. Gov't Code §2306.6702(a)(5)(B), an Applicant may propose relocation of the existing Units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred with the units proposed for Rehabilitation or Reconstruction prior to the tax credit Carryover deadline;

(ii) the Applicant seeking tax credits must propose at least the same number of restricted Units (the Applicant may, however, add market rate Units, and other rules, limitations, approvals, and potential conflicting requirements based on fund source, number and unit type may be implicated by creating more units than the original number); and

(iii) the new Development Site must either:

(I) qualify for points on the Opportunity Index under §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria); OR

(II) the local Governing Body of the applicable municipality or county (if completely outside of a municipality) in which that Development is located must submit a resolution confirming that the proposed Development is supported by the municipality or county in order to carry out a previously adopted plan that meets the requirements of §11.9(d)(7) of this chapter. Development Sites that cross jurisdictional boundaries must provide such resolutions from both local governing bodies.

(E) If Developments at risk of losing affordability from the financial benefits available to the Development are able to retain, renew, or replace the existing financial benefits and affordability they must do so unless regulatory barriers necessitate elimination of all or a portion of that benefit for the Development.

(i) Evidence of the legal requirements that will unambiguously cause the loss of affordability and that this will occur within the two calendar years of July 31 of the year the Application is submitted, and must be included with the application.

(ii) For Developments qualifying under Tex. Gov't Code §2306.6702(a)(5)(B), only a portion of the subsidy must be retained for the proposed Development, but no less than 25% of the proposed Units must be public housing units supported by public housing operating subsidy. (§2306.6714(a-1). If less than 100% of the public housing benefits are transferred to the proposed Development, an explanation of the disposition of the remaining public housing benefits must be included in the Application, as well as a copy of the HUD-approved plan for demolition and disposition.

(F) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under Code, §42. Evidence must be provided in the form of a copy of the recorded LURA, the first year's IRS Forms 8609 for all buildings showing Part II of the form completed and, if applicable, documentation from the original application regarding the Right of First Refusal. The Application must also include evidence that any applicable Right of First Refusal procedures have been completed prior to the pre-application Final Delivery Date.

(G) An amendment to any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. Competitive HTC Allocation Process.

This section identifies the general allocation process and the methodology by which awards during the Application Round are made.

(1) Regional Allocation Formula. The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region (subregion) Housing Tax Credits in an amount not less than $600,000 in each Rural and Urban subregion, consistent with the Regional Allocation Formula developed in compliance with Tex. Gov't Code §2306.1115. As authorized by Tex. Gov't Code §2306.111(d-3), the Department will reserve $600,000 in housing tax credits for Applications in rural areas in each uniform state service region. The process of awarding the funds made available within each subregion shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of the regional allocation formula together with other policies and purposes set out in Tex. Gov't Code, Chapter 2306 and the Department shall provide the public the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the competitive ranking of Applications within a particular subregion or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the $6 million credit limit per Applicant, the Department will make its recommendation based on the criteria described in §11.4(a) of this chapter (relating to Tax Credit Request, Award Limits and Increase in Eligible Basis). The Department will publish on its website on or before December 1 of each year, initial estimates of Regional Allocation Formula percentages and limits of credits available, and the calculations periodically, if those calculations change, until the credits are fully allocated.

(2) Credits Returned and National Pool Allocated After January 1. For any credits returned after January 1 and eligible for reallocation (not including credit returned and reallocated under force majeure provisions), the Department shall first return the credits to the subregion or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the subregion and be awarded in the collapse process to an Application in another region, subregion or set-aside. Consistent with the allocation process described in this section, credits that are returned to the USDA or At-Risk Set-Asides are not eligible to flow to another subregion or set-aside unless no eligible Applications remain in the Set-Aside to which the credits were returned. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to any remaining credits and awarded to the next Application on the waiting list for the state collapse, if sufficient credits are available to meet the requirements of the Application as may be amended after underwriting review.

(3) Award Recommendation Methodology. (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications reviews will be conducted in the order described in subparagraphs (A) - (F) of this paragraph based upon the Applicant self-score and an initial program review. The procedure identified in subparagraphs (A) - (F) of this paragraph will also be used in making recommendations to the Board.

(A) USDA Set-Aside Application Selection (Step 1). The first set of reviews will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d)) are attained. The minimum requirement may be ex-

ceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the USDA Set-Aside requirement.

(B) At-Risk Set-Aside Application Selection (Step 2). The second set of reviews will be those Applications with the highest scores in the At-Risk Set-Aside statewide until the minimum requirements stated in §11.5(3) of this chapter (relating to At-Risk Set-Aside) are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 subregions to award under the remaining steps.

(C) Initial Application Selection in Each Subregion (Step 3). The highest scoring Applications within each of the 26 subregions will then be selected provided there are sufficient funds within the subregion to fully award the Application with the priorities in this subparagraph first prioritized. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the subregions. In Urban subregions in which credits available do not allow for all of the priorities in clauses (iii) to (v) of this subparagraph to be achieved, the priorities will be followed in the order reflected in this subparagraph.

(i) In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available for Elderly Developments, unless there are no other qualified Applications in the subregion. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h), and will publish such percentages on its website..

(ii) In accordance with Tex. Gov't Code, §2306.6711(g), in Uniform State Service Regions containing a county with a population that exceeds 1.7 million, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is part of a concerted revitalization plan that meets the requirements of §11.9(d)(7) (except for §11.9(d)(7)(A)(ii)(III) and §11.9(d)(7)(B)(iii)), is located in an Urban subregion, and is within the boundaries of a municipality with a population that exceeds 500,000.

(iii) In Urban subregions, not including the calculation of At-Risk Applications awarded, no more than 50% of all credits in a subregion will be awarded to Applications proposing Rehabilitation or Reconstruction, unless only Rehabilitation or Reconstruction Applicants are eligible in the subregion.

(iv) In Urban subregions containing a county with a population that exceeds 950,000, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is located in a neighborhood which is a recipient of a HUD Choice Neighborhood Planning or Implementation grant in the preceding five years from the date of Application submission and funds from the HUD Choice Neighborhood awardee are reflected in the Application's Sources and Uses.

(v) In Urban subregions containing a county with a population that exceeds 1,000,000, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that elects to provide a High-Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site that meets the requirements of items (a)-(c) of subparagraph (C)(i)(I) of §11.101(b)(5) (related to Common Amenities).

(D) Rural Collapse (Step 4). If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region (Rural subregion) that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural subregion as compared to the subregion's allocation. This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20% of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one subregion is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any subregion in the State, will be combined into one "pool." The funds will be used to award the highest scoring Application (not selected or eliminated in a prior step) in the most underserved subregion in the State compared to the amount originally made available in each subregion. In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available as calculated through the Regional Allocation Formula (RAF) for Elderly Developments, within an Urban subregion of that service region. Therefore, certain Applications for Elderly Developments may be excluded from receiving an award from the collapse. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website. This process will continue until the funds remaining are insufficient to award the next highest scoring Application that is not rendered ineligible through application of the elderly cap in the next most underserved subregion. At least seven calendar days prior to the July Board meeting of the Department at which final awards of credits are authorized, the Department will post on its website the most current 2023 State of Texas Competitive Housing Tax Credit Ceiling Accounting Summary which includes the Regional Allocation Formula percentages including the maximum funding request/award limits, the Elderly Development maximum percentages and limits of credits available, and the methodology used for the determination of the award determinations within the State Collapse. In the event that more than one subregion is underserved by the same degree, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10% Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the Set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-aside statewide are selected to meet the minimum requirements of the Nonprofit Set- Aside. This step may cause some lower scoring Applications

in a subregion to be selected instead of a higher scoring Application not participating in the Nonprofit Set-aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the next Application to award. If credits are returned through any process, those credits will first be made available in the set-aside or subregion from which they were originally awarded. The first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application as may be amended on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. The Department will evaluate all waiting list awards for compliance with requested Set-asides. This may cause some lower scoring Applications to be selected instead of a higher scoring Application. Where sufficient credit becomes available to award an Application on the waiting list later in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline and changes to the Application as necessary to ensure to the extent possible that available resources are allocated by December 31. (§2306.6710(a) - (f); §2306.111).

(5) Credit Returns Resulting from Force Majeure Events. In the event that the Department receives a return of Competitive HTCs during the current program year from an Application that received a Competitive Housing Tax Credit award during any of the preceding three years, such returned credit will, if the Board determines that all of the requirements of this paragraph are met to its satisfaction, be allocated separately from the current year's tax credit allocation, and not be subject to the requirements of paragraph (2) of this section. The Board determination must indicate the year of the Multifamily Rules to be applied to the Development. The Department's Governing Board may impose a deadline that is earlier than the Placed in Service Deadline and may impose conditions that were not placed on the original allocation. Requests to allocate returned credit separately where all of the requirements of this paragraph have not been met or requests for waivers of any part of this paragraph will not be considered. For purposes of this paragraph, credits returned after September 30 of the preceding program year may be considered to have been returned on January 1 of the current year in accordance with the treatment described in §(b)(2)(C)(iii) of Treasury Regulation 1.42-14. The Board may approve the execution of a current program year Carryover Agreement regarding the returned credits with the Development Owner that returned such credits only if:

(A) The credits were returned as a result of "Force Majeure" events that occurred before issuance of Forms 8609. Force Majeure events are the following sudden and unforeseen circumstances outside the control of the Development Owner: acts of God such as fire, tornado, flooding, significant and unusual rainfall or subfreezing temperatures, or loss of access to necessary water or utilities as a direct result of significant weather events; explosion; vandalism; orders or acts of military authority; unrelated party litigation; changes in law, rules, or regulations; national emergency or insurrection; riot; acts of terrorism; supplier failures; or materials or labor shortages. If a Force Majeure event is also a presidentially declared disaster, the Department may treat the matter under the applicable federal provisions. Force Majeure events must make construction activity impossible or materially impede its progress;

(B) Acts or events caused by the negligent or willful act or omission of the Development Owner, Affiliate or a Related Party shall under no circumstance be considered to be caused by Force Majeure. In order for rainfall, material shortages, or labor shortages to constitute Force Majeure, the Development Owner must clearly explain and document how such events could not have been reasonably foreseen and mitigated through appropriate planning and risk management. Staff may use Construction Status reports for the subject or other Developments in conducting their review and forming a recommendation to the Board;

(C) A Development Owner claiming Force Majeure must provide evidence of the type of event, as described in subparagraph (A) of this paragraph, when the event occurred, and that the loss was a direct result of the event;

(D) The Development Owner must prove that reasonable steps were taken to minimize or mitigate any delay or damages, that the Development Owner substantially fulfilled all obligations not impeded by the event, including timely closing of all financing and start of construction, that the Development and Development Owner was properly insured and that the Department was timely notified of the likelihood or actual occurrence of an event described in subparagraph (A) of this paragraph;

(E) The event prevents the Development Owner from meeting the placement in service requirements of the original allocation;

(F) The requested current year Carryover Agreement allocates the same amount of credit as that which was returned; and

(G) The Department's Real Estate Analysis Division determines that the Development continues to be financially feasible in accordance with the Department's underwriting rules after taking into account any insurance proceeds related to the event.

§11.7. Tie Breaker Factors.

In the event there are Competitive HTC Applications that receive the same number of points in any given set-aside category, rural regional allocation or urban regional allocation, or rural or statewide collapse, the Department will utilize the factors in this section, in the order they are presented, to determine which Development will receive preference in consideration for an award. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. The tie breaker factors are not intended to specifically address a tie between equally underserved subregions in the rural or statewide collapse.

(1) For Applications funded through the USDA Set-Aside

(A) Applications proposed to rehabilitate the property with the earliest year of initial construction as a residential Development.

(i) Only the year of initial construction will be taken into consideration. The specific date of construction or conversion will not affect this tie breaker. A tie will persist if two Applications have the same year. In the event that a Development was constructed over a number of years, the earliest year will be used.

(ii) Year submitted must be evidenced by the initial USDA loan documentation. If such documentation does not exist or cannot be provided, the Application is ineligible for this tiebreaker.

(B) Once 5% or more of the State Housing Credit Ceiling has been allocated to USDA developments, no further applications with USDA financing shall receive preference under this tie breaker but may receive preference under subsections (2) and (3) of this section.

(2) For all other competitive Applications

(A) Applications proposed to be located in closest proximity to the following features as of the Full Application Delivery Date:

(i) A park, or a parcel of land dedicated for public use by a Municipal, County, State, or Federal entity and used as parkland or for a recreational purpose. This feature must have been designated by the relevant authority one year prior to the Full Application Delivery Date.

(ii) The elementary school of attendance. In districts with district-wide enrollment or choice, the Applicant shall use the closest elementary. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools, the closest campus of attendance that serves any grade between kindergarten and fifth grade shall be used.

(iii) A full service grocery store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items.

(iv) A Public Library with indoor space, physical books that can be checked out and that are of general and wide-ranging subject matter, computers and internet access, and that is: Open 35 hours or more per week in an Urban Area and 25 hours or more per week in a Rural Area. The library must not be age or subject-restricted and must be at least partially funded with government funding.

(B) The linear measurement will be performed from closest parcel boundary of the Development Site to closest parcel boundary of each feature. The Department may prescribe a specific form to be used for the calculation of these distances using GPS coordinates provided by the Applicant.

(C) In calculating this proximity, each feature's distance will be required for submittal, with the sum of the three closest features being used to produce the result. The Application with the lowest sum of proximity will receive preference.

(D) In the event that one of the top three features is disqualified due to not conforming to the definitions provided or a substantial misrepresentation of distance from the development, the fourth will be used as an opportunity to replace the disqualified feature. If multiple features are disqualified, the Application will not receive preference. If the competing application(s) also has multiple disqualified features the tie will persist.

(E) In the event that the sum proximities described under §11.7(2)(B) for two tied Applications differ by 100 or fewer feet, the tie will persist.

(3) If the tie persists, preference will be determined using this final tiebreaker. Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded 15 or fewer years ago. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory from the Site Demographics Characteristics report from the current year. The specific month and date of the award are disregarded for this analysis. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary of the Site presented at Pre-Application, if a pre-application is submitted, or the Site presented at full Application, whichever is closest.

§11.8. Pre-Application Requirements (Competitive HTC Only).

(a) General Submission Requirements. The pre-application process allows Applicants interested in pursuing an Application to assess potential competition across the 13 state service regions, subregions, and set-asides. Based on an understanding of the potential competition they can make a more informed decision about whether they wish to proceed to prepare and submit an Application. A complete pre-application is a pre-application that meets all of the Department's criteria, as outlined in subsections (a) and (b) of this section.

(1) The pre-application must be submitted using the URL provided by the Department, as outlined in the Multifamily Programs Procedures Manual, along with the required pre-application fee as described in §11.901 of this chapter (relating to Fee Schedule), not later than the pre-application Final Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). If the pre-application and corresponding fee is not submitted on or before this deadline the Applicant will be deemed to have not made a pre-application.

(2) Only one pre-application may be submitted by an Applicant for each Development Site and for each Site Control document.

(3) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed or addressed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. While the pre-application is more limited in scope than the Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as Applications, and pre-applications will thus be subject to the same consequences for violation, including but not limited to loss of points and termination of the pre-application.

(4) The pre-application becomes part of the full Application if the full Application claims pre-application points.

(5) Regardless of whether a Full Application is submitted, a pre-application may not be withdrawn after the Full Application Delivery Date described in §11.2(a) of this chapter.

(b) Pre-Application Threshold Criteria. Pursuant to Tex. Gov't Code §2306.6704(c) pre-applications will be terminated unless they meet the threshold criteria described in subsection (a) of this section and paragraphs (1) and (2) of this subsection:

(1) Submission of the Competitive HTC pre-application in the form prescribed by the Department which identifies or contains at a minimum:

(A) Site Control meeting the requirements of §11.204(9) of this title (relating to Required Documentation for Application Submission). For purposes of meeting this specific requirement related to pre-application threshold criteria, proof of consideration and any documentation required for identity of interest transactions is not required at the time of pre-application submission but will be required at the time of full application submission;

(B) Funding request;

(C) Target Population;

(D) Requested set-asides (At-Risk, USDA, Nonprofit, or Rural);

(E) Total Number of Units proposed;

(F) Census tract number or numbers in which the Development Site is located, and a map of the census tract(s) with an outline of the proposed Development Site;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) Proposed name of ownership entity;

(I) If points are to be claimed related to Underserved Area and/or Proximity to Jobs, documentation supporting those point elections;

(J) The name and coordinates of the nearest park, grocery store, and library meeting the criteria established in 10 TAC §11.7(2) as well as the name and coordinates of the elementary school of attendance;

(K) For Applications funded through the USDA Set-Aside; year of initial construction as evidenced by the initial USDA loan documentation.

(2) Evidence in the form of a certification provided in the pre-application, that all of the notifications required under this paragraph have been made. (§2306.6704).

(A) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development, where a reasonable search for applicable entities has been conducted.

(B) Notification Recipients. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted; however, a mailed notification that is addressed to the entity or officeholder rather than a specific person is acceptable so long as it is mailed to the correct address and otherwise meets all requirements. Between the time of pre-application (if made) and full Application, the boundaries of an official's jurisdictions may change. If there is a change in jurisdiction between pre-application and the Full Application Delivery Date that results in the Development being located in a new jurisdiction, additional notifications must be made at full Application to any entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct entity constitutes notification. No later than the date the pre-application is submitted, notification must be sent to all of the entities prescribed in clauses (i) - (viii) of this subparagraph:

(i) Neighborhood Organizations on record with the state or county 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development Site;

(ii) Superintendent of the school district in which the Development Site is located;

(iii) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(iv) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(v) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(vi) Presiding officer of the Governing Body of the county in which the Development Site is located;

(vii) All elected members of the Governing Body of the county in which the Development Site is located; and

(viii) State Senator and State Representative of the districts whose boundaries include the proposed Development Site.

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (IX) of this clause:

(I) The Applicant's name, address, an individual contact name and phone number;

(II) The Development name, address, city, and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) The physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise, etc.);

(VI) The approximate total number of Units and approximate total number of Low-Income Units;

(VII) The residential density of the Development, i.e., the number of Units per acre;

(VIII) Information on how and when an interested party or Neighborhood Organization can provide input to the Department; and

(IX) Information on any proposed property tax exemption.

(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a population exclusively or as a preference unless such targeting or preference is documented in the Application and is in full compliance with all applicable state and federal laws, including state and federal fair housing laws.

(iii) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

(c) Pre-Application Results. Only pre-applications which have satisfied all of the pre-application requirements, including those in §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability), will be eligible for pre-application points. The order and scores of those

Developments released on the pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the pre-application Submission Log. Inclusion of a pre-application on the pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

(d) Applicants that may be requesting a Multifamily Direct Loan from the Department may submit a Request for Preliminary Determination on or before February 13, 2023. The results of evaluation of the Request may be used as evidence of review of the Development and the Principals for purposes of scoring under §11.9(e)(1)(F) of this chapter. Submission of a Request for Preliminary Determination does not obligate the Applicant to request Multifamily Direct Loan funds with their full Application.

§11.9. Competitive HTC Selection Criteria.

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required under Tex. Gov't Code, Chapter 2306, Code §42, and other criteria established in a manner consistent with Chapter 2306 and Code §42. There is no rounding of numbers in this section for any of the calculations in order to achieve the desired requirement or limitation, unless rounding is explicitly stated as allowed for that particular calculation or criteria. The Application must include one or more maps indicating the location of the Development Site and the related distance to the applicable facility. Distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the facility, unless otherwise noted. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. Applications will only be reviewed for point items specifically elected in the Application. Except for scoring items that are awarded based on tiered categories, if an Application is determined to not qualify for the points elected, Department staff will not evaluate the Application to determine whether it might qualify for alternative points.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); 2306.6725(b)(1); §42(m)(1)(C)(iii) and (ix)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements:

(i) five-hundred (500) square feet for an Efficiency Unit;

(ii) six-hundred (600) square feet for a one Bedroom Unit;

(iii) eight-hundred fifty (850) square feet for a two Bedroom Unit;

(iv) one-thousand fifty (1,050) square feet for a three Bedroom Unit; and

(v) one-thousand two-hundred fifty (1,250) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features (9 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §11.101(b)(6)(B) of this title (relating to Unit, Development Construction, and Energy and Water Efficiency Features) and as certified to in the Application. The amenities will be required to be identified in the LURA. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) An Application may qualify to receive either one (1) or two (2) points if it meets the requirements of either subparagraphs (A), (B), or (C) of this paragraph.

(A) HUB. The ownership structure contains a HUB or HUBs certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date. The HUB or HUBs must have some combination of ownership interest in each of the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB or nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories. Any Application that includes one or more HUBs must include a narrative description of each of the HUB's experience directly related to the housing industry.

(i) The HUB must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal or officer of the HUB cannot be a Related Party to or Affiliate, including the spouse, of any other Principal or officer of the Applicant, Developer or Guarantor (excluding another Principal of said HUB), regardless of Control. (2 points).

(iii) The HUB must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the HUB or nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant, Developer or Guarantor (excluding another Principal of said HUB or Nonprofit Organization). (1 point).

(B) Qualified Nonprofit Organization. The ownership structure contains a Qualified Nonprofit Organization provided the Application is submitted in the Nonprofit Set-Aside. The Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50%, and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories.

(i) The Qualified Nonprofit Organization must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the Qualified Nonprofit Organization is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse, of any other Principal of the Applicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (2 points).

(iii) The Qualified Nonprofit Organization must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (1 point).

(C) Nonprofit Organization. The ownership structure contains a nonprofit organization that meets the requirements of IRC §42(h)(5)(C) on the Application Delivery Date, with at least 51% ownership in the General Partner of the Applicant. (2 points)

(i) The nonprofit organization must maintain Control of the Development and materially participate in the operation of the Development throughout the Compliance Period. Nonprofit organizations that formally operate under a parent organization may assign Control of the Development to that parent organization, so long as it meets the requirements of IRC §42(h)(5)(C).

(ii) The nonprofit organization, or individuals with Control of the nonprofit organization, must provide verifiable documentation of at least 10 years' experience in the continuous operation of a Development that provides services similar to those in the proposed Development.

(iii) The Applicant will provide a minimum of 3 additional points under §11.101(7) of this chapter (related to Resident Supportive Services), in addition to points selected under subsection (c)(3) of this section.

(3) Quantity of Low-Income Units. An Application may qualify for up to three (3) points under subparagraphs (A) or (B) of this paragraph. All calculations of averages shall be based solely on the July meeting of the Governing Board at which final awards of credits are authorized. Subsequent awards or withdrawals and supplemental credit allocations shall not be considered when calculating averages under this item. The only awards that will be included in the calculation of averages are 9% competitive tax credits, inclusive of any forward commitments made at the July meeting, and the average will only calculate housing tax credit units. If points are to be claimed under this item, Low-Income Units shall not be reduced after an award of tax credits. The Department shall publish relevant averages pertaining to this scoring item in the Site Demographics and Characteristics Report, and those figures shall be authoritative. These points are not available in the USDA or At-Risk Set-Asides, and Applications that were awarded in those Set-Asides will not be included in when calculating averages for this item.

(A) The Development is Urban and the Application proposes a number of Low-Income Units that is greater than the subregion average of the two prior competitive rounds.

(i) The proposed number of Low-Income Units is 10% greater than the subregion average of the two prior competitive rounds (1 point);

(ii) The proposed number of Low-Income Units is 20% greater than the subregion average of the two prior competitive rounds. (2 points);

(iii) The Application is proposing Rehabilitation of a Development that has no existing rent and income restrictions and does not receive any subsidy listed under §11.5(3)(B)(i). The proposed number of Low-Income Units is 50% greater than the subregion average of the two prior competitive rounds (3 points).

(B) The Development is rural and the Application proposes a number of Low-Income Units that is larger than the average of all rural awards in the two prior competitive rounds.

(i) The proposed number of Low-Income Units is 10% greater than the average of all Rural awards in the two prior competitive rounds (1 point);

(ii) The Development size is 80 units and entirely Low-Income or the proposed number of Low-Income Units is 20% greater than the average of all rural New Construction awards in the two prior competitive rounds (2 points).

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Residents. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42 (m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A), (B), (C), or (D) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 40 % of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 30% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 20% of all Low-Income Units at 50 %or less of AMGI (11 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph and that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 20% of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 15% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 10% of all Low-Income Units at 50% or less of AMGI (11 points).

(C) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs

that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 54% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (13 points); or

(iii) The average income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (11 points).

(D) For Developments proposed to be located in the areas other than those listed in subparagraph (C) of this paragraph and that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (13 points); or

(iii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 57% or lower (11 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(E)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. If selecting points from paragraph (1)(A) or paragraph (1)(B) of this subsection, these levels are in addition to those committed under paragraph (1) of this subsection. If selecting points from paragraph (1)(C) or paragraph (1)(D) of this subsection, these levels are included in the income average calculation under paragraph (1) of this subsection. These units must be maintained at this rent level throughout the Affordability Period regardless of the Average Income calculation. Scoring options include:

(A) At least 20% of all Low-Income Units at 30% or less of AMGI for Supportive Housing Developments proposed by a Qualified Nonprofit (13 points);

(B) At least 10% of all Low-Income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all Low-Income Units at 30% or less of AMGI (11 points); or

(C) At least 5% of all Low-Income Units at 30% or less of AMGI (7 points).

(3) Resident Supportive Services. (§2306.6710(b)(3) and (1)(G), and §2306.6725(a)(1)) A Development may qualify to receive up to eleven (11) points.

(A) The Applicant certifies that the Development will provide a combination of resident supportive services, which are listed in §11.101(b)(7) of this chapter (relating to Development Requirements and Restrictions) and meet the requirements of that section. (10 points).

(B) The Applicant certifies that the Development will contact local nonprofit and governmental providers of services that would support the health and well-being of the Department's residents, and will make Development community space available to them on a regularly-scheduled basis to provide outreach services and education to the tenants. Applicants may contact service providers on the Department list, or contact other providers that serve the general area in which the Development is located. (1 point).

(4) Residents with Special Housing Needs. (§2306.6710(b)(4); §42(m)(1)(C)(v)) An Application may qualify to receive up to four (4) points by serving Residents with Special Housing Needs by selecting points under any combination of subparagraphs (A), (B), and (C), of this paragraph. The Units identified for this scoring item may not be the same Units identified previously for the Section 811 PRA Program.

(A) The Development must commit at least 5% of the total Units to Persons with Special Housing Needs. For purposes of this subparagraph, Persons with Special Housing Needs is defined as a household where one or more individuals have alcohol or drug addictions, is a Colonia resident, a Person with a Disability, has Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, homeless, veterans, and farmworkers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market Units to Persons with Special Housing Needs. In addition, the Department will require an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Housing Needs or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Housing Needs, but will be required to continue to specifically market Units to Persons with Special Housing Needs. (2 points)

(B) If the Development has committed units under subparagraph (A) of this paragraph, the Development must commit at least an additional 2% of the total Units to Persons referred from the Continuum of Care or local homeless service providers to be made available for those experiencing homelessness. Rejection of an applicant's tenancy for those referred may not be for reasons of credit history or prior rental payment history. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market the 2% of Units through the Continuum of Care and other homelessness providers local to the Development Site. In addition, the Department will require an initial minimum twelve-month period in Urban subregions, and an initial six-month period in Rural subregions, during which Units must either be occupied by Persons referred from the Continuum of Care or local homeless service providers, or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month or six-month period, the Development Owner will no longer be required to hold Units vacant but will be required to continue to provide quarterly notifications to the Continuum of Care and other homeless service providers local to the Development Site on the availability of Units at the Development Site. A Development is not eligible under this paragraph unless points have also been selected under subparagraph (A) of this paragraph. (1 point)

(C) If the Development is Supportive Housing and has a proposed occupancy preference or limitation for Veterans or a subgroup of only Veterans that is required or allowed by other federal or state financingby the Full Application Delivery Date. These points are only available to Developments that are proposed to be located on sites owned by the United States Department of Veterans Affairs (1 point).

(5) Opportunity Index. (42(m)(1)(C)(i)) The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials. Based on the American Community Survey (ACS) data, a Development is eligible for a maximum of seven (7) opportunity index points from subparagraphs (A) and (B) of this paragraph.

(A) A proposed Development is eligible for up to two (2) opportunity index points if it is located entirely within a census tract with a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and meets the requirements in clause (i),(ii), or (iii) of this subparagraph:

(i) The Development Site is located entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region whichever is greater; and

(II) a median household income in the two highest quartiles among Census tracts within the uniform service region (2 points); or

(ii) The Development Site is located in an Urban Area and entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region, whichever is greater,

(II) a median household income in the third quartile among Census tracts within the region, and

(III) is contiguous to a census tract that is in the first or second quartile among tracts for median household income in the region, and has a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and the Development Site is no more than 2 miles from the boundary between the census tracts (1 point); or

(iii) The Development Site is located in a Rural Area and:

(I) is located entirely located within a Census tract that has a poverty rate less than 20% or the median poverty rate among Census tracts for the region, whichever is greater, and

(II) is located in a Place which experienced an increase in population since the 2010 Decennial Census according to the Site Demographics Characteristics Report; (1 point).

(B) An Application that meets one of the foregoing criteria in subparagraph (A) of this paragraph may qualify for additional points for any one or more of the factors in clause (i) or (ii) of this subparagraph. Each amenity may be used only once for scoring purposes, unless allowed within the scoring item, regardless of the number of categories it fits. All members of the Applicant or Affiliates cannot have had an ownership position in the amenity or served on the board or staff of a nonprofit that owned or managed that amenity within the year preceding the Pre-Application Final Delivery Date. All amenities must be operational or have started Site Work at the Pre-Application Final Delivery Date. Any age restrictions associated with an amenity must positively correspond to the Target Population of the proposed Development.

(i) For Developments located in an Urban Area (other than Applicants competing in the USDA Set- Aside), an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XV) of this clause.

(I) The Development Site is located on a route, with sidewalks for pedestrians, that is 1/2 mile or less from the entrance to a public park with a playground or from a multiuse hike-bike trail. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (1 point).

(II) The Development Site is located on a route, with sidewalks for pedestrians, that is within a specified distance from the entrance of a public transportation stop or station with a route schedule that provides regular service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. Only one of the following may be selected:

(-a-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service is beyond 8 a.m. to 5 p.m., plus weekend service (both Saturday and Sunday) (1 point); or

(-b-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service arrives every 15 minutes, on average, between 6 a.m. and 8 p.m., every day of the week (2 points).

(III) The Development Site is located within 2 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(IV) The Development Site is located within 2 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(V) The Development Site is located within 4 miles of a health-related facility, such as a full service hospital, community health center, minor emergency center, emergency room or urgent care facility. Physician offices and physician specialty offices are not considered in this category. (1 point).

(VI) The Development Site is within 3 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(VII) The Development Site is located in a census tract with a property crime rate of 26 per 1,000 persons or less as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VIII) The Development Site is located within 2 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 50 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(IX) The Development Site is located within 6 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required

distance; online-only institutions do not qualify under this item. (1 point)

(X) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point)

(XI) Development Site is within 2 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point)

(XII) Development Site is within 2 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XIII) Development Site is within 2 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIV) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(XVI) If at Application, the Development is located in a county with a population of 1.2 million or more, but less than 4 million, and is located not more than two miles from a veteran's hospital, veteran's affairs medical center, or veteran's affairs health care center, (which include all providers listed under the Veteran's Health Administration categories, excluding Benefits Administration offices, listed at this link https://www.va.gov/directory/guide/fac_list_by_state.cfm?State=TX&dnum=ALL), and has federal or state financing that requires or allows preference for leasing units in the Development to low income veterans, and agrees to provide that preference. (1 point).

(ii) For Developments located in a Rural Area and any Application qualifying under the USDA set- aside, an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XIV) of this clause.

(I) The Development Site is located within 5 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(II) The Development Site is located within 5 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(III) The Development Site is located within 5 miles of health-related facility, such as a full service hospital, community health center, minor emergency center, or a doctor with a general practice that takes walk-in patients. Physician specialty offices are not considered in this category. (1 point).

(IV) The Development Site is located within 5 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point).

(V) The Development Site is located in a census tract with a property crime rate 26 per 1,000 or less, as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point).

(VI) The Development Site is located within 5 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 40 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point).

(VII) The Development Site is located within 5 miles of a public park with a playground. (1 point).

(VIII) The Development Site is located within 15 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point).

(IX) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point).

(X) Development Site is within 4 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point).

(XI) Development Site is within 4 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XII) Development Site is within 4 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIII) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XIV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(6) Underserved Area. (§§2306.6725(a)(4) and (b)(2); 2306.127(3), 42(m)(1)(C)(i) and (ii)). Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph (5) of this subsection, then the Application is not eligible for points under subparagraphs (A) and (B) of this paragraph. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory of the Site Demographic Characteristics Report from the current year. The specific month and date of the award are disregarded for this analysis. The Application must include evidence that the Development Site meets the requirements. An Application may qualify to receive up to five (5) points if the Development Site meets any one of the criteria described in subparagraphs (A) - (E) of this paragraph:

(A) (§2306.127(3)). The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border (5 points);

(B) (§2306.127(3)). The Development Site is located entirely within the boundaries of an Economically Distressed Area that has been awarded funds by the Texas Water Development Board in the previous five years ending at the beginning of the Application Acceptance Period (1 point);

(C) (§2306.6725(b)(2)). The Development Site is located entirely within a census tract that does not have another Development that was awarded 30 or fewer years ago that serves the same Target Population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item (4 points);

(D) For areas not scoring points for subparagraph (C), the Development Site is located entirely within a census tract that does not have another Development that was awarded 15 or fewer years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (3 points);

(E) For areas not scoring points for subparagraphs (C) or (D) of this paragraph, the Development Site is located entirely within a census tract that does not have another Development that was awarded 10 or fewer years ago according to the Department's property inventory in the Site Demographic Characteristics Report (2 points);

(F) The Development Site is located within a census tract and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded 10 or fewer years ago that serves the same tenant population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item. This item will apply to Development Sites located entirely in a Place, or its ETJ, with a population of 50,000 or more for Urban subregions and 10,000 or more for Rural subregions, and will not apply in the At-Risk Set-Aside; (5 points)

(i) The Development Site may intersect the boundaries of multiple Places so long as each has a population of at least 50,000 for Urban subregions, and 10,000 for Rural subregions.

(ii) Contiguous census tracts include those that touch at a point.

(G) An At-risk or USDA Development placed in service 25 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development. If the Application involves multiple sites, the age of all sites will be averaged for the purposes of this scoring item. (3 points).

(7) Proximity to Job Areas. (§42(m)(1)(C)(i)) An Application may qualify to receive up to four (4) points if the Development Site is located in one of the areas described in subparagraphs (A), (B), or (C) of this paragraph, and the Application contains evidence substantiating qualification for the points. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. This determination will be based on the latest data set posted to the US Census website on or before August 1, 2023. The Development will use OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(A) Proximity to Jobs. For Development Sites in Urban subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (vi) of this subparagraph.

(i) The Development is located within 2 miles of 10,000 jobs. (4 points)

(ii) The Development is located within 2 miles of 8,000 jobs. (3 points)

(iii) The Development is located within 2 miles of 6,500 jobs. (2 points)

(iv) The Development is located within 2 miles of 4,500 jobs. (1 points)

(B) Proximity to Jobs. For Development Sites in Rural subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (vi) of this subparagraph.

(i) The Development is located within 4 miles of 8,000 jobs. (4 points)

(ii) The Development is located within 4 miles of 6,000 jobs. (3 points)

(iii) The Development is located within 4 miles of 4,000 jobs. (2 points)

(iv) The Development is located within 4 miles of 2,000 jobs. (1 points)

(C) Access to Jobs. A Development site which qualifies for at least 2 points under subparagraph (A) or (B) may qualify for up to 2 additional points under this subparagraph if the Development Site is within one half-mile from the entrance of a public transportation stop or station with a route schedule that provides regularly scheduled service to employment and basic services. (2 points)

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s)

must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. Resolutions received by the Department setting forth that the municipality and/or county objects to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(B) Within the extraterritorial jurisdiction of a municipality, the Application may receive points under clause (i) or (ii) of this subparagraph and under clause (iii) or (iv) of this subparagraph.

(i) Eight and one-half (8.5) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(ii) Seven (7) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(iii) Eight and one-half (8.5) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(iv) Seven (7) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(C) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) The source of the funding cannot be the Applicant, Developer, or an Affiliate of the Applicant. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals $500 or more for Applications located in Urban subregions or $250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contribution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn. (1 point)

(3) Declared Disaster Area. (§2306.6710(b)(1)(H); §42(m)(1)(C)(i)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site. In addition, the Neighborhood Organization must be on record 30 days prior to the beginning of the Application Acceptance period with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph:

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood

Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of or placing on record of a Neighborhood Organization. Technical assistance is limited to:

(i) the use of a facsimile, copy machine/copying, email and accommodations at public meetings;

(ii) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process;

(iii) presentation of information and response to questions at duly held meetings where such matter is considered; and

(iv) notification regarding deadlines for submission of responses to Administrative Deficiencies.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in only one of the clauses (i) - (vi) of this subparagraph. Points will not be cumulative. Where more than one written statement is received for an Application, the average of all statements received in accordance with this subparagraph will be assessed and awarded.

(i) Nine (9) points for explicit support from a Neighborhood Organization that, during at least one of the three prior Application Rounds, provided a written statement that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged.

(ii) Eight (8) points for explicitly stated support from a Neighborhood Organization.

(iii) Six (6) points for explicit neutrality from a Neighborhood Organization that, during at least one of the three prior Application Rounds provided a written statement, that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged.

(iv) Four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection.

(v) Four (4) points for areas where no Neighborhood Organization is in existence, equating to neutrality or lack of objection, or where the Neighborhood Organization did not meet the explicit requirements of this section.

(vi) Zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2023. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Government Entity, or should the Neighborhood Organization not respond in seven calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(f) and (g)) Applications may receive up to eight (8) points for express support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead or submitted in such a manner as to verify the sender, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). Letters received by the Department from State Representatives will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(B) No Letter from a State Representative. To qualify under this subparagraph, no written statement can be received for an Application from the State Representative who represents the geographic area in which the proposed Development is located, unless the sole content of the written statement is to convey to the Department that no written statement will be provided by the State Representative for a particular Development. Points available under this subparagraph will be based on how an Application scores under paragraph (1) of this subsection (relating to Local Government Support). If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. For an Application with a

proposed Development Site that, at the time of the initial filing of the Application, is:

(i) Within a municipality, the Application will receive:

(I) Eight (8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(ii) Within the extraterritorial jurisdiction of a municipality, the Application will receive points under subclause (I) or (II) or (III) of this subparagraph, and under subclause (IV) or (V) or (VI) of this subparagraph.

(I) Four (4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(III) Negative four (-4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(IV) Four (4) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(V) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(VI) Negative four (-4) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(iii) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(I) Eight (8) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(6) Input from Community Organizations. (§2306.6725(a)(2)) Where, at the time of Application, the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization or there is a qualifying Neighborhood Organization that has given no statement or a statement of neutrality (as described in subparagraph B(4)(C)(iv) or (v) of this subsection), then, in order to ascertain if there is community support, an Application may receive up to four (4) points for letters that qualify for points under subparagraphs (A), (B), or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters of support must be submitted within the Application. Once a letter is submitted to the Department it may not be changed or withdrawn. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item. Letters received by the Department setting forth that the community organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose the overall betterment, development, or improvement of the community as a whole or of a major aspect of the community such as improvement of schools, fire protection, law enforcement, city-wide transit, flood mitigation, or the like. The Applicant must provide evidence that the community or civic organization remains in good standing by providing evidence from a federal or state government database confirming that the exempt status continues. An Organization must also provide evidence of its participation in the community in which the Development Site is located including, but not limited to, a listing of services or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts as described in subparagraph C), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District formed under Tex. Local Gov't Code chapter 375 whose boundaries, as of the Full Application Delivery Date as identified in §11.2(a) of this chapter, (relating to Competitive HTC Deadlines, Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Concerted Revitalization Plan. (§42(m)(1)(B)(ii)(III) and (C)(iii)). An Application may qualify for up to seven (7) points un-

der this paragraph only if no points are elected under subsection (c)(5) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area:

(i) An Application may qualify to receive points if the Development Site is geographically located within an area for which a concerted revitalization plan (plan or CRP) has been developed and published by the municipality.

(ii) A plan may consist of one or two complementary local planning documents that together have been approved by the municipality as a plan to revitalize the specific area. The plan and supporting documentation must be submitted using the CRP Application Packet. No more than two local plans may be submitted for each proposed Development. The concerted revitalization plan may be a Tax Increment Reinvestment Zone (TIRZ) or Tax Increment Finance (TIF) or similar plan. A city- or county-wide comprehensive plan, including a consolidated plan or one-year action plan required to receive HUD funds does not equate to a concerted revitalization plan. However, a comprehensive plan may include plans for specific areas targeted for revitalization that would qualify so long as that plan meets all requirements of this section.

(iii) The proposed Development must be entirely located within the targeted revitalization area.(iv) The Application must include a copy of the plan or a link to the online plan and a description of where specific information required below can be found in the plan. The plan must meet the criteria described in subclauses (I) and (II) of this clause:

(I) The concerted revitalization plan, or each of the local planning documents that compose the plan, must have been published by the municipality or county in which the Development Site is located.

(II) The plan must be current at the time of Application. (v) If the Application includes an acceptable Concerted Revitalization Plan, up to seven (7) points will be awarded as follows:

(I) the proposed Development Site is located within a Qualified Census Tract and has submitted a letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing to the concerted revitalization efforts of the municipality or county (as applicable) (7 points); or

(II) the proposed Development Site is not located within a Qualified Census Tract and has submitted a letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing to the concerted revitalization efforts of the municipality or county (as applicable) (7 points); or

(III) the proposed Development Site does not have a letter described in subclause (I) and (II) of this clause (5 points).

(B) For Developments located in a Rural Area, the Rehabilitation or demolition and Reconstruction of a Development that has been leased and occupied at 85% or greater for the six months preceding Application by low income households and which was initially constructed 25 or more years prior to Application submission as either public housing or as affordable housing with support from USDA, HUD, the HOME program, or the CDBG program. The occupancy percentage will not include Units that cannot be occupied due to needed repairs, as confirmed by the SCR or CNA. Demolition and relocation of units must be determined locally to be necessary to comply with the Affirmatively Furthering Fair Housing Rule, or if necessary to create an acceptable distance from Undesirable Site Features or Neighborhood Risk Factors. (7 points)

(e) Criteria promoting the efficient use of limited resources and Applicant accountability.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted, unless allowable exceptions provided for in §11.302(i)(5) are applicable. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable by an authorized representative of a proposed Third Party permanent lender. In addition to the signed pro forma, a lender approval letter must be submitted. An acceptable form of lender approval letter may be obtained in the Uniform Multifamily Application Templates. Applications that are proposed to have no Third Party permanent lender must still submit a 15-year pro forma; however, the signature and approval letters are not required. Scoring will be awarded as follows:

(A) If the letter evidences review of the Development alone it will receive twenty-four (24) points; or

(B) If the letter is from the Third Party permanent lender and evidences review of the Development and the Principals, it will receive twenty-six (26) points; or

(C) If the Development is Supportive Housing and meets the requirements of §11.1(d)(125)(E)(i) of this chapter, it will receive twenty-six (26) points; or

(D) If the Development is part of the USDA set-aside and meets the requirements of §11.5(2) of this chapter and the letter is from the Third Party construction lender, and evidences review of the Development and the Principals, it will receive twenty-six (26) points; or

(E) Applications that are proposed to have no Third Party permanent lender will receive twenty-six (26) points; or

(F) If the Department is the only permanent lender, and the Application includes the evaluation of the Request for Preliminary Determination submitted under §11.8(d) of this chapter, it will receive twenty-six (26) points.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general contractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned. The Department will annually compare the proportional cost increases from October of the prior year to October of the year being calculated based on the Construction Price Index for Multifamily Housing Units Under Construction (US Census Bureau) and increase the square foot cost targets in this item by that annual proportional amount of increase.

(A) Applications proposing New Construction or Reconstruction or Adaptive Reuse will be eligible for twelve (12) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $144.72 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $193.32 per square foot.

(B) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $154.44 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $203.04 per square foot.

(C) Applications proposing Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

(i) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $193.32 per square foot; or

(ii) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $250.56 per square foot, located in an Urban Area, and that qualify for 5 or more points under subsection (c)(5)(A) and (B) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $250.56 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted by the Pre-Application Final Delivery Date. Applications that meet all of the requirements described in subparagraphs (A) - (H) of this paragraph will qualify for six (6) points:

(A) The total number of Units does not increase by more than 10% from pre-application to Application;

(B) The designation of the proposed Development as Rural or Urban remains the same;

(C) The proposed Development serves the same Target Population;

(D) The pre-application and Application are participating in the same set-asides (At-Risk, USDA, Non-Profit, or Rural);

(E) The Application final score (inclusive of only scoring items reflected on the self-score form) does not vary by more than four (4) points from what was reflected in the pre-application self-score;

(F) If points are claimed related to Underserved Area and/or Proximity to Jobs, the point elections may not change from what was reflected in the pre-application self-score and the supporting documentation for these points must be substantially similar to what was submitted with the Pre-Application;

(G) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number or numbers listed at pre-application is the same at Application. The site at full Application may not require notification to any person or entity not required to have been notified at pre-application

(H) The name and coordinates of the nearest park, grocery store, and library meeting the criteria established in 10 TAC §11.7(2) as well as the name and coordinates of the elementary school of attendance remain the same;

(I) For Applications funded through the USDA Set-Aside; year of initial construction as a residential Development remains the same or is not earlier;

(J) If a high quality Pre-Kindergarten is to be provided under §11.6(3)(C)(v), the election must be made at pre-application and may not change at full Application.

(K) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least 5% of the total Units are restricted to serve households at or below 30% of AMGI (restrictions elected under other point items may count) and the Housing Tax Credit funding request for the proposed Development meet one of the levels described in clauses (i) - (iv) of this subparagraph:

(i) the Development leverages CDBG Disaster Recovery, HOPE VI, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9% of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) if the Housing Tax Credit funding request is less than 9% of the Total Housing Development Cost (3 points); or

(iii) if the Housing Tax Credit funding request is less than 10% of the Total Housing Development Cost (2 points); or

(iv) if the Housing Tax Credit funding request is less than 11% of the Total Housing Development Cost (1 point).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50% of the Developer Fee can be deferred. Where costs or financing change after completion of underwriting or award (whichever occurs later), the points attributed to an Application under this scoring item will not be reassessed unless there is clear evidence that the information in the Application was intentionally misleading or incorrect.

(5) Extended Affordability. (§§2306.6725(a)(5) and (7); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) An Application may qualify to receive up to four (4) points for this item.

(A) Development Owners that agree to extend the Affordability Period for a Development to 45 years total. (4 points)

(B) Development Owners that agree to extend the Affordability Period for a Development to 40 years total. (3 points)

(C) Development Owners that agree to extend the Affordability Period for a Development to 35 years total. (2 points)

(6) Historic Preservation. (§2306.6725(a)(6); §42(m)(1)(C)(x)).

(A) An Application may qualify to receive five (5) points if;

(i) For Developments with under 100 total Units at least 55% of the residential Units shall be constructed fully or partially within the Certified Historic Structure.

(ii) For Developments with 100 total Units or more, at least 55 of the residential Units shall be constructed fully or partially within the Certified Historic Structure.

(B) To qualify for points, the Development must receive historic tax credits before or by the issuance of Forms 8609. The Application must include either documentation from the Texas Historical Commission that the Property is currently a Certified Historic Structure, or documentation determining preliminary eligibility for Certified Historic Structure status and evidence that the Texas Historic Commission received the request for determination of preliminary eligibility and supporting information on or before February 1 of the current year (5 points).

(7) Right of First Refusal. (§2306.6725(b)(1); §42(m)(1)(C)(viii)). An Application may receive points under subparagraphs (A) or (B) of this paragraph.

(A) An Application may qualify to receive (1 point) for Development Owners that will agree to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with Tex. Gov't Code, §2306.6726 and the Department's rules including §10.407 of this title (relating to Right of First Refusal) and §10.408 of this title (relating to Qualified Contract Requirements).

(B) The Development at the time of LURA execution is single family detached homes on separate lots or is organized as condominiums under Chapter 81 or 82 of the Texas Property Code and commits to offer a right of first refusal to tenants of the property to purchase the dwelling at a selected term but no earlier than the end of the Compliance Period and no later than the Extended Use Period. A de minimis amount of a participating tenant's rent may be attributed to the purchase of a Unit. Such commitment will be reflected in the LURA for the Development. The Applicant must provide a description of how they will implement the 'rent-to-own' activity, how they will make tenants aware of the opportunity, and how they will implement the right at the end of the selected term. If a Development is layered with National Housing Trust Funds, HOME-ARP, or another MFDL source where homeownership is not an eligible activity, the right of first refusal may not be earlier than the end of the Federal Affordability Period. §42(m)(1)(C)(viii). (1 point)

(8) Funding Request Amount. The Application requests no more than 100% of the amount of LIHTC available within the subregion or set-aside as determined by the regional allocation formula on or before December 1, 2023. (1 point)

(9) Readiness to Proceed. The Application includes a certification that site acquisition and construction permit submission will occur on or before the last day of March or as otherwise permitted under subparagraph (C) of this paragraph. These points are not available in the At-Risk or USDA Set-Asides. (1 point)

(A) Applications must include an acknowledgement from all lenders and the syndicator of the required closing date.

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to acquire the site and submit for construction permits by the March deadline will result in penalty under 10 TAC §11.9(f), as determined solely by the Board.

(C) Applications that remain on the waiting list after awards are made in late July that ultimately receive an award will receive an extension of the March deadline equivalent to the period of time between the late July meeting and the date that the Commitment Notice for the Application is issued.

(f) Factors Affecting Scoring and Eligibility in current and future Application Rounds. Staff may recommend to the Board and the Board may find that an Applicant or Affiliate should be ineligible to compete in the following year's competitive Application Round or that it should be assigned a penalty deduction in the following year's competitive Application Round of no more than two points for each submitted Application (Tex. Gov't Code §2306.6710(b)(2)) because it meets the conditions for any of the items listed in paragraphs (1) - (3) of this subsection. For those items pertaining to non-statutory deadlines, an exception to the penalty may be made if the Board or Executive Director, as applicable, makes an affirmative finding setting forth that the need for an extension of the deadline was beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of deduction by the Board must include notice from the Department to the affected party not less than 14 days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point deductions. The Executive Director may make a determination that the matter does not warrant point deduction only for paragraph (1) of this subsection. (§2306.6710(b)(2)) Any deductions assessed by the Board for paragraph (1), (2), (3), or (4) of this subsection based on a Housing Tax Credit Commitment from a preceding Application round will be attributable to the Applicant or Affiliate of an Application submitted in the Application round referenced above.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline or the 10% Test deadline (relating to either submission or expenditure).

(2) If the Applicant or Affiliate failed to meet the federal commitment or expenditure requirements, deadlines to enter into a Contract or close a Direct Loan, or did not meet benchmarks of their Contract with the Department.

(3) If the Applicant or Affiliate, in the Competitive HTC round immediately preceding the current round, failed to meet the deadline to both close financing and provide evidence of an executed construction contract under subsection (c)(9) of this section (related to Readiness to Proceed).

(4) If the Developer or Principal of the Applicant has violated or violates the Adherence to Obligations.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

(a) The purpose of the Third Party Request for Administrative Deficiency (RFAD) process is to allow an unrelated person or entity to bring new, material information about an Application to staff's attention. Such Person may request staff to consider whether a matter in an Application in which the Person has no involvement should be the subject of an Administrative Deficiency. While an Administrative Deficiency may be issued as the result of an RFAD, not all RFADs will result in an Administrative Deficiency being issued.

(b) Staff will consider each RFAD received and proceed as it deems appropriate under the applicable rules including, if the Application in question has a noncompetitive score relative to other Applications in the same Set-Aside or subregion or will not be eligible for an award through the collapse as outlined in §11.6(3) of this chapter

(related to Competitive HTC Allocation Process), not reviewing the matter further.

(c) If the assertion(s) in the RFAD describe matters that are part of the Application review process, and the RFAD does not contain information not present in the Application, staff will not review or act on it.

(d) The RFAD and any testimony presented to the Board regarding the result of an RFAD may not be used to appeal staff decisions regarding competing Applications (§2306.6715(b)). Any RFAD that questions a staff decision regarding staff's scoring of an Application filed by another Applicant will be disregarded.

(e) Requestors must provide, at the time of filing the request all information that the requestor offers in support of the deficiency. A copy of the request and supporting information must be provided by the requestor directly to the Applicant at the same time it is provided to the Department. Requestors must provide sufficient credible evidence that, if confirmed, would substantiate the deficiency request. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered. An RFAD that expresses the requestor's opinion will not be considered.

(f) Staff shall provide to the Board a written report summarizing each third party request for administrative deficiency and the manner in which it was addressed. Interested persons may provide testimony on this report before the Board takes any formal action to accept the report. When the Board receives a report on the disposition of RFADs it may, for any staff disposition contained in the report, change the conclusion if it believes the change is necessary to bring the result into compliance with applicable laws and rules as construed by the Board; or if based on public testimony, it believes staff's conclusion should be revisited, it may remand the RFAD to staff for further consideration, which may result in a reaffirmation, reversal, or modification.

(g) The results of a RFAD may not be appealed by the requestor, and testimony to the Board arguing staff's determination will not be considered unless the requestor can show that staff failed to follow the applicable rule.

(h) A scoring notice or termination notice that results from a RFAD may be appealed by the Applicant as further described in §11.902 of this chapter, relating to Appeals Process.

(i) Information received after the RFAD deadline will not be considered by staff or presented to the Board unless the information is of such a matter as to warrant a termination notice.

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

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TRD-202303356
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.101. Site and Development Requirements and Restrictions.

(a) Site Requirements and Restrictions. The purpose of this section is to identify specific requirements and restrictions related to a Development Site seeking multifamily funding or assistance from the Department.

(1) Floodplain. New Construction or Reconstruction Developments located within a 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. The Applicant will have to use floodplain maps and comply with regulation as they exist at the time of commencement of construction. Even if not required by such provisions, the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent federal or local requirements they must also be met. Applicants requesting NHTF funds from the Department must also meet the federal environmental provisions under 24 CFR §93.301(f)(1)(vi). Applicants requesting HOME, HOME-ARP, or NSP PI funds from the Department must meet the federal environmental provisions under 24 CFR Part 58, as in effect at the time of execution of the Contract between the Department and the Owner. If no FEMA Flood Insurance Rate Maps are available for the proposed Development Site, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from HUD or USDA are exempt from this requirement, to the extent NHTF is not being requested from the Department. All Developments located within a 100 year floodplain must state in the Tenant Rights and Resource Guide that part or all of the Development Site is located in a floodplain, and that it is encouraged that they consider getting appropriate insurance or take necessary precautions. However, where existing and ongoing federal assistance is not applicable such Rehabilitation (excluding Reconstruction) Developments will be allowed in the 100 year floodplain provided the local government has undertaken and can substantiate sufficient mitigation efforts and such documentation is submitted in the Application or the existing structures meet the requirements that are applicable for New Construction or Reconstruction Developments, as certified to by a Third Party engineer.

(2) Undesirable Site Features.

(A) An Undesirable Site Feature will render an Application ineligible unless acceptable mitigation as determined by staff or the Board is undertaken. For Competitive HTC Applications, if staff identifies an undesirable site feature reflected in clause (i) - (x) of subparagraph (E) and it was not disclosed, the Application shall be terminated by staff. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under clause (xi) of subparagraph (E), staff may issue an Administrative Deficiency. In the event that staff cannot reasonably conclude whether a feature is considered undesirable, it may defer to the Board for decision.

(B) Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA) and Developments encumbered

by a TDHCA LURA the earlier of the first day of the Application Acceptance Period for HTC, Application Acceptance Date for Direct Loan, or date the pre-application is submitted (if applicable) may be granted an exemption by staff; however, depending on the undesirable site feature(s) staff may recommend mitigation still be provided as appropriate. Such an exemption must be requested at the time of or prior to the filing of an Application. Historic Developments that would otherwise qualify under §11.9(e)(6) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability) may be granted an exemption, and such exemption must be requested at the time of or prior to the filing of an Application.

(C) Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit a request for pre-determination at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Undesirable Site Features become available while the Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and may result in an Administrative Deficiency or re-evaluation.

(D) If a state or federal cognizant agency would require a new facility under its jurisdiction to have a minimum separation from housing, the Department will defer to that agency and require the same separation for a new housing facility near an existing regulated or registered facility. In addition to these limitations, a Development Owner must ensure that the proposed Development Site and all construction thereon comply with all applicable state and federal requirements regarding separation for safety purposes.

(E) The Undesirable Site Features include those described in clauses (i) - (xi) of this subparagraph. The distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the undesirable feature, unless otherwise noted below. Where there is a local ordinance that specifies the proximity of such undesirable feature to a multifamily development that has smaller distances than the minimum distances noted below, then such smaller distances may be used and documentation such as a copy of the local ordinance identifying such distances relative to the Development Site must be included in the Application. Pre-existing zoning does not meet the requirement for a local ordinance.

(i) Development Sites located within 300 feet of junkyards. For purposes of this paragraph, a junkyard shall be defined as stated in Texas Transportation Code §396.001;

(ii) Development Sites located within 300 feet of an active solid waste facility, sanitary landfill facility, waste transfer station, or illegal dumping sites (as such dumping sites are identified by the local municipality);

(iii) Development Sites located within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined in Local Government Code §243.002, or as zoned, licensed and regulated as such by the local municipality;

(iv) Development Sites located within 500 feet of active railroad tracks, measured from the closest rail to the boundary of the Development Site, unless:

(I) the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone covering the area within 500 feet of the Development Site;

(II) the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(III) the railroad in question is commuter or light rail;

(v) Development Sites located within 500 feet of heavy industry (i.e. facilities that require extensive use of land and machinery, produce high levels of external noise such as manufacturing plants, or that maintain fuel storage facilities, to the extent that these qualifying items are consistent with the general characteristics of heavy industry. Gas stations and other similar facilities that are not consistent with the characteristics of heavy industry are not considered an undesirable site feature;

(vi) Development Sites located within 10 miles of a nuclear plant;

(vii) Development Sites in which the buildings are located within the accident potential zones or the runway clear zones of any airport;

(viii) Development Sites that contain one or more pipelines, situated underground or aboveground, which carry highly volatile liquids or Development Sites located adjacent to a pipeline easement (for a pipeline carrying highly volatile liquids), the Application must include a plan for developing near the pipeline(s) and mitigation, if any, in accordance with a report conforming to the Pipelines and Informed Planning Alliance (PIPA);

(ix) Development Sites located within 2 miles of refineries capable of refining more than 100,000 barrels of oil daily;

(x) Development Sites that are located in a Clear Zone, any Accident Potential Zone, or within any Noise Contour of 65 decibels or greater, as reflected in a Joint Land Use Study for any military Installation, except that if the Development Site is located in a Noise Contour between 65 and 70 decibels, the Development Site will not be considered to have an Undesirable Site Feature if the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(xi) Any other Site deemed unacceptable, which would include, without limitation, those with exposure to an environmental factor that may adversely affect the health and safety of the residents or render the Site inappropriate for housing use and which cannot be adequately mitigated. If staff believe that a Site should be deemed unacceptable under this provision due to information that was not included in the Application, it will provide the Applicant with written notice and an opportunity to respond.

(3) Neighborhood Risk Factors.

(A) A Neighborhood Risk Factor will render an application ineligible unless acceptable mitigation as determined by staff or the board is undertaken. If the Development Site has any of the characteristics described in subparagraph (D) of this paragraph, the Applicant must disclose the presence of such characteristics in the Application submitted to the Department. For Competitive HTC Applications, should staff determine that the Development Site has any of the characteristics described in subparagraph (D) of this paragraph and such

characteristics were not disclosed, the Application shall be terminated by staff.

(B) Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit the documentation described under subparagraph (E) of this paragraph at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development or Direct Loan only Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and staff may issue an Administrative Deficiency.

(C) The presence of any characteristics listed in subparagraph (D) of this paragraph will prompt staff to perform an assessment of the Development Site and neighborhood, which may include a site visit. Mitigation to be considered by staff is identified in subparagraph (E) of this paragraph. Preservation of affordable units alone does not present a compelling reason to support a conclusion of eligibility.

(D) The Neighborhood Risk Factors include those noted in clauses (i) - (iii) of this subparagraph and additional information as applicable to the neighborhood risk factor(s) disclosed as provided in subparagraph (E) of this paragraph must be submitted in the Application. In order to be considered an eligible Site despite the presence of Neighborhood Risk Factors, an Applicant must demonstrate actions being taken that would lead staff to conclude that there is a high probability and reasonable expectation the risk factor will be sufficiently mitigated or significantly improved prior to placement in service and that the risk factor demonstrates a positive trend and continued improvement. Conclusions for such reasonable expectation may need to be affirmed by an industry professional, as appropriate, and may be dependent upon the severity of the Neighborhood Risk Factor disclosed.

(i) The Development Site is located within a census tract that has a poverty rate above 40% for individuals (or 55% for Developments in regions 11 and 13). Rehabilitation Developments are exempt from this Neighborhood Risk Factor.

(ii) The Development Site is New Construction or Reconstruction and is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com. Rehabilitation developments are exempt from this Neighborhood Risk Factor.

(iii) The Development Site is located within the attendance zone of an elementary school, a middle school or a high school that had a TEA Accountability Rating of "Not Rated: Senate Bill 1365" for 2022 and a rating of D for 2023.

(I) In districts with district-wide enrollment or choice districts an Applicant shall use the rating of the closest elementary, middle and high school, respectively, which may possibly be attended by the tenants in determining whether or not disclosure is required. Schools with an application process for admittance, limited enrollment or other requirements that may prevent a child from attending will not be considered as the closest school or the school which attendance zone contains the site.

(II) School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating.

(III) If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), middle schools (typically grades 6-8 or 7-8) and high schools (typically grades 9-12), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions. In determining the ratings for all three levels of schools, ratings for all grades K-12 must be included, meaning that two or more schools' ratings may be combined. Sixth grade centers will be considered as part of the middle school rating.

(IV) Elderly Developments, Supportive Housing SRO Developments or Supportive Housing Developments where all Units are Efficiency Units, and Applications in the USDA Set-Aside for Rehabilitation of existing properties are exempt and are not required to provide mitigation for this subparagraph, but are still required to provide rating information in the Application.

(E) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and should include the measures described in clauses (i) - (iii) of this subparagraph or such other mitigation as the Applicant determines appropriate to support a finding of eligibility. If staff determines that the Development Site cannot be found eligible and the Applicant appeals that decision to the Board, the Applicant may not present new information at the Board meeting.

(i) Mitigation for Developments in a census tract that has a poverty rate that exceeds 40% may include a resolution from the Governing Body of the appropriate municipality or county containing the Development, acknowledging the high poverty rate and authorizing the Development to move forward. If the Development is located in the ETJ, the resolution would need to come from the county.

(ii) Evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons or the data and evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location. The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. The data must include incidents reported during the entire calendar year previous to the year of Application. Violent crimes reported through the date of Application submission may be requested by staff as part of the assessment performed under sub-

paragraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sheriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts may be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway there is crime data that reflects a favorable downward trend in crime rates.

(iii) Evidence of mitigation for each of the schools in the attendance zone that has a TEA Accountability Rating of "Not Rated: Senate Bill 1365" for 2022 and a rating of D for 2023 must meet the requirements of subclauses (I) and (II) of this clause which will be a requirement of the LURA for the duration of the Affordability Period and cannot be used to count for purposes of meeting the threshold requirements under subparagraph (7)(B)(ii) of this paragraph.

(I) Documentation from a person authorized to speak on behalf of the school district with oversight of the school in question that indicates the specific plans in place and current progress towards meeting the goals and performance objectives identified in the Campus Improvement Plan and in restoring the school(s) to an acceptable rating status. The documentation should include actual data from progress already made under such plan(s) to date demonstrating favorable trends and should speak to the authorized persons assessment that the plan(s) and the data supports a reasonable conclusion that the school(s) will have an acceptable rating by the time the proposed Development places into service. The letter may, to the extent applicable, identify the efforts that have been undertaken to increase student performance, decrease mobility rate, benchmarks for re-evaluation, increased parental involvement, plans for school expansion, plans to implement early childhood education, and long- term trends that would point toward their achieving an A, B, or C Rating by the time the Development is placed in service. The letter from such education professional could also speak to why they believe the staff tasked with carrying out the plan will be successful at making progress towards acceptable student performance considering that prior Campus Improvement Plans were unable to do so. Such assessment could include whether the team involved has employed similar strategies at prior schools and were successful.

(II) The Applicant has committed that it will operate an after school learning center that offers at a minimum 15 hours of weekly, organized, on-site educational services provided to elementary, middle and high school children by a dedicated service coordinator or Third-Party entity which includes at a minimum: homework assistance, tutoring, test preparation, assessment of skill deficiencies and provision of assistance in remediation of those deficiencies (e.g., if reading below grade level is identified for a student, tutoring in reading skills is provided), research and writing skills, providing a consistent weekly schedule, provides for the ability to tailor assistance to the age and education levels of those in attendance, and other evidence-based approaches and activities that are designed to augment classroom performance. Up to 20% of the activities offered may also include other enrichment activities such as music, art, or technology.

(F) In order for the Development Site to be found eligible, including when mitigation described in subparagraph (E) of this paragraph is not provided in the Application, despite the existence of one or more Neighborhood Risk Factors, the Applicant must explain how the use of Department funds at the Development Site is consistent with the goals in clauses (i) - (iii) of this subparagraph. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(i) Preservation of existing occupied affordable housing units to ensure they are safe and suitable or the new construction of high quality affordable housing units that are subject to federal rent or income restrictions.

(ii) Determination that the risk factor(s) that has been disclosed are not of such a nature or severity that should render the Development Site ineligible based on the assessment and mitigation provided under subparagraphs (C) and (D) of this paragraph.

(iii) No mitigation was provided, or in staff's determination the mitigation was considered unsatisfactory and the Applicant has requested a waiver of the presence of Neighborhood Risk Factors on the basis that the Development is necessary to enable the state, a participating jurisdiction, or an entitlement community to comply with its obligation to affirmatively further fair housing, a HUD approved Conciliation Agreement, or a final and non-appealable court order and such documentation is submitted with the disclosure.

(4) Site and Neighborhood Standards (Direct Loan only). A New Construction Development, as defined by the applicable federal fund source, requesting federal funds must meet the Site and Neighborhood Standards in 24 CFR §983.57(e)(2) or (3). A Development requesting NHTF funds that meets the federal definition of reconstruction in 24 CFR §93.2 must also meet these standards.

(b) Development Requirements and Restrictions. The purpose of this subsection is to identify specific restrictions on a proposed Development requesting multifamily funding by the Department.

(1) Ineligible Developments. A Development shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply.

(A) General Ineligibility Criteria include:

(i) Developments such as hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities that are usually classified as transient housing (as provided in Code §42(i)(3)(B)(iii) and (iv));

(ii) any Development with any building(s) with four or more stories that does not include an elevator. Developments where topography or other characteristics of the Site require basement splits such that a tenant will not have to walk more than two stories to fully utilize their Unit and all Development amenities, will not require an elevator;

(iii) a Housing Tax Credit Development that provides on-site continual or frequent nursing, medical, or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(iv) a Development that proposes population limitations that violate §1.15 of this title (relating to Integrated Housing Rule);

(v) a Development seeking Housing Tax Credits that will not meet the general public use requirement under Treasury Regulation, §1.42-9 or a documented exception thereto;

(vi) a Development utilizing a Direct Loan that is subject to the Housing and Community Development Act, 104(d) requirements and proposing Rehabilitation or Reconstruction, if the Applicant is not proposing at least the one-for-one replacement of the existing Unit mix. Adding additional units would not violate this provision; or

(vii) any New Construction or Reconstruction proposing more than 30% efficiency and/or one-Bedroom Units. This requirement will not apply to Elderly or Supportive Housing Developments. For Historic Developments, this requirement will not apply to any units constructed within the Historic structure. For any New Construction or Reconstruction undertaken as part of a Historic Application, those newly constructed or reconstructed Units must meet this standard. The Units that are part of the Historic structure will not be included in the total when determining if the Application meets this requirement.

(B) Ineligibility of Elderly Developments include:

(i) any Elderly Development of two stories or more that does not include elevator service for any Units or Common Areas above the ground floor;

(ii) any Elderly Development with any Units having more than two Bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, or security officer. These employee Units must be specifically designated as such; or

(iii) any New Construction, Reconstruction, or Adaptive Reuse Elderly Development (including Elderly in a Rural Area) proposing more than 70% two-Bedroom Units.

(C) Ineligibility of Developments within Certain School Attendance Zones. Any Development that falls within the attendance zone of a school that has a TEA Accountability Rating of F for 2023 and a rating of "Not Rated: Senate Bill 1365" for 2022 is ineligible with no opportunity for mitigation. Developments that are encumbered by a TDHCA LURA on the first day of the Application Acceptance Period or at the time of Pre-application (if applicable), an Elderly Development, or a Supportive Housing SRO Development or Supportive Housing Development where all Units are Efficiency Units are exempt. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(D) Ineligibility of Developments within Areas of High Crime. Any Development involving New Construction or Adaptive Reuse located in an area described in (a)(3)(B)(ii) of this subsection and for which mitigation submitted under subparagraph (D)(ii) of this paragraph still yields a Part I violent crime rate greater than 18 per 1,000 persons (annually) is ineligible with no opportunity for mitigation. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(2) Development Size Limitations. The minimum Development size is 16 Units. Competitive Housing Tax Credit or Multifamily Direct Loan-only Developments involving New Construction or Adaptive Reuse in Rural Areas are limited to a maximum of 80 total Units. Tax-Exempt Bond Developments involving New Construction or Adaptive Reuse in a Rural Area must meet the Development size limitation and corresponding capture rate requirements in §11.302(i)(1)(C) of this chapter (related to Feasibility Conclusion). Rehabilitation Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance, and meet the minimum Rehabilitation amounts identified in subparagraphs (A) - (C) of this paragraph. Such amounts must be maintained through the issuance of IRS Forms 8609. For Developments with multiple buildings that have varying placed in service dates, the earliest date will be used for purposes of establishing the minimum Rehabilitation amounts. Applications must meet the Rehabilitation amounts identified in subparagraphs (A), (B) or (C) of this paragraph. For Tax-Exempt Bond Developments that include existing USDA funding that is continuing or new USDA funding, staff may consider the cost standard under subparagraph (A) of this paragraph on a case-by-case basis.

(A) For Housing Tax Credit Developments under the USDA Set-Aside the Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work.

(B) For Tax-Exempt Bond Developments, less than 20 years old, based on the placed in service date, the Rehabilitation will involve at least $20,000 per Unit in Building Costs and Site Work. If such Developments are greater than or equal to 20 years old, based on the placed in service date, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(C) For all other Developments, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (O) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (D) - (L), (N), and (O) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), (H) or (N) of this paragraph; however, access must be provided to a comparable amenity in a Common Area. All amenities listed below must be at no charge to the residents. Residents must be provided written notice of the applicable required amenities for the Development. The Board may waive one or more of the requirements of this paragraph for Developments that will include Historic Tax Credits, with evidence submitted with the request for amendment that the amenity has not been approved by the Texas Historical Commission or National Park Service, as applicable. Applicants for Multifamily Direct Loans should be aware that certain amenities are not eligible for Direct Loan funding, including without limitation, detached community spaces, furnishings, swimming pools, athletic courts, and playgrounds, as more fully described at §13.3 of this title (relating to General Loan Requirements). Amenities include:

(A) All Bedrooms, the dining room and living room in Units must be wired with current cabling technology for data and phone;

(B) Laundry connections;

(C) Exhaust/vent fans (vented to the outside) in the bathrooms;

(D) Screens on all operable windows;

(E) Disposal (not required for USDA Rehabilitation);

(F) Energy-Star or equivalently rated dishwasher; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit;

(G) Energy-Star or equivalently rated refrigerator;

(H) Oven/Range;

(I) Blinds or window coverings for all windows;

(J) At least one Energy-Star or equivalently rated ceiling fan per Unit;

(K) Energy-Star or equivalently rated lighting in all Units;

(L) All areas of the Unit (excluding exterior storage space on an outdoor patio/balcony) must have heating and air-conditioning;

(M) Adequate parking spaces consistent with local code, unless there is no local code, in which case the requirement would be one and a half spaces per Unit for non-Elderly Developments and one space per Unit for Elderly Developments. The minimum number of required spaces must be available to the tenants at no cost. If parking requirements under local code rely on car sharing or similar arrangements, the LURA will require the Owner to provide the service at no cost to the tenants throughout the Affordability Period. If a waiver or variance of local code parking requirements has been requested then evidence to that effect must be included in the Application;

(N) Energy-Star or equivalently rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work); and

(O) Adequate accessible parking spaces consistent with the requirements of the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 FR 29671, the Texas Accessibility Standards, and if covered by the Fair Housing Act, HUD's Fair Housing Act Design Manual.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph:

(i) Developments with 16 to 40 Units must qualify for two (2) points;

(ii) Developments with 41 to 76 Units must qualify for four (4) points;

(iii) Developments with 77 to 99 Units must qualify for seven (7) points;

(iv) Developments with 100 to 149 Units must qualify for ten (10) points;

(v) Developments with 150 to 199 Units must qualify for fourteen (14) points; or

(vi) Developments with 200 or more Units must qualify for eighteen (18) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all residents and made available throughout normal business hours and maintained throughout the Affordability Period. Residents must be provided written notice of the elections made by the Development Owner. If fees or deposits in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the requirement. All amenities must meet all applicable accessibility standards, including those adopted by the Department, and where a specific space or size requirement for a listed amenity is not specified then the amenity must be reasonably adequate based on the Development size. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the test applied based on the number of Units per individual site and the amenities selected must be distributed proportionately across all sites. A Development composed of non-contiguous single family sites must provide a combination of unit and common amenities to equal the appropriate points under subparagraph (A) of this paragraph for the Development size. In the case of additional phases of a Development any amenities that are anticipated to be shared with the first phase development cannot be claimed for purposes of meeting this requirement for the second phase. The second phase must include enough points to meet this requirement that are provided on the Development Site, regardless of resident access to the amenity in another phase. All amenities must be available to all Units via an accessible route.

(C) The common amenities and respective point values are set out in clauses (i) - (v) of this subparagraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of amenities from each section. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) Community Space for Resident Supportive Services includes:

(I) Except in Applications where more than 10% of the Units in the proposed Development are Supportive Housing SRO Units, an Application may qualify to receive half of the points required under §11.101(b)(5)(A)(i) - (vi) by electing to provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site. To receive the points the Applicant must commit to all of items (-a-) - (-c-) of this subclause.

(-a-) Space and Design. The educational space for the HQ Pre-K program must be provided on the Development Site and must be a suitable and appropriately designed space for educating children that an independent school district or open-enrollment charter school can utilize to establish and operate a HQ Pre-K program. This space includes at a minimum a bathroom and large closet in the classroom space; appropriate design considerations made for the safety and security of the students; including limited and secure ingress and egress to the classroom space; and satisfaction of the requirements of all applicable building codes for school facilities. The Applicant must provide in the Application a copy of the current school facility code requirements applicable to the Development Site and Owner and Architect certifications that they understand the associated space and design requirements reflected in those code requirements. The Application must also include acknowledgement by all lenders, equity providers and partners that the Application includes election of these points.

(-b-) Educational Provider Agreement. The Applicant must enter into an agreement, addressing all items as described in subitems (-1-) - (-5-) of this item, and provide evidence of such agreement to the Department on or before submission of the Cost Certification. Lack of evidence of such agreement by the deadline will be cause for rescission of the Carryover Agreement for Competitive HTC Applications.

(-1-) The agreement must be between the Owner and an Educational Provider.

(-2-) The agreement must reflect that at the Development Site the Educational Provider will provide a HQ Pre-K program, in accordance with Texas Education Code Chapter 29, Subchapter E-1, at no cost to residents of the proposed Development and that is available for general public use, meaning students other than those residing at the Development may attend.

(-3-) Such agreement must reflect a provision that the option to operate the HQ Pre-K program in the space at the Development Site will continue to be made available to the school or provider until such time as the school or provider wishes to withdraw from the location. This provision will not limit the Owner's right to terminate the agreement for good cause.

(-4-) Such agreement must set forth the responsibility of each party regarding payment of costs to use the space, utility charges, insurance costs, damage to the space or any other part of the Development, and any other costs that may arise as the result of the operation of the HQ Pre-K program.

(-5-) The agreement must include provision for annual renewal, unless terminated under the provisions of item (-c-) of this subclause.

(-c-) If an Education Provider who has entered into an agreement becomes defunct or elects to withdraw from the agreement and provision of services at the location, as provided for in subitem (-b-)(-3-) of this subclause, the Owner must notify the Texas Commissioner of Education at least 30 days prior to ending the agreement to seek out any other eligible parties listed in subitem (-b-)(-1-) of this subclause above. If another interested open-enrollment charter school or school district is identified by the Texas Commissioner of Education or the Owner, the Owner must enter into a subsequent agreement with the interested open-enrollment charter school or school district and continue to offer HQ Pre-K services. If another interested provider cannot be identified, and the withdrawing provider certifies to the Department that their reason for ending the agreement is not due to actions of the Owner, the Owner will not be considered to be in violation of its commitment to the Department. If the Owner is not able to find a provider, they must notify the Commissioner annually of the availability of the space.

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (4 points).

(III) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (2 points).

(IV) Service provider office in addition to leasing offices (1 point).

(ii) Safety amenities include:

(I) Controlled gate access for entrance and exit areas, intended to provide access that is limited to the Development's tenancy (1 point).

(II) Secured Entry (applicable only if all Unit entries are within the building's interior) (1 point).

(III) Twenty-four hour, seven days a week monitored camera/security system in each building. Monitoring may be on-site or off-site (2 points).

(IV) Twenty-four hour, seven days a week recorded camera / security system in each building (1 point).

(V) The provision of a courtesy patrol service that, at a minimum, answers after-hour resident phone calls regarding noise and crime concerns or apartment rules violations and that can dispatch to the apartment community a courtesy patrol officer in a timely manner (3 points).

(iii) Health/Fitness/Play amenities include:

(I) Accessible walking/jogging path, equivalent to the perimeter of the Development or a length that reasonably achieves the same result, separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point).

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point).

(III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points).

(IV) One Children's Playscape Equipped for five to 12 year olds, or one Tot Lot (2 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (V) of this clause is not selected.

(V) Two Children's Playscapes Equipped for five to 12 year olds, two Tot Lots, or one of each (4 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (IV) of this clause is not selected.

(VI) Horseshoe pit; putting green; shuffleboard court; pool table; ping pong table; or similar equipment in a dedicated location accessible to all residents to play such games (1 point).

(VII) Swimming pool (5 points).

(VIII) Splash pad/water feature play area (3 points).

(IX) Sport Court or field (including, but not limited to, Tennis, Basketball, Volleyball, Pickleball, Soccer, or Baseball Field) (2 points).

(iv) Design / Landscaping amenities include:

(I) Full perimeter fencing that contains the parking areas and all amenities (excludes guest or general public parking areas) (2 points).

(II) Enclosed community sun porch or covered community porch/patio (1 point).

(III) Dog Park area that is fully enclosed (the perimeter fencing may be used for part of the enclosure) and intended for tenant owned dogs to run off leash (requires that the Development allow dogs) (2 points).

(IV) Shaded rooftop or structural viewing deck of at least 500 square feet (2 points).

(V) Porte-cochere (1 point).

(VI) Lighted pathways along all accessible routes (1 point).

(VII) a resident-run community garden with annual soil preparation and mulch provided by the Owner and access to water (which may be subject to local water usage restrictions) (1 point).

(v) Community Resources amenities include:

(I) Community laundry room with at least one washer and dryer for every 40 Units (2 points).

(II) Barbecue grill and picnic table with at least one of each for every 50 Units (1 point). Grill must be permanently installed (no portable grills).

(III) Business center with workstations and seating internet access, 1 printer and at least one scanner which may be integrated with the printer, and either 2 desktop computers or laptops available to check-out upon request (2 points).

(IV) Furnished Community room (2 points).

(V) Library with an accessible sitting area (separate from the community room) (1 point).

(VI) Activity Room stocked with supplies (Arts and Crafts, board games, etc.) (2 points).

(VII) Community Dining Room with full or warming kitchen furnished with adequate tables and seating (3 points).

(VIII) Community Theater Room equipped with a 52 inch or larger screen or projection with surround sound equipment; DVD player or a streaming service at no cost to residents; and seating (3 points).

(IX) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 or more with coverage throughout the clubhouse or community building (1 point).

(X) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 with coverage throughout the Development (2 points).

(XI) Bicycle parking that allows for, at a minimum, one bicycle for every five Units, within reasonable proximity to each residential building that allows for bicycles to be secured with lock (lock not required to be provided to tenant) (1 point).

(XII) Package Lockers or secure package room. Automated Package Lockers or secure package room provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least one locker for every eight residential units (2 points).

(XIII) Recycling Service (includes providing a storage location and service for pick-up) (1 point).

(XIV) Community car vacuum station (1 point).

(XV) Access to onsite bike sharing services, provided tenants have short-term, autonomous access to community-owned bicycles, with at least one bicycle per 25 Units (1 point).

(6) Unit Requirements.

(A) Unit Sizes. Developments proposing New Construction or Reconstruction will be required to meet the minimum sizes of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with any selection criteria. Developments proposing Rehabilitation (excluding Reconstruction) or Supportive Housing Developments will not be subject to the requirements of this subparagraph. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements. The requirements are:

(i) four hundred fifty (450) square feet for an Efficiency Unit;

(ii) five hundred fifty (550) square feet for a one Bedroom Unit;

(iii) eight hundred (800) square feet for a two Bedroom Unit;

(iv) one thousand (1,000) square feet for a three Bedroom Unit; and

(v) one thousand, two-hundred (1,200) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of nine (9) points. Direct Loan Applications not layered with Housing Tax Credits must include enough amenities to meet a minimum of five (5) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the Affordability Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points. At least two (2) points must be selected from clause (iii), Energy and Water Efficiency Features, of this subparagraph.

(i) Unit Features include:

(I) Covered entries (0.5 point);

(II) Nine foot ceilings in living room and all Bedrooms (at minimum) (1 point);

(III) Microwave ovens (0.5 point);

(IV) Self-cleaning or continuous cleaning ovens (0.5 point);

(V) Storage room or closet, of approximately 9 square feet or greater, separate from and in addition to Bedroom, entryway or linen closets and which does not need to be in the Unit but must be on the Property site (0.5 point);

(VI) Covered patios or covered balconies (0.5 point);

(VII) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point);

(VIII) Built-in (recessed into the wall) shelving unit (0.5 point);

(IX) Breakfast Bar (a space, generally between the kitchen and dining area, that includes an area for seating although actual seating such as bar stools does not have to be provided) (0.5 point);

(X) Walk-in closet in at least one Bedroom (0.5 point);

(XI) 48-inch upper kitchen cabinets (1 point);

(XII) Kitchen island (0.5 points);

(XIII) Kitchen pantry with shelving (may include the washer/dryer unit for Rehabilitation Developments only) (0.5 point);

(XIV) Natural stone or quartz countertops in kitchen and bath (1 point);

(XV) Double vanity in at least one bathroom (0.5 point); and

(XVI) Hard floor surfaces in over 50% of unit NRA (0.5 point).

(ii) Development Construction Features include:

(I) Covered parking (may be garages or carports, attached or freestanding) and include at least one covered space per Unit (1.5 points);

(II) Thirty year roof (0.5 point);

(III) Greater than 30% stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious and metal siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

(IV) Electric Vehicle Charging Station (0.5 points);

(V) An Impact Isolation Class (IIC) rating of at least 55 and a Sound Transmission Class (STC) rating of 60 or higher in all Units, as certified by the architect or engineer of record (3 points); and

(VI) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Four (4) points may be selected from only one of the categories described in items (-a-) - (-d-) of this subclause. If the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(-a-) Enterprise Green Communities. The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at http://www.greencommunitiesonline.org.

(-b-) Leadership in Energy and Environmental Design (LEED). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(-c-) ICC/ASHRAE - 700 National Green Building Standard (NGBS). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

(-d-) 2018 International Green Construction Code.

(iii) Energy and Water Efficiency Features include:

(I) Energy-Star or equivalently rated refrigerator with icemaker (0.5 point);

(II) Energy-Star or equivalently rated laundry equipment (washers and dryers) for each individual Unit; must be front loading washer and dryer in required accessible Units (2 points);

(III) Recessed LED lighting or LED lighting fixtures in kitchen and living areas (1 point);

(IV) Energy-Star or equivalently rated ceiling fans in all Bedrooms (0.5 point);

(V) EPA WaterSense or equivalent qualified toilets in all bathrooms (0.5 point);

(VI) EPA WaterSense or equivalent qualified showerheads and faucets in all bathrooms (0.5 point);

(VII) 15 SEER HVAC, or in Region 13, an efficient evaporative cooling system. For Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, (1 point);

(VIII) 16 SEER HVAC, for New Construction or Rehabilitation (1.5 points);

(IX) A rainwater harvesting/collection system or locally approved greywater collection system (0.5 points);

(X) Wi-Fi enabled, Energy-Star or equivalently rated "smart" thermostats installed in all units (1 point); and

(XI) Solar panels installed, with a sufficient number of panels to reach a rated power output of at least 300 watts for each Low-Income Unit. (2 points).

(7) Resident Supportive Services. The resident supportive services include those listed in subparagraphs (A) - (E) of this paragraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of services from each section. Tax Exempt Bond Developments must select a minimum of eight points; Direct Loan Applications not layered with Housing Tax Credits must include enough services to meet a minimum of four points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this title (relating to Monitoring for Social Services) and maintained throughout the Affordability Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. A Development Owner may be required to substantiate such service(s) if requested by staff. Should the QAP in subsequent years provide different services than those listed in subparagraphs (A) - (E) of this paragraph, the Development Owner may request an Amendment as provided in §10.405(a)(2) of this chapter (relating to Amendments and Extensions). The services provided should be those that will directly benefit the Target Population of the Development. Residents must be provided written notice of the elections made by the Development Owner. No fees may be charged to the residents for any of the services, there must be adequate space for the intended services and services offered should be accessible to all (e.g. exercises classes must be offered in a manner that would enable a person with a disability to participate). Unless otherwise specified, services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) Transportation Supportive Services include:

(i) shuttle, at least three days a week, to a grocery store and pharmacy or a major, big-box retailer that includes a grocery store and pharmacy, OR a daily shuttle, during the school year, to and from nearby schools not served by a school bus system for children who live at the Development (3.5 points); and

(ii) monthly transportation to community/social events such as mall trips, community theatre, bowling, organized tours, etc. (1 point).

(B) Children Supportive Services include:

(i) provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site meeting the requirements of paragraph (5)(C)(i)(I) of this subsection. (Half of the points required under this paragraph); and

(ii) Twelve hours of weekly, organized, on-site services provided to K-12 children by a dedicated service coordinator or third-party entity. Services include after-school and summer care and tutoring, recreational activities, character building programs, mentee opportunities, test preparation, and similar activities that promote the betterment and growth of children and young adults (3.5 points).

(C) Adult Supportive Services include:

(i) Four hours of weekly, organized, in-person, hybrid, or virtual classes accessible to participants from a common area on site to an adult audience by persons skilled or trained in the subject matter being presented, such as English as a second language classes, computer training, financial literacy courses, homebuyer counseling, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);

(ii) annual income tax preparation (offered by an income tax prep service) or IRS-certified VITA (Volunteer Income Tax Assistance) program (offered by a qualified individual) that also emphasizes how to claim the Earned Income Tax Credit (1 point);

(iii) contracted career training and placement partnerships with local worksource offices, culinary programs, or vocational counseling services; may include resident training programs that train and hire residents for job opportunities inside the development in areas like leasing, tenant services, maintenance, landscaping, or food and beverage operation (2 points);

(iv) external partnerships for provision of weekly substance abuse meetings at the Development Site (1 point);

(v) reporting rent payments to credit bureaus for any resident who affirmatively elects to participate, which will be a requirement of the LURA for the duration of the Affordability Period (2 points); and

(vi) participating in a non-profit healthcare job training and placement service that includes case management support and other need-based wraparound services to reduce barriers to employment and support Texas healthcare institution workforce needs (2 points).

(D) Health Supportive Services include:

(i) food pantry consisting of an assortment of non-perishable food items and common household items (i.e. laundry detergent, toiletries, etc.) accessible to residents at least on a monthly basis or upon request by a resident. While it is possible that transportation may be provided to a local food bank to meet the requirement of this resident service, the resident must not be required to pay for the items they receive at the food bank (2 points);

(ii) annual health fair provided by a health care professional (1 point);

(iii) weekly exercise classes (offered at times when most residents would be likely to attend) (2 points); and

(iv) contracted onsite occupational or physical therapy services for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points).

(E) Community Supportive Services include:

(i) partnership with local law enforcement or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);

(ii) Notary Services during regular business hours (§2306.6710(b)(3)) (1 point);

(iii) twice monthly arts, crafts, and other recreational activities (e.g. Book Clubs and creative writing classes) (1 point);

(iv) twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, holiday celebrations, etc.) (1 point);

(v) specific service coordination services offered by a qualified Owner or Developer, qualified provider or through external, contracted parties for seniors, Persons with Disabilities or Supportive Housing (3 points);

(vi) weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc., and quarterly preventative maintenance including light bulb replacement) for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(vii) any of the programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601, et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of unplanned pregnancies; and encourages the formation and maintenance of two-parent families (1 point);

(viii) a part-time resident services coordinator with a dedicated office space at the Development or a contract with a third-party to provide the equivalent of 15 hours or more of weekly resident supportive services at the Development (2 points); and

(ix) provision, by either the Development Owner or a community partner, of an education tuition- or savings-match program or scholarships to residents who may attend college (2 points).

(8) Development Accessibility Requirements. All Developments must meet all specifications and accessibility requirements as identified in subparagraphs (A) - (F) of this paragraph and any other applicable state or federal rules and requirements. The accessibility requirements are further identified in the Certification of Development Owner as provided in the Application.

(A) The Development shall comply with the accessibility requirements under Federal law and as further defined in Chapter

1, Subchapter B of this title (relating to Accessibility Requirements). (§§2306.6722; 2306.6730).

(B) Regardless of building type, all Units accessed by the ground floor or by elevator (affected units) must comply with the visitability requirements in clauses (i) - (iii) of this subparagraph. Design specifications for each item must comply with the standards of the Fair Housing Act Design Manual. Buildings occupied for residential use on or before March 13, 1991 are exempt from this requirement. If the townhome Units of a Rehabilitation Development do not have a bathroom on the ground floor, the Applicant will not be required to add a bathroom to meet the requirements of clause (iii) of this subparagraph. Visitability requirements include:

(i) All common use facilities must be in compliance with the Fair Housing Design Act Manual;

(ii) To the extent required by the Fair Housing Design Act Manual, there must be an accessible or exempt route from common use facilities to the affected units; and

(iii) Each affected unit must include the features in subclauses (I) - (V) of this clause:

(I) At least one zero-step, accessible entrance;

(II) At least one bathroom or half-bath with toilet and sink on the entry level. The layout of this bathroom or half-bath must comply with one of the specifications set forth in the Fair Housing Act Design Manual;

(III) The bathroom or half-bath must have the appropriate blocking relative to the toilet for the later installation of a grab bar, if ever requested by the tenant of that Unit;

(IV) There must be an accessible route from the entrance to the bathroom or half-bath, and the entrance and bathroom must provide usable width; and

(V) Light switches, electrical outlets, and thermostats on the entry level must be at accessible heights.

(C) The Development Owner is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as substantial alteration, in accordance with Chapter 1, Subchapter B of this title (relating to Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act).

(E) For all Developments other than Direct Loan Developments, for the purposes of determining the appropriate distribution of accessible Units across Unit Types, assuming all the Units have similar features only the number of Bedrooms and full bathrooms will be used to define the Unit Type, but accessible Units must have an equal or greater square footage than the square footage offered in the smallest non-accessible Unit with the same number of Bedrooms and full bathrooms. For Direct Loan Developments, for purposes of determining the appropriate distribution of accessible Units across Unit Types, the definition of Unit Type will be used. However, a single story Unit may be substituted for a townhome Unit, if the single story Unit contains the same number of Bedrooms and bathrooms and has an equal or greater square footage.

(F) Alternative methods of calculating the number of accessible Units required in a Development must be approved by the Department prior to award or allocation.

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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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.

This subchapter establishes the procedural requirements for Application submission. Only one Application may be submitted for a Development Site in an Application Round. While the Application Acceptance Period is open or prior to the Application deadline, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original pre-application fee (as applicable) that was paid as long as no substantive evaluation was performed by the Department and the re-submitted Application relates to the same Development Site, consistent with §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability). Applicants are subject to the schedule of fees as set forth in §11.901 of this chapter (relating to Fee Schedule).

(1) General Requirements.

(A) An Applicant requesting funding from the Department must submit an Application in order to be considered for an award. An Application must be complete (including all required exhibits and supporting materials) and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §11.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application; provided, however, that errors in the calculation of applicable fees may be cured via an Administrative Deficiency. The deficiency period for curing fee errors will be 5:00 p.m. on the third business day following the date of the deficiency notice and may not be extended. Failure to cure such an error timely will be grounds for termination.

(B) Applying for multifamily funds from the Department is a technical process that must be followed completely. As a result of the competitive nature of some funding sources, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible. If checks or original Carryover Allocation Agreements are physically delivered to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. All Applications and all related materials are to be delivered electronically pursuant to the Multifamily Programs Procedures Manual. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Applicants must ensure that all documents are legible, properly organized and tabbed, and that materials are fully readable by the Department.

(C) The Applicant must timely upload a PDF copy and Excel copy of the complete Application to the Department's secure web transfer server. The PDF copy and Excel copy of the Application must match, if variations exist between the two copies, an Administrative Deficiency will be issued for the Applicant to identify which document to rely on. Each copy must be in a single file and individually bookmarked as further described in the Multifamily Programs Procedures Manual. Additional files required for Application submission outside the Uniform Application must also be uploaded to the secure web transfer server. It is the responsibility of the Applicant to confirm the upload to the Department's secure web transfer server was successful and to do so in advance of the deadline. If an Applicant can view the files that were uploaded, then that shall serve as an indication that the Application was uploaded and received by the Department. Staff, may, as a courtesy, confirm that the Application files were uploaded, but shall not be obligated or required to confirm such submission. Where there are instances of computer problems, mystery glitches, etc. that prevent the Application from being received by the Department prior to the deadline the Application may be terminated.

(D) Applications must include materials addressing all of the items enumerated in this chapter and other chapters as applicable. If an Applicant does not believe that a specific item should be applied, the Applicant must include, in its place, a statement identifying the required item, stating that it is not being supplied, and a statement as to why the Applicant does not believe it should be required.

(2) Filing of Application for Tax-Exempt Bond Developments. Applications must be submitted to the Department as described in either subparagraph (A) or (B) of this paragraph. Applications will be required to satisfy the requirements of this chapter and applicable Department rules that coincide with the year the Certificate of Reservation is issued. Those Applications that receive a Traditional Carryforward Designation will be subject to the QAP and applicable Department rules in place at the time the Application is received by the Department, unless determined otherwise by staff. Regardless of the timing associated with notification by the TBRB that an application is next in line to receive a Certificate of Reservation and the corresponding deadline to submit the Application pursuant to 34 TAC §190.3(b)(13), it is the Department's expectation that the requirements in this chapter are adhered to, and that care and attention are given to the compilation of the Application, or the Application may be terminated. Applications that intend to request other Department funding (e.g. Multifamily Direct Loan, HOME-ARP, etc) will require a minimum 120-day review period by staff before targeting a Board meeting date for consideration. If, at the time of Application submission, other Department funding is over-subscribed, the submitted Application cannot include a request for such funds.

(A) Lottery Applications. At the option of the bond issuer, an Applicant may participate in the TBRB lottery for private activity bond volume cap. Applicants should refer to the TBRB website or discuss with their issuer or TBRB staff, the deadlines regarding lottery participation and the timing for the issuance of the Certificate of Reservation based on lottery results. Depending on the Priority designation of the application filed with TBRB, the Application submission requirements to the Department under clauses (i) - (iii) of this subparagraph must be met. For those that participate in the Lottery but are not successful (i.e. a Certificate of Reservation will not be issued in January, but at some other time), the Application may not be submitted until a Certificate of Reservation has been issued (i.e. Priority 4 applications) or TBRB has sent an email stating the application is next in line (i.e. Priority 1, Priority 2 or Priority 3), but the Certificate of Reservation cannot be issued until the Application is submitted.

(i) Priority 1 applications for supplemental bond allocations: If an Applicant is seeking additional private activity bond volume cap pursuant to H.B. 1766 for purposes of meeting the 50% Test, upon notice from the TBRB that the Application is next in line to receive a Certificate of Reservation, a complete Application will not be required to be submitted and staff will notify TBRB accordingly. However, if there are changes to the Development that are different from what the Department originally approved that would constitute an amendment under §10.405 of this chapter (relating to Amendments and Extensions) a request for an Amendment must be submitted to the Department. Staff will not re-issue the Determination Notice associated with supplemental bond allocations.

(ii) Priority 2 or 3 applications: If the Certificate of Reservation will be issued in January, the Applicant may submit the complete Application, including all required Third Party Reports, accompanied by the Application Fee described in §11.901 of this chapter, within the timeframe allowed under the TBRB notice. Alternatively, upon notification from TBRB that an Applicant is next in line to receive a Reservation the Applicant may choose to only submit the complete Application (excluding all required Third Party Reports), for purposes of meeting TBRB requirements to have the Certificate of Reservation issued. In this case, the Application will not be scheduled for a Board meeting or target date for the issuance of the Determination Notice, as applicable, until such time the Third Party Reports have been submitted, which should be on the fifth of the month. The Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the issuance of the Determination Notice, as applicable, approximately 90 days following the submission of such Third Party Reports. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. For Third Party Reports that are submitted after the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target date for the issuance of the Determination Notice, as applicable. The Application must be submitted using the Uniform Application released by the Department for the upcoming program year.

(iii) Priority 4 applications: Once the Certificate of Reservation has been issued, the same Application submission requirements as indicated in clause (ii) of this subparagraph apply. Specifically, an Applicant may submit the Application including or excluding the Third Party Reports, however, only after the Application is considered complete (i.e. Application Fee and all Third Party Reports) will staff schedule the Application for a Board meeting or target date for the issuance of the Determination Notice. The timing of when a Priority 4 Application is submitted to the Department is up to the Applicant and if not submitted on the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target

date for the administrative issuance of the Determination Notice, as applicable.

(B) Non-Lottery Applications or Applications Not Successful in Lottery.

(i) Applications designated as Priority 2 or 3 by the TBRB must submit the Application Fee described in §11.901 of this chapter and the complete Application, with the exception of the Third Party Reports, before the Certificate of Reservation can be issued by the TBRB. The Third Party Reports, if not submitted with the Application to meet the TBRB submission requirement, must then be submitted on the fifth day of the month and the Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the administrative issuance of the Determination Notice, as applicable, approximately 90 days following such submission deadline. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. If the Third Party Reports are submitted on a date other than the fifth of the month, it will be at staff's discretion as to which Board meeting the Application will be presented, or what will be the target date for the administrative issuance of the Determination Notice, as applicable. Applicants may not submit the Application until staff receives notice from TBRB that the application is next in line to receive a Certificate of Reservation; or

(ii) An Application designated as Priority 4 will not be accepted until after the TBRB has issued a Certificate of Reservation and may be submitted on the fifth day of the month. Priority 3 Application submissions must be complete, including all Third Party Reports and the required Application Fee described in §11.901 of this chapter, before they will be considered accepted by the Department and meeting the submission deadline for the applicable Board meeting date or administrative issuance of the Determination Notice, as applicable.

(C) Generally, the Department will require at least 90 days to review an Application unless staff can complete its evaluation in sufficient time for earlier consideration. If the Application is layered with other Department funds the Department will require at least 120 days to complete its evaluation. An Applicant should expect this timeline to apply regardless of whether the Board will need to approve the issuance of the Determination Notice or it is determined that staff can issue the Determination Notice administratively for a particular Application. Applicants should be aware that unusual financing structures, portfolio transactions, the need to resolve Administrative Deficiencies and changes made by an Applicant after the Application has been reviewed by staff may require additional time to review. In instances where an Application necessitates more staff time to review than normal, where an Application is suspended due to the inability to resolve Administrative Deficiencies by the original deadline, or an extension to respond to an Administrative Deficiency is requested, staff is not obligated to ensure the Application meets the original target date for a Board Meeting or administrative issuance of a Determination Notice, as applicable. Moreover, such review period may be longer depending on the volume of Applications under review and statutory program timing constraints associated with such Applications. The prioritization of Applications will be subject to the review priority established in paragraph (5) of this section.

(D) Withdrawal of Certificate of Reservation. Applications under review by the Department that have the Certificate of Reservation withdrawn and for which a new Certificate of Reservation is not expected to be issued within a reasonable amount of time, as determined by staff, the Department will consider the Application withdrawn and the Applicant will be provided notice to that effect. Once a new Certificate of Reservation is issued, it will be at the Department's discretion to determine whether the existing Application can still be utilized for purposes of review or if a new Application, including payment of another Application Fee, must be submitted. The Department will not prioritize the processing of the new Application over other Applications under review once a new Certificate of Reservation is issued, regardless of the stage of review the Application was in prior to the withdrawal of the Certificate of Reservation, or that it maintain the originally selected Board meeting or targeted administrative issuance date for the Determination Notice, as applicable.

(E) Direct Loan Applications must be submitted in accordance with the requirements in this chapter, §13.5 (relating to the Application and Award Process), and the applicable Notice of Funding Availability (NOFA).

(3) Withdrawal of Application. An Applicant may withdraw an Application prior to or after receiving an award of funding by submitting to the Department written notice of the withdrawal. To the extent a Direct Loan award is returned after Board approval, penalties may be imposed on the Applicant and Affiliates in accordance with §13.11(a) of this title (relating to Post Award Requirements).

(4) Competitive Evaluation Process. Applications believed likely to be competitive will undergo a program review for compliance with submission requirements and selection criteria, as applicable. In general, Application reviews by the Department shall be conducted based upon the likelihood that an Application will be competitive for an award based upon the region, set-aside, self score, received date, or other ranking factors. Thus, non-competitive or lower scoring Applications may never be reviewed. The Director of Multifamily Finance will identify those Applications that will receive a full program review based upon a reasonable assessment of each Application and its relative position to other Applications, but no Application with a competitive ranking shall be skipped or otherwise overlooked. This initial assessment may be a high level assessment, not a full assessment. The Real Estate Analysis division shall underwrite Applications that received a full program review and remain competitive to determine financial feasibility and an appropriate funding amount. In making this determination, the Department will use §11.302 of this chapter (relating to Underwriting Rules and Guidelines) and §13.6 of this title (relating to Multifamily Direct Loan Rule) as applicable. The Department may have an external party perform all or part of the underwriting evaluation and components thereof to the extent it determines appropriate. The expense of any external underwriting shall be paid by the Applicant prior to the commencement of the aforementioned evaluation pursuant to §11.901(5) of this chapter (relating to Fee Schedule, Appeals and other Provisions). The reviews by the Multifamily Finance Division and the Real Estate Analysis Division will be conducted to meet the requirements of the Program or NOFA under which the Application was submitted. Applications will undergo a previous participation review in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation) and a Development Site may be evaluated by the Department or its agents through a physical site inspection or site visit, (which may include neighboring areas), independent of or concurrent with a site visit that may be performed in conjunction with §11.101(a)(3) (relating to Neighborhood Risk Factors). The Department may provide a scoring notice reflecting such score to the Applicant which will trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process). For an Application for which the selection criteria are reviewed, the scoring notice for the Application will be sent to the Applicant no later than 21 days prior to the final Board approval of awards.

(5) Order of review of Applications under various Programs. This paragraph identifies how ties or other matters will be handled when dealing with de-concentration requirements, capture

rate calculations, and general order of review of Applications submitted under different programs.

(A) De-concentration. Priority will be established based on the earlier date associated with an Application. The dates that will be used to establish priority are as follows:

(i) for Tax-Exempt Bond Developments, the issuance date of the Certificate of Reservation issued by the TBRB; or in instances where there is a Traditional Carryforward Designation associated with an Application the Department will utilize the date the complete HTC Application associated with the Traditional Carryforward Designation is submitted to the Department;

(ii) for all other Developments, the date the Application is considered received by the Department; and

(iii) notwithstanding the foregoing, after July 31 of the current program year, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list.

(B) General Review Priority. Order of reviews of Applications under various multifamily programs will be established based on Department staff's consideration of any statutory timeframes associated with a program or Application in relation to the volume of Applications being processed.

(6) Deficiency Process. The purpose of the deficiency process is to allow an Applicant to provide clarification, explanation, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in an efficient and effective review of the Application. The deficiency process does not require staff to request information from the Applicant in order to complete the Application. Applicants are encouraged to utilize manuals or other materials produced by staff, as additional guidance in conjunction with the rules to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, or meeting of threshold and eligibility requirements. Because the review of an Application occurs in several phases, deficiency notices may be issued during any of these phases. Staff will send the deficiency notice via an e-mail to the Applicant and one other contact party if identified in the Application. It is the Applicant's responsibility to ensure that e-mails sent from TDHCA staff to the Applicant or contact are not electronically blocked or redirected by a security feature as they will be considered to be received once they are sent. The time period for responding to a deficiency notice commences on the first business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post-award submissions. Responses are required to be submitted electronically as a PDF or multiple PDF files and must be uploaded to the Application's ServU http file. Emailed responses will not be accepted. A review of the response provided by the Applicant may reveal that issues initially identified as an Administrative Deficiency are actually determined to be beyond the scope of an Administrative Deficiency process, meaning they are Material Deficiencies not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Department staff and Board.

(A) It is critical that the use of the deficiency process not unduly slow the review process, and since the process is intended to clarify or explain matters or obtain at the Department's request missing information, there is an expectation that a party responding to an Administrative Deficiency will be able to respond immediately. It is the responsibility of a person who receives a deficiency to address the matter in a timely manner so that staff has the ability to review the response by the close of business on the date by which resolution must be complete and the deficiency fully resolved. Merely submitting materials prior to that time places the responsibility on the responding party that if the materials do not fully resolve the matter there may be adverse consequences such as point deductions, suspension, or termination. Extensions relating to Administrative Deficiency deadlines may only be extended up to five days if documentation needed to resolve the item is needed from a Third Party, the documentation involves Third Party signatures needed on certifications in the Application, or an extension is requested as a reasonable accommodation. A Deficiency response may not contain documentation that did not exist prior to submission of the pre-application or Full Application, as applicable.

(B) Deficiencies for Competitive HTC Applications. Unless an extension has been timely requested and granted prior to the deadline, if a deficiency is not fully resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then five (5) points shall be deducted from the selection criteria score for each additional day the deficiency remains unresolved. Points deducted for failure to timely respond to a deficiency will not impact the Pre-Application score. If deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated, subject to the Applicant's right to appeal. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline or while the Application is under consideration for an award, and may not add any set-asides, increase the requested credit amount, revise the Unit mix (both income levels and Bedroom mixes), or adjust their self-score except in response to a direct request from the Department to do so as a result of an Administrative Deficiency. (§2306.6708(b); §2306.6708) Applicants may not use the Deficiency Process to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. To the extent that the review of deficiency documentation or the imposing of point reductions for late responses alters the score assigned to the Application, such score will be reflected in the updated application log published on the Department's website or a Scoring Notice may be issued.

(C) Deficiencies for Tax-Exempt Bond Developments. Unless an extension has been requested prior to the deadline, deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application will be terminated and the Applicant will be provided notice to that effect. If an Applicant appeals a staff termination to the Board, Board decisions on terminations are final and an Applicant will not be allowed to re-apply under the same Certificate of Reservation due to the limited timeframe allowed under the existing Reservation.

(D) Deficiencies for Direct Loan-only Applications. Deficiencies must be resolved to the satisfaction of the Department by

5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application may be terminated and the Applicant will be provided notice to that effect. For purposes of priority under the Direct Loan set-asides, if the outstanding item(s) are resolved during the suspension period, the date by which the final deficient item is submitted shall be the new Application Acceptance Date pursuant to §13.5(c) of this title (relating to Multifamily Direct Loan Rule). Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section. Should an Applicant still desire to move forward with the Development after Termination, a completely new Application must be submitted, along with a new Application Fee, as applicable, pursuant to rule. All of the deficiencies noted in the original deficiency notice must be incorporated into the re-submitted Application, which will have a new Application Acceptance Date.

(7) Limited Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that could likely be the subject of a Deficiency, the Applicant may request a limited review of the specific and limited issues in need of clarification or correction. The issue may not relate to the score of an Application. This limited review may only cover the specific issue and not the entire Application. If the limited review results in the identification of an issue that requires correction or clarification, staff will request such through the Deficiency process as stated in paragraph (6) of this section, if deemed appropriate. A limited review is intended to address:

(A) Clarification of issues that Department staff would have difficulty identifying due to the omission of information that the Department may have access to only through Applicant disclosure, such as a prior removal from a tax credit transaction or participation in a Development that is not identified in the previous participation portion of the Application; or

(B) Technical correction of non-material information that would cause an Application deemed non- competitive to be deemed competitive and, therefore, subject to a staff review. For example, failure to mark the Nonprofit Set-Aside in an Application that otherwise included complete submission of documentation for participation in the Nonprofit Set-Aside.

(8) Challenges to Opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter and no later than May 1 of the current year for Competitive HTC Applications. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis by staff will be provided to a fact finder, chosen by the Department, for review and a determination. The fact finder will not make determinations as to the accuracy of the statements presented, but only regarding whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§11.202. Ineligible Applicants and Applications.

The purpose of this section is to identify those situations in which an Application or Applicant may be considered ineligible for Department funding and subsequently terminated. Such matters may be brought to the attention of staff by anyone, including members of the general public. The items listed in this section include those requirements in Code, §42, Tex. Gov't Code, Chapter 2306, and other criteria considered important by the Department, and does not represent an exhaustive list of ineligibility criteria that may otherwise be identified in applicable rules, federal statutes or regulations, or a specific program NOFA. The Application may include, or Department staff may request, documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development. One or more of the matters enumerated in paragraph (1) of this section may also serve as a basis for debarment, or the assessment of administrative penalties, and nothing herein shall limit the Department's ability to pursue any such matter. Failure to provide disclosure may be cause for termination.

(1) Applicants. An Applicant may be considered ineligible if any of the criteria in subparagraphs (A) - (N) of this paragraph apply to those identified on the organizational chart for the Applicant, Developer and Guarantor. An Applicant is ineligible if the Applicant, Developer, or Guarantor:

(A) Has been or is barred, suspended, or terminated from participation in a state or Federal program, including those listed in the U.S. government's System for Award Management (SAM); (§2306.0504)

(B) Has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within 15 years preceding the received date of Application or Pre-Application submission (if applicable);

(C) Is, at the time of Application, subject to an order in connection with an enforcement or disciplinary action under state or federal securities law or by the NASD; subject to a federal tax lien (other than a contested lien for which provision has been made); or the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of financial misconduct or uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity;

(D) Has materially breached a contract with a public agency, and, if such breach is permitted to be cured under the contract, has been given notice of the breach and a reasonable opportunity to cure, and failed to cure that breach within the time specified in the notice of breach;

(E) Has misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency, and the amount of financial assistance awarded to the Developer by the agency;

(F) Has been found by the Board to be ineligible based on a previous participation review performed in accordance with Chapter 1 Subchapter C of this title (relating to Previous Participation Review);

(G) Is delinquent in any loan, fee, or escrow payments to the Department in accordance with the terms of the loan, as amended, or is otherwise in default with any provisions of such loans, and for which no repayment plan has been approved by the Department;

(H) Has failed to cure any past due fees owed to the Department within the time frame provided by notice from the Department and at least 10 days prior to the Board meeting at which the decision for an award is to be made;

(I) Would be prohibited by a state or federal revolving door or other standard of conduct or conflict of interest statute, including Tex. Gov't Code §2306.6733, or a provision of Tex. Gov't Code, Chapter 572, from participating in the Application in the manner and capacity they are participating;

(J) Has, without prior approval from the Department, had previous Contracts or Commitments that have been partially or fully Deobligated during the 12 months prior to the submission of the Application, and through the date of final allocation due to a failure to meet contractual obligations, and the Person is on notice that such Deobligation results in ineligibility under this chapter;

(K) Has provided false or misleading documentation or made other intentional or negligent material misrepresentations or omissions in or in connection with an Application (and certifications contained therein), Commitment or Determination Notice, or Direct Loan Contract for a Development;

(L) Was the Owner or Affiliate of the Owner of a Department assisted rental Development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not been re-affirmed or Department funds repaid;

(M) Fails to disclose, in the Application, any Principal or any entity or Person in the Development ownership structure who was or is involved as a Principal in any other affordable housing transaction, that has terminated voluntarily or involuntarily within the past 10 years, or plans to or is negotiating to terminate, their relationship with any other affordable housing development. The disclosure must identify the person or persons and development involved, the identity of each other development, and contact information for the other Principals of each such development, a narrative description of the facts and circumstances of the termination or proposed termination, and any appropriate supporting documents. An Application may be referred to the Board for a determination of a person's fitness to be involved as a Principal with respect to an Application, which may include a staff recommendation, using the factors described in clauses (i) - (v) of this subparagraph as considerations:

(i) the amount of resources in a Development and the amount of the benefit received from the Development;

(ii) the legal and practical ability to address issues that may have precipitated the termination or proposed termination of the relationship;

(iii) the role of the person in causing or materially contributing to any problems with the success of the development;

(iv) the person's compliance history, including compliance history on other developments; and

(v) any other facts or circumstances that have a material bearing on the question of the person's ability to be a compliant and effective participant in their proposed role as described in the Application; or

(N) Fails to disclose in the Application any voluntary compliance agreement or similar agreement with any governmental agency that is the result of negotiation regarding noncompliance of any affordable housing Development with any requirements. Any such agreement impacting the proposed Development or any other affordable housing Development controlled by the Applicant must be disclosed.

(2) Applications. An Application shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply to the Application:

(A) A violation of Tex. Gov't Code §2306.1113, exists relating to Ex Parte Communication. An ex parte communication occurs when an Applicant or Person representing an Applicant initiates substantive contact (i.e. any contact other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by Tex. Gov't Code §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect so long as the Application remains eligible for funding. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present; provided that no matters related to any Application being considered by the Board may be discussed;

(B) The Application is submitted after the Application submission deadline (time or date); is missing multiple parts of the Application; or has a Material Deficiency; or

(C) For any Development utilizing Housing Tax Credits or Tax-Exempt Bonds:

(i) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been a person covered by Tex. Gov't Code §2306.6703(a)(1);

(ii) if the Application is represented or communicated about by a Person that would prompt the violations covered by Tex. Gov't Code §2306.6733; or

(iii) the Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless the exceptions in Tex. Gov't Code §2306.6703(a)(2) are met.

§11.203. Public Notifications. (§2306.6705(9)).

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifications generally must not be older than three months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments and Direct Loan Applications, notifications generally must not be older than three months prior to the date the complete Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same Application, then no additional notification is required at Application. Should the jurisdiction of the official holding any position or role described in paragraph (2) of this section change between the submission of a pre-application and the submission of an Application in a manner that results in the Development being within a new jurisdiction, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As

used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those in office at the time the Application is submitted; however, a mailed notification that is addressed to the entity or officeholder rather than a specific person is acceptable so long as it is mailed to the correct address and otherwise meets all requirements. Note that between the time of pre-application (if made) and full Application, the boundaries of their jurisdictions may change. Meetings and discussions do not constitute notification. Recipients include:

(A) Neighborhood Organizations on record with the state or county as of 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (ix) of this subparagraph:

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed;

(vii) the residential density of the Development, i.e., the number of Units per acre;

(viii) information on how and when an interested party or Neighborhood Organization can provide input to the Department; and

(ix) Information on any proposed property tax exemption.

(B) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will target, provide a preference, or serve a Target Population exclusively, unless such population limitation, targeting, or preference is documented in the Application, and is or will be in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(C) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

§11.204. Required Documentation for Application Submission.

The purpose of this section is to identify the threshold documentation that is required at the time of Application submission, unless specifically indicated or otherwise required by Department rule. Unless stated otherwise, all documentation identified in this section must not be dated more than six (6) months prior to the close of the Application Acceptance Period or the date of Application submission as applicable to the program.

(1) Certification, Acknowledgement and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified.

(A) The Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no local building codes are in place, then to the most recent version of the International Building Code.

(B) This Application and all materials submitted to the Department constitute records of the Department subject to Tex. Gov't Code, Chapter 552. Any person signing the Certification acknowledges that they have the authority to release all materials for publication on the Department's website, that the Department may publish them on the Department's website and release them in response to a request for public information, and make other use of the information as authorized by law.

(C) All representations, undertakings and commitments made by Applicant in the Application process expressly constitute conditions to any Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment for such Development which the Department may issue or award, and the violation of any such condi-

tion shall be sufficient cause for the cancellation and rescission of such Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment by the Department. If any such representations, undertakings and commitments concern or relate to the ongoing features or operation of the Development, they shall be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the residents of the Development, including enforcement by administrative penalties for failure to perform (consistent with Chapter 2, Subchapter C of this title, relating to Administrative Penalties), in accordance with the Land Use Restriction Agreement.

(D) The Development Owner has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(E) The Development Owner agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Tex. Gov't Code §2306.6734.

(G) The Development Owner will specifically market to veterans through direct marketing or contracts with veteran's organizations and will specifically market to the public housing authority (PHA) waitlists for any PHA in the city and/or county the Development is located within and the PHA of any City within 5 miles of the Development. The Development Owner will be required to identify how they will specifically market to veterans and the PHA waiting lists and report to the Department in the annual housing report on the results of the marketing efforts to veterans and PHA waiting lists. Exceptions to this requirement must be approved by the Department.

(H) The Development Owner will comply with any and all notices required by the Department.

(I) If the Development has an existing LURA with the Department, the Development Owner will comply with the existing restrictions.

(2) Applicant Eligibility Certification. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by any individuals required to be listed on the organizational chart and also meeting the definition of Control. The certification must identify the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §11.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Engineer/Architect Certification Form. The certification, addressing all of the accessibility requirements applicable to the Development Site, must be executed by the Development engineer or accredited architect after careful review of the Department's accessibility requirements, and including Tex. Gov't Code §2306.6722 and §2306.6730.

(4) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Tex. Gov't Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department consideration for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §11.203 of this chapter (relating to Public Notifications (§2306.6705(9)).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. For an Application with a Development Site that is:

(i) within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) within the ETJ of a municipality, the Applicant must submit both:

(I) A resolution from the Governing Body of that municipality; and

(II) A resolution from the Governing Body of the county; or

(iii) within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond Dates and Deadlines). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the resolution may be determined by staff to be invalid. In general, the resolution should not be older than one year from the date the Application is submitted and the representations regarding the Development made to the applicable Governing Body to obtain the resolution must remain accurate, as reflected in the submitted Application. If the resolution is older than one year or if material aspects of the Development have changed from when the Governing Body adopted the resolution, it is incumbent upon the Applicant to obtain a new resolution in order to satisfy this requirement. No resolutions older than two years will be accepted. The resolution(s) must certify that:

(i) notice has been provided to the Governing Body in accordance with Tex. Gov't Code §2306.67071(a);

(ii) the Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) the Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Tex. Gov't Code §2306.67071(b); and

(iv) after due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban.

(A) Each Application must identify whether the Development Site is located in an Urban Area or Rural Area of a Uniform State Service Region. The Department shall make available a list of Places meeting the requirements of Tex. Gov't Code §2306.004(28-a)(A) and (B), for designation as a Rural Area and those that are an Urban Area in the Site Demographics Characteristics Report. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(B) Certain areas located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area can request a Rural designation from the Department for purposes of receiving an allocation Housing Tax Credits (§2306.6740). In order to apply for such a designation, a letter must be submitted from a duly authorized official of the political subdivision or census designated place addressing the factors outlined in clauses (i) - (vi) of this subparagraph. Photographs and other supporting documentation are strongly encouraged. In order for the area to be designated Rural by the Department for the current Application Round, such requests must be made no later than December 15 of the previous year. If staff is able to confirm the findings outlined in the request, the Rural designation will be granted without further action and will remain in effect until such time that the population as described in clause (i) of this subparagraph exceeds 25,000. In the event that staff is unable to confirm the information contained in the request, the Applicant will be given an opportunity to supplement their case. If, after receiving any supplemental information, staff still cannot confirm the rural nature of the Application, a recommendation for denial will be presented to the Board. The factors include:

(i) the population of the political subdivision or census designated place does not exceed 25,000;

(ii) the characteristics of the political subdivision or census designated place and how those differ from the characteristics of the area(s) with which it shares a contiguous boundary;

(iii) the percentage of the total border of the political subdivision or census designated place that is contiguous with other political subdivisions or census designated places designated as urban. For purposes of this assessment, less than 50% contiguity with urban designated places is presumptively rural in nature;

(iv) the political subdivision or census designated place contains a significant number of unimproved roads or relies on unimproved roads to connect it to other places;

(v) the political subdivision or census designated place lacks major amenities commonly associated with urban or suburban areas; and

(vi) the boundaries of the political subdivision or census designated place contain, or are surrounded by, significant areas of undeveloped or agricultural land. For purposes of this assessment, significant being more than one-third of the total surface area of political subdivision/census designated place, or a minimum of 1,000 acres immediately contiguous to the border.

(6) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required or elected in accordance with this Chapter or Chapter 13 of this title (relating to Multifamily Direct Loan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with Code §42(g) if the Development will receive housing tax credits. The income and corresponding rent restrictions that impact the Units also restricted by the Department will be reflected in the LURA. Financing amounts must be consistent throughout the Application and acceptable documentation shall include those described in clauses (i) - (iv) of this subparagraph.

(i) Financing is in place as evidenced by:

(I) a valid and binding loan agreement; and

(II) a valid recorded deed(s) of trust lien on the Development in the name of the Development Owner as grantor in favor of the party providing such financing.

(ii) Term sheets for interim and permanent loans issued by a lending institution or mortgage company must:

(I) be current, non-expired, and have been signed or otherwise acknowledged by the lender;

(II) be addressed to the Development Owner or Affiliate;

(III) for a permanent loan, include a minimum loan term of 15 years with at least a 30 year amortization or for non-amortizing loan structures a term of not less than 30 years;

(IV) include either a committed and locked interest rate, or the estimated interest rate;

(V) include all required Guarantors, if known;

(VI) include the principal amount of the loan;

(VII) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet; and

(VIII) include and address any other material terms and conditions applicable to the financing. The term sheet may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits, if applicable;

(iii) For Developments proposing to refinance an existing USDA Section 514, 515, or 516 loan, a letter from the USDA confirming the outstanding loan balance on a specified date and confirming that the Preliminary Assessment Tool has been submitted by the Applicant to USDA. The loan amount that is reported on the Schedule of Sources (tab 31 in the MF Uniform Application) and that is used to determine the acquisition cost must be the Applicant's estimate of the projected outstanding loan balance at the time of closing as calculated on the USDA Principal Balance Amortization exhibit.

(iv) For Direct Loan Applications or Tax-Exempt Bond Developments with TDHCA as the issuer that utilize FHA

financing, the Application shall include the applicable pages from the HUD Application for Multifamily Housing Project. If the HUD Application has not been submitted at the time the Application is submitted then a statement to that effect should be included in the Application along with an estimated date for submission. Applicants should be aware that staff's underwriting of an Application will not be finalized and presented to the Board until staff has evaluated the HUD Application relative to the Application.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified and described in the Application. Applicants must provide evidence that an application for such gap financing has been made to an available fund source. Acceptable documentation may include a letter from the funding entity confirming receipt of an application or a term sheet from the lending agency which clearly describes the amount and terms of the financing. Other Department funding requested with Housing Tax Credit Applications must be on a concurrent funding period with the Housing Tax Credit Application, and no term sheet is required for such a request. A term loan request must comply with the applicable terms of the NOFA under which an Applicant is applying.

(C) Owner Contributions. If the Development will be financed in part with a capital contribution or debt by the General Partner, Managing General Partner, any other partner or investor that is not a partner providing the syndication equity, a Guarantor or a Principal in an amount that exceeds 5% of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or depository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds are and will remain readily available at Commitment and until the required investment is completed. Regardless of the amount, all capital contributions other than syndication equity will be deemed to be a part of, and therefore added to, the Deferred Developer Fee for feasibility purposes under §11.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the contribution is a seller note equal to or less than the acquisition price of the subject Development, the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a nonprofit organization with a documented history of fundraising sufficient to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

(i) an estimate of the amount of equity dollars expected to be raised for the Development;

(ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;

(iii) pay-in schedules;

(iv) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis; and

(v) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

(E) Financing Narrative. (§2306.6705(1)) A narrative must be submitted that describes all aspects of the financing plan for the Development, including as applicable the sources and uses of funds; construction, permanent and bridge loans, rents, operating subsidies, project-based assistance, and replacement reserves; and the status (dates and deadlines) for applications, approvals and closings, etc. associated with the term sheets for all funding sources. For Applicants requesting Direct Loan funds and 9% LIHTC, Match, as applicable, must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of Direct Loan funds. The information provided must be consistent with all other documentation in the Application.

(7) Operating and Development Cost Documentation.

(A) Fifteen-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses (or longer, if required by the NOFA), in the form provided by the Department. Any "other" debt service included in the pro forma must include a description. For Tax-Exempt Bond Developments, the pro forma must be signed by the lender and syndicator.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this title (relating to Utility Allowances), including deadlines for submission. Where the Applicant uses any method that requires Department review, documentation indicating that the requested method has been granted by the Department must be included in the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must include a description. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must meet the requirements of clauses (i) - (vi) of this subparagraph. The income and corresponding rent restrictions will be reflected in the LURA for the duration of the Affordability Period and for Tax-Exempt Bond Developments, in accordance with the Applicant's election under Tex. Gov't Code §1372.0321. The requirements are:

(i) indicate the type of Unit restriction based on the Unit's rent and income restrictions;

(ii) reflect the rent and utility limits available at the time the Application is submitted;

(iii) reflect gross rents that cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided and rents are consistent with such assistance and applicable legal requirements;

(iv) have a Unit mix and net rentable square footages that are consistent with the site plan and architectural drawings;

(v) if applying for Direct Loan funds:

(I) Direct Loan-restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules or as specifically allowed in a NOFA;

(II) if HOME, TCAP RF, and/or NSP PI are the anticipated fund source, the Application must have at least 90% of the Direct Loan-restricted Units be available to households or families whose incomes do not exceed 60% of the Area Median Income;

(III) in which HOME or TCAP RF are the anticipated fund source have at least 20% of the Direct Loan-restricted Units

available to households or families whose incomes do not exceed 50% of the Area Median Income;

(IV) in which NHTF is the anticipated fund source, have 100% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed the greater of 30% of the Area Median Income or whose income is at or below the poverty line;

(V) in which NSP PI is the anticipated fund source, have at least 25% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed 50% of the Area Median Income;

(VI) in which HOME-ARP is the anticipated fund source, during the State Affordability Period have at least 20% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 60% of the Area Median Income and 100% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 80% of the Area Median Income; and

(vi) if proposing to elect income averaging, Units restricted by any fund source other than housing tax credits must be specifically identified, and all restricted Units, regardless of fund source, must be included in the average calculation.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph. For Applications that include a scope of work that contains a combination of new construction and rehabilitation activities, the Application must include a separate development cost schedule exhibit for only the costs attributed to the portion of rehabilitation activities.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs (excluding site amenities), if any, prepared by a Third Party engineer. If Site Work costs (excluding site amenities) exceed $20,000 per Unit and are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis.

(ii) If costs for Off-Site Construction are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then an Off-Site Cost Breakdown prepared by a Third Party engineer must be provided. The certification from a Third Party engineer must describe the necessity of the off-site improvements, including the relevant requirements of the local jurisdiction with authority over building codes and the source of their cost estimate. If any Off-Site Construction costs are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those costs should be included in Eligible Basis. If off-site costs are included in Eligible Basis based on PLR 200916007, a statement of findings from a CPA must be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the Development matches the fact pattern in PLR 200916007.

(F) Rental Assistance/Subsidy. (§2306.6705(4)) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the Application includes a request for Direct Loan funds, Applicants must follow the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and other HUD requirements including Section 104(d) of the Housing and Community Development Act. HUD Handbook 1378 provides guidance and template documents. Failure to follow URA or 104(d) requirements will make the proposed Development ineligible for Direct Loan funds and may lead to penalty under §13.11(b) of this title (relating to Multifamily Direct Loan Rule). If one or more of the items described in clauses (i) - (vi) of this subparagraph is not applicable based upon the type of occupied structures on the Development Site, the Applicant must provide an explanation of such non- applicability. Applicant must submit:

(i) at least one of the items identified in subclauses (I) - (IV) of this clause:

(I) Historical monthly operating statements of the Existing Residential Development for 12 consecutive months ending not more than three months from the first day of the Application Acceptance Period; or

(II) The two most recent consecutive annual operating statement summaries; or

(III) The most recent consecutive six months of operating statements and the most recent available annual operating summary; or

(IV) All monthly or annual operating summaries available; and

(ii) a rent roll not more than six months old as of the first day the Application Acceptance Period that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and any vacant units;

(iii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or to ensure compliance with the URA and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to all appropriate legal or governmental agencies or bodies. (§2306.6705(6))

(8) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) For all Developments a site plan must be submitted that includes the items identified in clauses (i) - (xii) of this subparagraph:

(i) states the size of the site on its face;

(ii) includes a Unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application;

(iii) includes a table matrix specifying the square footage of Common Area space on a building by building basis;

(iv) identifies all residential and common buildings in place on the Development Site and labels them consistently with the Rent Schedule and Building/Unit Type Configuration forms provided in the Application;

(v) shows the locations (by Unit and floor) of mobility and hearing/visual accessible Units (unless included in residential building floor plans);

(vi) clearly delineates the flood plain boundary lines or states there is no floodplain;

(vii) indicates placement of detention/retention pond(s) or states there are no detention ponds;

(viii) describes, if applicable, how flood mitigation or other required mitigation will be accomplished;

(ix) indicates the location and number of parking spaces, garages, and carports;

(x) indicates the location and number of accessible parking spaces, garages, and carports, including van accessible spaces;

(xi) includes information regarding local parking requirements; and

(xii) indicates compliant accessible routes or if a route is not accessible a cite to the provision in the Fair Housing Design Manual providing for its exemption.

(B) Building floor plans must be submitted for each building type. Building floor plans must include the locations of the accessible Units and must also include square footage calculations for balconies, breezeways, corridors and any other areas not included in net rentable area.

(C) Unit floor plans for each Unit Type must be included in the Application and must include the square footage. Unit floor plans must be submitted for the accessible Units. Applications for Adaptive Reuse are only required to include Unit floor plans for each distinct floor plan such as one-Bedroom, or two-Bedroom, and for all floor plans that vary in Net Rentable Area by 10% from the typical floor plan.

(D) Elevations must be submitted for each side of each building type (or include a statement that all other sides are of similar composition as the front) and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation may submit photographs if the Unit configurations are not being altered and post-renovation drawings must be submitted if Unit configurations are proposed to be altered.

(9) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that allows for an ability to assign the Site Control to the Development Owner. All of the sellers of the proposed Property for the 36 month period prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development Team must be identified at the time of Application. The Department may request documentation at any time after submission of an Application of the Development Owner's ability to compel title of any Affiliated property acquisition(s) and the Development Owner must be able to promptly provide such documentation or the Application, award, or Commitment may be terminated. The Department acknowledges and understands that the Property may have one or more encumbrances at the time of Application submission and the Department will take into account whether any such encumbrance is reasonable within the legal and financial ability of the Development Owner to address without delaying development on the timeline contemplated in the Application. To meet the requirements of subparagraph (B) of this paragraph, Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer, must certify in the Application that the Site Control submitted with the TBRB application for the Certificate of Reservation to be issued is still valid.

(B) In order to establish Site Control, one of the items described in clauses (i) - (iii) of this subparagraph must be provided. In the case of land donations, Applicants must demonstrate that the entity donating the land has Site Control as evidenced through one of the items described in clauses (i) - (iii) of this subparagraph or other documentation acceptable to the Department. Site Control items include:

(i) a recorded warranty deed vesting indefeasible title in the Development Owner or, if transferrable to the Development Owner, an Affiliate of the Owner, with corresponding executed settlement statement (or functional equivalent for an existing lease with at least 45 years remaining); or

(ii) a contract or option for lease with a minimum term of 45 years that includes a price; address or legal description; proof of consideration in the form specified in the contract; and expiration date; or

(iii) a contract for sale or an option to purchase that includes a price; address or legal description; proof of consideration in the form specified in the contract; and expiration date.

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §11.302 of this chapter (relating to Underwriting Rules and Guidelines), then the documentation required as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(D) If ingress and egress to a public right of way are not part of the Property described in the site control documentation, the Applicant must provide evidence of an easement, leasehold, or similar documented access, along with evidence that the fee title owner of the property agrees that the LURA may extend to the access easement by the time of Commitment, Determination Notice or Contract (as applicable).

(E) If control of the entire proposed Development Site requires that a plat or right of way be vacated to remove a right of way or similar dedication, evidence that the vacation/re-platting process has started must be included in the Application, and evidence of control of the entire Development Site must be provided by the time of Commitment or Contract (as applicable).

(10) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph. In instances where annexation of a Development Site occurs while the Application is under review, the Applicant must submit evidence of appropriate zoning with the Commitment or Determination Notice. Letters evidencing zoning status must be no more than 6 months old at Application submission, except where such evidence is for an area where there is no zoning and such letters must be updated annually by the political subdivision.

(A) No Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision that has no zoning. This requirement

does not apply to a Development Site located entirely in the unincorporated area of a county, and not within the ETJ of a municipality.

(B) Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development.

(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate has made formal application for a required zoning change and that the jurisdiction has received a release whereby the Applicant has agreed to hold the political subdivision and all other parties harmless in the event the appropriate zoning is not granted. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice.

(D) Zoning for Rehabilitation Developments. In an area with zoning, the Application must include documentation of current zoning. If the Property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, the Application must include a letter from a local government official with appropriate jurisdiction which addresses the items in clauses (i) - (v) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) that it will allow the non-conformance;

(iv) Owner's rights to reconstruct in the event of damage; and

(v) penalties for noncompliance.

(11) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, then a letter from the title company indicating that nothing further has transpired during the six-month period on the commitment or policy must be submitted. Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer are exempt from this requirement.

(A) The title commitment must list the name of the Development Owner as the proposed insured and list the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(12) Ownership Structure and Previous Participation.

(A) The Department assumes that the Applicant will be able to form any one or more business entities, such as a limited partnership, that are to be engaged in the ownership of a Development as represented in the Application, and that all necessary rights, powers, and privileges including, but not limited to, Site Control will be transferable to that entity. The formation of the ownership entity, qualification to do business (if needed), and transfer of any such rights, powers, and privileges must be accomplished as required in this chapter and Chapters 12 and 13, as applicable.

(B) Organizational Charts. A chart must be submitted that clearly illustrates the organizational structure of the proposed Development Owner and of any Developer and Guarantor, identifying all Principals thereof and providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, whether directly or through one or more subsidiaries, whether or not they have Control. Persons having Control should be specifically identified on the chart. Individual board members and executive directors of nonprofit entities, governmental bodies, and corporations, as applicable, must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries. In the case of Housing Tax Credit Applications only in which private equity fund investors are passive investors in the sponsorship entity, the fund manager, managing member or authorized representative of the fund who has the ability to Control, should be identified on the organizational chart, and a full list of investors is not required. The List of Organizations form, as provided in the Application, must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development.

(C) Previous Participation. Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (B) of this paragraph has provided a copy of the completed previous participation information to the Department. Individual Principals of such entities identified on the organizational chart and on the List of Organizations form, must provide the previous participation information, unless excluded from such requirement pursuant to Chapter 1 Subchapter C of this title (relating to Previous Participation Review). The information must include a list of all Developments that are, or were, previously under ownership or Control of the Applicant or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The individuals providing previous participation information must authorize the parties overseeing such assistance to release compliance histories to the Department.

(D) Direct Loan. In addition to the information required in subparagraphs (B) and (C) of this paragraph, if the Applicant is applying for Direct Loan funds then the Applicant must also include the definitions of Person, Affiliate, Principal, and Control found in 2 CFR Part 180 and 2424, when completing the organizational chart and the Previous Participation information.

(13) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph, as applicable. Additionally, a resolution approved at a regular meeting of the majority of the board of directors of the nonprofit, indicating their awareness of the organization's participation in each specific Application, and naming all members of the board and employees who may act on its behalf, must be provided. For Tax-Exempt Bond Developments, if the bond issuer is the sole member of the General Partner, a copy of the executed inducement resolution will meet the resolution requirement in this paragraph.

(A) Competitive HTC Applications for the Nonprofit Set-Aside. Applications for Competitive Housing Tax Credits involving a §501(c)(3) or (4) nonprofit General Partner and which meet the Nonprofit Set-Aside requirements, must submit all of the documents described in clauses (i) to (v) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Applications that include an affirmative election to not

be treated under the Nonprofit Set-Aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being Affiliated with a nonprofit, only need to submit the documentation in subparagraph (B) of this paragraph. Required documents include:

(i) An IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code;

(ii) The Nonprofit Participation exhibit as provided in the Application, including a list of the names and contact information for all board members, directors, and officers;

(iii) A Third Party legal opinion stating:

(I) That the nonprofit organization is not Affiliated with or Controlled by a for-profit organization and the basis for that opinion;

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to Code, §42(h)(5) and the basis for that opinion;

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board. If the Application includes a request for Community Housing Development Corporation (CHDO) funds, no member of the board may receive compensation, including the chief staff member;

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(VI) That the nonprofit organization has the ability to do business as a nonprofit in Texas;

(iv) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(v) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a Rural Area; or

(II) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(B) All Other Applications. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner must submit an IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code; and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not exempt from taxation under §501(c)(3) or (4) of the Code, then they must disclose in the Application the basis of their nonprofit status. Housing finance corporations or public facility corporations that do not have such IRS determination letter shall submit documentation evidencing creation under their respective chapters of the Texas Local Government Code and corresponding citation for an exemption from taxation.

(14) Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, and prepared in accordance with this paragraph, which reviews site conditions and development requirements of the Development and Development Site, is required and must meet all of the criteria provided in subparagraphs (A) to (F) of this paragraph. Acquisition and Rehabilitation Applications are exempt from this requirement. If an Application involves Acquisition and Rehabilitation along with other activities, the Feasibility Report is required for the entire Development. Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, only subparagraph (D) of this paragraph is required to be submitted.

(A) For all Applications, careful focus and attention should be made regarding any atypical items materially impacting costs or the successful and timely execution of the Development plan. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(B) An Executive Summary must provide a narrative overview of the Development in sufficient detail that would help a reviewer of the Application better understand the site, the site plan, off site requirements (including discussion of any seller contributions or reimbursements), any other unique development requirements, and their impact on Site Work and Off- Site Construction costs. It should specifically describe any atypical or unusual factors that will impact site design or costs, including but not limited to: Critical Water Quality Zones, habitat protection requirements, construction for environmental conditions (wind, hurricane, flood), and local design restrictions.

(C) The Report should contain a general statement regarding the level of due diligence that has been done relating to site development (including discussions with local government development offices). Where ordinances or similar information is required, provide website links rather than copies of the ordinance. Additionally, it should contain:

(i) a summary of zoning requirements;

(ii) subdivision requirements;

(iii) property identification number(s) and millage rates for all taxing jurisdictions;

(iv) development ordinances;

(v) fire department requirements;

(vi) site ingress and egress requirements; and

(vii) building codes, and local design requirements impacting the Development.

(D) Survey as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey or Category 1B - Standard Land Boundary Survey). Surveys (excluding those for Rehabilitation Developments) may not be older than 24 months from the beginning of the Application Acceptance Period.

(E) Preliminary site plan for New Construction or Adaptive Reuse Developments prepared by the civil engineer with a statement that the plan materially adheres to all applicable zoning, site development, and building code ordinances. The site plan must identify all structures, site amenities, parking spaces and driveways, topography (using either existing seller topographic survey or U.S. Geological Survey (USGS)/other database topography), site drainage

and detention, water and waste water utility tie-ins, general placement of retaining walls, set- back requirements, and any other typical or locally required items. Off-site improvements required for utilities, detention, access or other requirement must be shown on the site plan or ancillary drawings.

(F) Architect or civil engineer prepared statement describing the entitlement, site development permitting process and timing, building permitting process and timing, and an itemization specific to the Development of total anticipated impact, site development permit, building permit, and other required fees.

(15) HOME Match Requirements. All Developments with HOME Match Eligible Units will be required to enter into a Contract and a Land Use Restriction Agreement with the Department.

(A) For HTC Competitive Applicants applying for greater than $1.5 million, a HOME Match Eligible Unit financial contribution equal or greater than 10% of the annual amount applied for in HTC must be present in the Application. A portion of Units will be required to meet criteria to be classified as HOME Match Eligible Units. This is in addition to any Match contribution required by a Direct Loan Application.

(B) Tax-Exempt Bond Developments where the Department is the bond issuer, must meet criteria to be classified as HOME Match Eligible Units. Tax-Exempt Bond Developments through a Local Bond Issuer, that include a certification from the Participating Jurisdiction where the Development site(s) is located stating that the bond proceeds are being used as HOME Match funds for the Participating Jurisdiction(s) where the Development Site(s) is located will be exempt from having to provide HOME Match Eligible Units. This certification is not required if the Development site(s) are located outside a local Participating Jurisdiction, as the Bonds will be classified as HOME Match.

(C) For Direct Loan funded Developments, unless otherwise identified by the provisions in the NOFA or other funding document, TCAP RP and matching contributions on HOME, NSP, and NHTF Developments, must meet all criteria to be classified as HOME-Match Eligible Units. The amount of Match required will be published in the NOFA or other funding document.

§11.205. Required Third Party Reports.

The Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Market Analysis must be submitted no later than the Third Party Report Delivery Date as identified in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Development Dates and Deadlines). For Competitive HTC Applications, the Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Primary Market Area map (with definition based on census tracts, and site coordinates in decimal degrees, area of PMA in square miles, and list of census tracts included) must be submitted no later than the Full Application Delivery Date as identified in §11.2(a) of this title (relating to Competitive HTC Deadlines Program Calendar) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2(a) of this chapter. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application may be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than 12 months prior to the date of Application submission for non-Competitive Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. If this timeframe is exceeded, then a letter or updated report must be submitted, dated not more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report.

(A) Existing Developments funded by USDA will not be required to supply this information; however, it is the Applicant's responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) If the report includes a recommendation that an additional assessment be performed, then a statement from the Applicant must be submitted with the Application indicating that those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations, then evidence indicating that the mitigating recommendations have been carried out must be submitted at cost certification.

(2) Market Analysis. The Market Analysis, required for all Developments and prepared in accordance with the requirements of §11.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six months prior to the date of Application submission, or Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original Market Analysis.

(A) For Acquisition/Rehabilitation or Reconstruction projects that meet the following criteria, a comprehensive market study as outlined in IRS Section 42(m)(1)(A)(iii) shall mean a location map and a written statement by a disinterested Qualified Market Analyst certifying that the project meets these criteria:

(i) All of the Units in the project contain existing project based rental assistance that will continue for at least the Compliance Period, an existing Department LURA, or the subject rents are at or below 50% AMGI rents;

(ii) The Units are at least 80% occupied at time of Application; and

(iii) Existing tenants have a leasing preference or right to return to the Development as stated in a relocation plan.

(B) The report must be prepared by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §11.303 of this chapter.

(C) Applications in the USDA Set-Aside proposing Rehabilitation with residential structures at or above 80% occupancy at

the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))(D). It is the responsibility of the Applicant to ensure that this analysis forms a sufficient basis for the Applicant to be able to use the information obtained to ensure that the Development will comply with fair housing laws.

(3) Scope and Cost Review (SCR). This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.306 of this chapter (relating to Scope and Cost Review Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the report provider may provide a statement that reaffirms the findings of the original SCR. The statement may not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original SCR. For Developments which require a capital needs assessment from USDA the capital needs assessment may be substituted for the SCR and may be more than six months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §11.306 of this chapter. All Rehabilitation Developments financed with Direct Loans must also submit a capital needs assessment estimating the useful life of each major system. This assessment must include a comparison between the local building code and the International Existing Building Code of the International Code Council. The report must be accompanied by the Department's SCR Supplement in the form of an excel workbook as published on the Department's website. For Rehabilitation (excluding Reconstruction) and Adaptive Reuse Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must include a Scope of Work Narrative as described in §11.306(j) of this chapter (relating to Scope and Cost Review Guidelines).

(4) Appraisal. This report prepared in accordance with the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines), is required for any Application claiming any portion of the building acquisition in Eligible Basis, and Identity of Interest transactions pursuant to Subchapter D of this chapter. The Appraisal must not be dated more than six months prior to the date of Application submission, the Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. For Developments that require an appraisal from USDA, the appraisal may be more than six months old, as long as USDA has confirmed in writing that the existing appraisal is still acceptable. Notwithstanding the foregoing, if the Application contains a Market Analysis and the appraisal is not required to fulfill purposes other than establishing the value of land or buildings, an appraisal is not required if no acquisition costs are entered in the development cost schedule.

§11.206. Board Decisions (§§2306.6725(c); 2306.6731; and 42(m)(1)(A)(iv)).

The Board's decisions regarding awards or the issuance of Determination Notices, if applicable, shall be based upon the Department's staff and the Board's evaluation of the proposed Developments' consistency with, and fulfillment of, the criteria and requirements set forth in this chapter, Chapter 13 of this title (relating to the Multifamily Direct Loan Rule) and other applicable Department rules and other applicable state, federal and local legal requirements, whether established in statute, rule, ordinance, NOFA, official finding, or court order. The Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause, and the reasons for any decision that conflicts with the recommendations made by Department staff. Good cause includes the Board's decision to apply discretionary factors where authorized. The Department reserves the right to reduce the amount of funds requested in an Application, condition the Housing Tax Credit or Direct Loan recommendation, or terminate the Application based on the Applicant's inability to demonstrate compliance with program requirements.

§11.207. Waiver of Rules.

An Applicant may request a waiver from the Board in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests on Competitive HTC Applications will not be accepted between submission of the Application and any award for the Application. Staff may identify and initiate a waiver request to remedy an error in the QAP or other Multifamily rules, provide necessary relief in response to a natural disaster, or address facets of an Application or Development that have not been contemplated. The Applicant must submit plans for mitigation or alternative solutions with the waiver request. Any such request for waiver submitted by an Applicant must be specific to an actual proposed Development and must be submitted to the Department in the format required in the Multifamily Programs Procedures Manual. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved. All waiver requests must meet the requirements of paragraphs (1) and (2) of this subsection.

(1) A waiver request made at or prior to pre-application or Application must establish that the need for the waiver is not within the control of the Applicant or is due to an overwhelming need. A recommendation for a waiver may be subject to the Applicant's provision of alternative design elements or amenities of a similar nature or that serve a similar purpose. Waiver requests for items that were elected to meet scoring criteria or where the Applicant was provided a menu of options to meet the requirement will not be considered to satisfy this paragraph, unless the Applicant demonstrates that all potential options have been exhausted.

(2) The waiver request must establish how, by granting the waiver, it better serves the policies and purposes articulated in Tex. Gov't Code §§2306.001, 2306.002, 2306.359, and 2306.6701, (which are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program) than not granting the waiver.

(3) The Board may not grant a waiver to provide directly or implicitly any Forward Commitments, unless due to extenuating and unforeseen circumstances as determined by the Board. The Board may not waive any requirement contained in statute. The Board may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the Qualified Allocation Plan to the extent authorized by a governor declared disaster proclamation suspending statutory or regulatory requirements.

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303358
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.301. General Provisions.

This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Direct Loan, and Scope and Cost Review standards employed by the Department. This subchapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of an awarded Application and the Department's portfolio. In addition, this subchapter guides staff in making recommendations to the Executive Director and the Board to help ensure procedural consistency in the determination of Development feasibility (Texas Government Code §§2306.081(c), 2306.185, and 2306.6710(d)). Due to the unique characteristics of each Development, the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

§11.302. Underwriting Rules and Guidelines.

(a) General Provisions.

(1) Pursuant to Tex. Gov't Code §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore, for Housing Credit Allocation, Code §42(m)(2), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notices 15-11 and 21-10 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan feasibility. The rules adopted pursuant to the Tex. Gov't Code and the Code are developed to result in an Underwriting Report (Report) used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(2) Oversourcing of Funds. The total amount of Department-allocated funds combined with any additional soft funds provided by other units of government may not exceed the total cost of all non-market Units at the development, calculated on a per-unit basis. For purposes of this subsection, soft funds include any grants, below-market interest rate loans, or similar funds with a total cost to the Applicant that is below commercial-rate financing, but does not include payable loans provided at commercial rates with deferred payments. If the Department determines that a Development is oversourced in accordance with this subsection, the Applicant will be required to reduce the soft funds provided by other units of government so as to no longer be oversourced.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be based upon information that is provided in accordance with and within the timeframes set forth in this chapter, Chapters 11, 12, or 13, or in a Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report, if being recommended, includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the amounts determined using the methods in paragraphs (1) - (3) of this subsection:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §11.1(d) of this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated Deferred Developer Fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of a Cash Flow loan as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio (DCR) conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner) but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income (NOI) to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's

income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to Utility Allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) Rental Income. The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 80% AMI.

(ii) Gross Program Rent. The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income (EGI) to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) Contract Rents. The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase. Tenant-based vouchers or tenant-based rental assistance are not included as Income.

(iv) Utility Allowances. The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of this title (relating to Utility Allowances). Utility Allowances must be calculated for individually metered tenant paid utilities.

(v) Net Program Rents. Gross Program Rent less Utility Allowance.

(vi) Actual Rents for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) Collected Rent. Represents the monthly rent amount collected for each Unit Type. For rent- assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to, late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $30 per Unit per month range. Projected income from tenant-based rental assistance will not be considered. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter uses a normalized vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss). 100% project-based rental subsidy developments (not including employee-occupied units) may be underwritten at a combined 5% vacancy rate.

(D) Effective Gross Income (EGI). EGI is the total of Collected Rent for all Units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5% of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing Development or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance. The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's database of properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's database is available on the Department's website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense. (G&A)--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. The Underwriter will use the Applicant's proposed Management Fee if it is within the range of 4% to 6% of EGI. A proposed fee outside of this range must be documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense (WST). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10% or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or Payment in Lieu of Taxes (PILOT) agreement the Applicant must provide documentation in accordance with §10.402(d) of this title (relating to Documentation Submission Requirements at Commitment of Funds). At the underwriter's discretion, such documentation may be required prior to Commitment or Determination Notice if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs). The Underwriter will use a minimum reserve of $250 per Unit for New Construction and Reconstruction Developments and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Scope and Cost Review (SCR) or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the SCR during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. For Developments financed by USDA, a Return to Owner (RTO) may be included as an operating expense in an amount consistent with the maximum approved by USDA or an amount determined by the Underwriter. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Resident Services. Resident services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide resident supportive services at a specified dollar amount. The financial obligation must be identified by the permanent lender in their term sheet and the dollar amount of the financial obligation must be included in the DCR calculation on the permanent lender's 15-year pro forma at Application. If the term sheet has an expiration date, the term sheet must have been signed by the Applicant prior to the expiration date; or

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing affiliated properties within the local area. Except for Supportive Housing Developments, the estimated expense of supportive services must be identified by the permanent lender in their term sheet and included in the DCR calculation on the 15-year pro forma; and

(iii) On-site staffing or pro ration of staffing for coordination of services only, and not the provision of services, can be included as a supportive services expense without permanent lender documentation.

(L) Total Operating Expenses. The total of expense items described in subparagraphs (A) - (K) of this paragraph (relating to Operating Feasibility). If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income (NOI). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5% of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma DCR, the Underwriter's calculation of NOI will be used unless the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5% of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates of EGI, Total Operating Expenses, or NOI. The Applicant's NOI will generally

be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of the debt service payments on all permanent or foreclosable lien(s) with scheduled and periodic payment requirements, including any required debt service on a Direct Loan subject to the applicable Notice of Funding Availability (NOFA) or other program requirements, and any on-going loan related fees such as credit enhancement fees or loan servicing fees. If executed loan documents do not exist, loan terms including principal and interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Term sheet(s) must indicate the minimum DCR required by the lender for initial underwriting as well as for stabilization purposes. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide the base rate index or methodology for determining the variable rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment. Interest on Related Party or Affiliate loans will be underwritten at 1% or lower. The underwriter will not amortize Related Party or Affiliate cash flow loans in order to meet feasibility requirements.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than 30 years and not more than 40 years. Up to 50 years may be used for federally sourced or insured loans. For permanent lender debt with amortization periods less than 30 years, 30 years will be used. For permanent lender debt with amortization periods greater than 40 years, 40 years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Direct Loans will be fully amortized over the same period as the permanent lender debt.

(C) Repayment Period. For purposes of projecting the DCR over a 30 year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the priority order presented in subclauses (I) - (IV) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) A reduction to the interest rate of a Direct Loan;

(II) An increase in the amortization period of a Direct Loan;

(III) A reduction in the principal amount of a Direct Loan; and

(IV) An assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the priority order presented in subclauses (I) - (III) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) an increase to the interest rate of a Direct Loan up to the lesser of the maximum interest rate pursuant to a Direct Loan NOFA or the interest rate on any senior permanent debt or if no senior permanent debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period on a Direct Loan but not less than 30 years; and

(III) an assumed increase in the permanent loan amount for non-Department proposed financing based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) For Developments financed with a Direct Loan subordinate to FHA financing, DCR on the Direct Loan will be calculated using 75% of the Surplus Cash (or other amount if identified in a Direct Loan NOFA).

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan and may limit total debt service if the Direct Loan is the senior primary debt.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the criteria provided in subparagraphs (A) to (C) of this paragraph:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's Development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5% of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments or Adaptive Reuse Developments will be based on the estimated cost provided in the SCR for the scope of work as defined by the Applicant and

§11.306(a)(5) of this chapter (relating to SCR Guidelines); the Underwriter may make adjustments to the SCR estimated costs. If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost. For Competitive Housing Tax Credit Applications, the Underwriter will adjust an Applicant's cost schedule line item to meet program rules. Underwriter will not make subsequent adjustments to the application to meet feasibility requirements as a result of the initial adjustment required to meet program rules.

(1) Acquisition Costs.

(A) Land, Acquisition and Rehabilitation, Reconstruction, and Adaptive Reuse Acquisition.

(i) For a non-identity of interest acquisition with no building acquisition cost in basis or when the acquisition is not part of the Direct Loan eligible cost and not subject to the appraisal requirements in the Uniform Relocation Assistance and Act of 1970, the underwritten acquisition cost will be the amount(s) reflected in the Site Control document(s) for the Property. At Cost Certification, the acquisition cost used will be the actual amount paid as verified by the settlement statement.

(ii) For an identity of interest acquisition or when required by the Uniform Relocation Assistance and Acquisition Act of 1970 the underwritten acquisition cost will be the lesser of the amount reflected in the Site Control documents for the property or the appraised value as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). An appraisal is not required if the land or building are donated to the proposed Development, and no costs of acquisition appear on the Development Cost Schedule. An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, or a Related Party to, any Owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property as of the first date of the Application Acceptance Period or the Application Acceptance Date for Direct Loans; or

(II) has or had within the prior 36 months the legal or beneficial ownership of the property or any portion thereof or interest therein regardless of ownership percentage, control or profit participation prior to the first day of the Application Acceptance Period or in the case of a tax-exempt bond or 4% tax credit application the Application Date.

(iii) For all identity of interest acquisitions, the cost used at cost certification will be limited to the acquisition cost underwritten in the initial Underwriting of the Application.

(iv) In cases where more land will be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s) or the appraisal, if an appraisal is required. An appraisal containing segregated values for the total acreage to be acquired, the acreage for the Development Site and the remainder acreage may be used by the Underwriter in making a proration determination based on relative value. The Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) USDA Rehabilitation Developments. The underwritten acquisition cost for developments financed by USDA will be the transfer value approved by USDA.

(C) Eligible Basis on Acquisition of Buildings. Building acquisition cost included in Eligible Basis is limited to the appraised value of the buildings, exclusive of land value, as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). If the acquisition cost in the Site Control documents is less than the appraised value, Underwriter will utilize the land value from the appraisal and adjust the building acquisition cost accordingly.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work, including site amenities, that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. Costs for multi- level parking structures must be supported by a cost estimate from a Third Party contractor with demonstrated experience in structured parking construction. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all Off-Site Construction, Site Work, and building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand the work and it must generally be arranged consistent with the line-items on the SCR Supplement and must also be consistent with the Development Cost Schedule of the Application.

(ii) The Underwriter will use cost data provided on the SCR Supplement if adequately described and substantiated in the SCR report as the basis for estimating Total Housing Development Costs.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7% of Building Cost plus Site Work and Off-Site Construction for New Construction and Reconstruction Developments, and 10% of Building Cost plus Site Work and Off-Site Construction for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible Off-Site Construction costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary

utilities, and other indirect costs. General Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lessor of $320,000 or 18% on Developments with Hard Costs at $2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. Any General Contractor fees above this limit will be excluded from Total Housing Development Costs. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15% of the project's eligible costs, less Developer Fee, for Developments proposing 50 Units or more and 20% of the project's eligible costs, less Developer Fee, for Developments proposing 49 Units or less. If the Development is an additional phase, proposed by any Principal of the existing tax credit Development, the Developer Fee may not exceed 15%, regardless of the number of Units.

(B) For Housing Tax Credit Developments, any additional Developer Fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs. Any Developer Fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer Fee. All costs for general and administrative expenses for the Developer, including, but not limited to, travel, dining, and courier fees will be considered part of the Developer Fee.

(C) For Housing Tax Credit Developments, Eligible Developer Fee is multiplied by the appropriate Applicable Percentage depending on whether it is attributable to acquisition or rehabilitation basis.

(D) For non-Housing Tax Credit Developments, the percentage can be up to 7.5%, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to 24 months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party or Affiliate construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount presented in the Applicant's Development Cost Schedule up to twelve months of stabilized operating expenses plus debt service (up to twenty-four months for USDA or HUD-financed rehabilitation transactions). Reserve amounts exceeding these limits will be excluded from Total Housing Development Costs. Pursuant to §10.404(c) of this title (relating to Operative Reserve Accounts), and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally, the Applicant's costs are used; however the Underwriter will use comparative data and Third Party CPA certification as to the capitalization of the costs to determine the reasonableness of all soft costs. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates for Building. Cost or Soft Costs. The Applicant's Total Housing Development Cost and Total Eligible Cost will generally be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the Target Population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities must be included in the LURA.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) Personal credit reports for development sponsors, Developer Fee recipients and those individuals anticipated to provide guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements as found in Chapter 2 of this title (relating to Enforcement);

(B) Quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of NSPIRE violations and other information available to the Underwriter;

(C) For Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process; and

(D) Adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the Development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during

the underwriting process may result in an Application being determined to be infeasible by the Underwriter. Any recommendation made under this subsection to deny an Application for a Grant, Direct Loan or Housing Credit Allocation is subject to Appeal as further provided for in §11.902 of this chapter (relating to Appeals).

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (4) of this subsection.

(1) Interim Operating Income. Interim operating income listed as a source of funds must be supported by a detailed lease-up schedule and analysis.

(2) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) The Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(3) Proximity to Other Developments. The Underwriter will identify in the Report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(4) Direct Loans. In accordance with the requirements of 24 CFR §§92.250 and 93.300(b), a request for a Direct Loan will not be recommended for approval if the DCR exceeds 1.50 any year during the longer of the term of the Direct Loan or the Federal Affordability Period, unless the Applicant elects to commit 25% of annual Cash Flow to a special reserve account, in accordance with §10.404(d) of this title, for any year the DCR is over 1.50. Annual Cash Flow will be calculated after deducting any payment due to the DevelopMuer on a deferred developer fee loan and any scheduled payments on cash flow loans. The Department will calculate the total special reserve amount based on the Cash Flow at Direct Loan Closing underwriting. The deposits into the special reserve account must be made annually from 25% of remaining annual cash flow until the total special reserve amount is reached. Alternatively, Applicant may request the Direct Loan interest rate be increased by Underwriter at Direct Loan Closing underwriting if financially feasibility is still met. If the Direct Loan is not recommended for approval, the remaining feasibility considerations under this section will be based on a revised sources schedule that does not contain the Direct Loan. This standard will also be used when the Development Owner is seeking approval for a request for a subordination agreement or a refinance, except the total special reserve amount will be based on the Cash Flow reflected in the underwriting at that time. A special reserve account is not eligible for Developments layered with FHA financing that is subject to HUD's Multifamily Accelerated Processing Guide.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) or (4) of this subsection, applies unless paragraph (5)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). The Underwriter will verify the conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) Is characterized as an Elderly Development and the Gross Capture Rate or any AMGI bad capture rate exceeds 10%; or

(B) Is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10% (or 15% for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than one million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) Is in a Rural Area and targets the general population, and:

(i) contains Housing Tax Credit Units of 120 or less, and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(ii) contains more than 120 Housing Tax Credit Units, and the Gross Capture Rate or any AMGI band capture rate exceeds 10%; or

(D) Is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(E) Has an Individual Unit Capture Rate for any Unit Type greater than 65%; and

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply:

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference; or

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMGI rents, which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated Deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first 15 years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68% for Rural Developments 36 Units or less, and 65% for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(4) Long Term Feasibility. The Long Term Pro forma reflects:

(A) A Debt Coverage Ratio below 1.15 at any time during years two through fifteen; or

(B) Negative Cash Flow at any time throughout the term of a Direct Loan, or at any time during years two through fifteen for applications that do not include a request for a Direct Loan.

(5) Exceptions. The infeasibility conclusions will not apply if:

(A) The Executive Director of the Department finds that documentation submitted by the Applicant at the request of the Underwriter will support unique circumstances that will provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3)(A) or (4) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan, including a Supportive Housing Development, will not be re-characterized as feasible with respect to paragraph (4)(B) of this subsection. The Development:

(i) will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50% of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application;

(ii) will receive rental assistance for at least 50% of the Units in association with USDA financing;

(iii) will be characterized as public housing as defined by HUD for at least 50% of the Units;

(iv) meets the requirements under §11.1(d)(124)(E)(i) of this chapter (relating to the Definition of Supportive Housing); or

(v) has other long term project based restrictions on rents for at least 50% of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Market Rent.

§11.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Development rental rates or sales price, and state conclusions as to the impact of the Development with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (2) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least 30 calendar days prior to the first day of the competitive tax credit Application Acceptance Period or 30 calendar days prior to submission of any other application for funding for which the Market Analyst must be approved. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A), (B), (C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list. Submission items include:

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships);

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis;

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis;

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed;

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted; and

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of

the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Development address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Development's address or location, description of Development, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Real Estate. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Development.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) How the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) Whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) What are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) What are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) If the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) For rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) Discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) Other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

(iv) property condition;

(v) Target Population;

(vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area including:

(I) monthly rent and Utility Allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) description of concessions;

(viii) list of unit amenities;

(ix) utility structure;

(x) list of common amenities;

(xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and

(xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

(i) total housing;

(ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;

(iii) Affordable housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support the overall demand conclusion for the proposed Development. State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Target Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports must include:

(i) All demographic reports must include population and household data for a five year period with the year of Application submission as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;

(iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit Type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. For HOME-ARP, demand for Qualifying Populations must be identified in accordance with Section VI B.10.a.ii of CPD Notice 21-10. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit Type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40% for the general population and 50% for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three or more Bedrooms:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) For Elderly Developments:

(-a-) minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) For Supportive Housing:

(-a-) minimum eligible income is $1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (Project Based Vouchers, Project-Based Rental Assistance, Public Housing Units):

(-a-) minimum eligible income for the assisted units is $1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) For External Demand, assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) For Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (J) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit Type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §11.302(i) of this chapter (relating to Feasibility Conclusion). In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category. For HOME-ARP, Units for Qualified Populations will be underwritten at $0 income, unless the Unit has project-based rental assistance or subsidy, or is supported by a capitalized operating reserve agreement.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15% must be supported with additional narrative.

(vi) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) For Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom Units restricted at 50% of AMGI; two-Bedroom Units restricted at 60% of AMGI);

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once; and

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and Unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in previously approved Developments in the PMA that have not achieved 90% occupancy for a minimum of 90 days. Approved Developments should be determined by:

(I) the HTC Property Inventory that is published on the Department's website as of December 31, 2023, for competitive housing tax credit Applications;

(II) the most recent HTC Property Inventory that is published on the Department's website one month prior to the Application date of non-competitive housing tax credit and Direct Loan Applications.

(iii) Unstabilized Comparable Units that are located in close proximity to the subject PMA if they are likely to share eligible demand or if the PMAs have overlapping census tracts. Underwriter may require Market Analyst to run a combined PMA including eligible demand and Relevant Supply from the combined census tracts; the Gross Capture Rate generated from the combined PMA must meet the feasibility criteria as defined in §11.302(i) (relating to Feasibility Conclusion).

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §11.302(i) of this chapter (relating to Feasibility Conclusion).

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual unit capture rate is defined as the Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%, and also 20%, 70%, and 80% if the Applicant will make the Income Average election), the capture rate by AMGI band is defined as Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(13) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in subsection (c)(1)(B) and (C) of this section (relating to Market Analyst Qualifications).

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or Unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market Analysis considering the combined PMA's and all proposed and Unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used by the Underwriter as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§11.304. Appraisal Rules and Guidelines.

(a) General Provision.

(1) An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must be prepared by a general certified appraiser by the Texas Appraisal Licensing and Certification Board. The appraisal must include a statement that the report preparer has read and understood the requirements of this section. The appraisal must include a statement that the person or company preparing the appraisal, or reviewing the appraisal, is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the appraisal and that the fee is in no way contingent upon the outcome of the appraisal.

(2) If an appraisal is required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the appraisal must also meet the requirements of 49 CFR Part 24 and HUD Handbook 1378. (b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(b) Appraiser Qualifications. The appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(c) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report. The title page must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of

marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject Property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the Development Site. Include a plat map or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject Property clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and any deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (Net Rentable Area, gross building area, etc.), use (whether vacant, occupied by owner, or being rented), number of residents, number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (such as discolored vegetation, oil residue, asbestos-containing materials, lead- based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised Property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the Property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the Cost Approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable:

(I) Property rights conveyed;

(II) Financing terms;

(III) Conditions of sale;

(IV) Location;

(V) Highest and best use;

(VI) Physical characteristics (e.g., topography, size, shape, etc.); and

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the Underwriter with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the Property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The Net Operating Income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject Property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental Units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., Unit Type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The Contract Rents should be compared to the market-derived rents. A determination should be made as to whether the Contract Rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (such as IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The "as vacant" value assumes that there are no improvements on the property and therefore demolition costs should not be considered. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value at current contract rents." For public housing converting to project-based rental assistance, the appraiser must provide a value based on the future restricted rents. The value used in the analysis may be based on the unrestricted market rents if supported by the appraisal. Regardless of the rents used in the valuation, the appraiser must consider any other on-going restrictions that will remain in place even if not affecting rents. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the value must be based on the current restricted rents when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of typical Units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(d) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§11.305. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department must be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM). The initial report must conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-13 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions must either address Texas Department of Housing and Community Affairs as a co-recipient of the report or letters from both the provider and the recipient of the report may be submitted extending reliance on the report to the Department. The ESA report must also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law." The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint or asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements. For all Rehabilitation Developments, the ESA provider must state whether the on-site plumbing is a potential source of lead in drinking water;

(6) Assess the potential for the presence of Radon on the Development Site, and recommend specific testing if necessary;

(7) Identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities (does not include liquified petroleum gas containers with a capacity of less than 125 gallons on-site or within 0.25 miles of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations; and

(8) Include a vapor encroachment screening in accordance with the ASTM "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions" (E2600-10 or any subsequent standards as published).

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as an existing USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§11.306. Scope and Cost Review Guidelines.

(a) General Provisions. The objective of the Scope and Cost Review Report (SCR) required for Rehabilitation Developments (excluding Reconstruction) and Adaptive Reuse Developments is to provide a self-contained report that provides a comprehensive description and evaluation of the current conditions of the Development and identifies a scope of work for the proposed repairs, replacements and improvements to an existing multifamily property or identifies a scope of work for the conversion of a non-multifamily property to multifamily use. The SCR author must evaluate the sufficiency of the Applicant's scope of work and provide an independent review of the Applicant's proposed costs. The report must be in sufficient detail for the Underwriter to fully understand all current conditions, scope of work and cost estimates. It is the responsibility of the Applicant to ensure that the scope of work and cost estimates submitted in the Application is provided to the author. The SCR must include a copy of the Development Cost Schedule submitted in the Application. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) For Rehabilitation Developments, the SCR must include analysis in conformity with the ASTM "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018, or any subsequent standards as published)" except as provided for in subsections (f) and (g) of this section.

(c) The SCR must include good quality color photographs of the subject Real Estate (front, rear, and side elevations, on-site amenities, interior of the structure). Photographs should be properly labeled.

(d) The SCR must also include discussion and analysis of:

(1) Description of Current Conditions. For both Rehabilitation and Adaptive Reuse, the SCR must contain a detailed description with good quality photographs of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced. For historic structures, the SCR must contain a description with photographs

of each aspect of the building(s) that qualifies it as historic and must include a narrative explaining how the scope of work relates to maintaining the historic designation of the Development. Replacement or relocation of systems and components must be described;

(2) Description of Scope of Work. The SCR must provide a narrative of the consolidated scope of work either as a stand-alone section of the report or included with the description of the current conditions for each major system and components. Any New Construction must be described. Plans or drawings (that are in addition to any plans or drawings otherwise required by rule) and that relate to any part of the scope of work should be included, if available;

(3) Useful Life Estimates. For each system and component of the property the SCR must estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(4) Code Compliance. The SCR must document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Applicant to ensure that the SCR adequately considers any and all applicable federal, state, and local laws and regulations which are applicable and govern any work and potentially impact costs. For Applications requesting Direct Loan funding from the Department, the SCR author must include a comparison between the local building code and the International Existing Building Code of the International Code Council;

(5) Program Rules. The SCR must assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, the Department's Uniform Physical Condition Standards, and any scoring criteria including amenities for which the Applicant may claim points. It is the responsibility of the Applicant to inform the report author of those requirements in the scope of work; for Direct Loan Developments this includes, but is not limited to the requirements in the Lead-Based Paint Poisoning Prevention Act (42 USC §§4821-4846), the Residential Lead- Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856), and implementing regulations, Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35 (including subparts A, B, J, K, and R), and the Lead: Renovation, Repair, and Painting Program Final Rule and Response to Children with Environmental Intervention Blood Lead Levels (40 CFR Part 745);

(6) Accessibility Requirements. The SCR report must include an analysis of compliance with the Department's accessibility requirements pursuant to Chapter 1, Subchapter B and §11.101(b)(8) of this title (relating to Site and Development Requirements and Restrictions) and identify the specific items in the scope of work and costs needed to ensure that the Development will meet these requirements upon Rehabilitation (including conversion and Adaptive Reuse);

(7) Reconciliation of Scope of Work and Costs. The SCR report must include the Department's Scope and Cost Review Supplement (SCR Supplement) with the signature of the SCR author. The SCR Supplement must reconcile the scope of work and costs of the immediate physical needs identified by the SCR author with the Applicant's scope of work and costs. The costs presented on the SCR Supplement must be consistent with both the scope of work and immediate costs identified in the body of the SCR report and the Applicant's scope of work and costs as presented in the Application. Variations between the costs listed on the SCR Supplement and the costs listed in the body of the SCR report or on the Applicant's Development Cost Schedule must be reconciled in a narrative analysis from the SCR provider. The consolidated scope of work and costs shown on the SCR Supplement will be used by the Underwriter in the analysis to the extent adequately supported in the report; and

(8) Cost Estimates. The Development Cost Schedule and SCR Supplement must include all costs identified below:

(A) Immediately Necessary Repairs and Replacement. For all Rehabilitation developments, and Adaptive Reuse developments if applicable, immediately necessary repair and replacement should be identified for systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards. The SCR must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional scope of work above and beyond the immediate repair and replacement items described in subparagraph (A) of this paragraph, the additional scope of work must be evaluated and either the nature or source of obsolescence to be cured or improvement to the operations of the Property discussed. The SCR must provide a separate estimate of the costs associated with the additional scope of work, citing the basis or the source from which such cost estimate is derived.

(C) Reconciliation of Costs. The combined costs described in subparagraphs (A) and (B) of this paragraph should be consistent with the costs presented on the Applicant's Development Cost Schedule and the SCR Supplement.

(D) Expected Repair and Replacement Over Time. The term during which the SCR should estimate the cost of expected repair and replacement over time must equal the lesser of 30 years or the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The SCR must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The SCR must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred for a period and no less than 30 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(e) Any costs not identified and discussed in sufficient detail in the SCR as part of subsection (d)(6), (d)(8)(A) and (d)(8)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(f) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports; and

(4) USDA guidelines for Capital Needs Assessment.

(g) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(h) The SCR shall be conducted by a Third Party at the expense of the Applicant, and addressed to Texas Department of Housing and Community Affairs as the client. Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to Texas Department of Housing and Community Affairs.

(i) The SCR report must include a statement that the individual or company preparing the SCR report will not materially benefit from the Development in any other way than receiving a fee for performing the SCR. Because of the Department's heavy reliance on the independent cost information, the provider must not be a Related Party to or an Affiliate of any other Development Team member. The SCR report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(j) Scope of Work Narrative. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must provide a Scope of Work Narrative, consisting of:

(1) A detailed description of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced;

(2) For historic structures, a description of each aspect of the building(s) that qualifies it as historic, including a narrative explaining how the scope of work relates to maintaining the historic designation of the Development; and

(3) a narrative of the consolidated scope of work for the proposed rehabilitation for each major system and components.

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303359
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.901. Fee Schedule.

Any unpaid fees, as stated in this section, will cause an Applicant to be ineligible to apply for Department funding, ineligible to receive additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. Other forms of payment may be considered on a case-by-case basis. Applicants will be required to pay any insufficient payment fees charged to the Department by the State Comptroller. The Executive Director may extend the deadline for specific extenuating and extraordinary circumstances, unless prohibited by other parts of this Chapter, provided the Applicant submits a written request for an extension to a fee deadline no later than five business days prior to the deadline associated with the particular fee. For any payment that must be submitted in accordance with this chapter, staff may grant relief of the associated deadline for that payment for unusual or unpredictable circumstances that are outside of the Applicant's control such as inclement weather or failed deliveries. Applicants must submit any payment due under this chapter and operate under the assumption that the deadline for such payment is final.

(1) Competitive Housing Tax Credit Pre-Application Fee. A pre-application fee, in the amount of $10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or a private Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated pre-application fee provided such documentation is submitted with the fee. (§2306.6716(d))

(2) Refunds of Competitive HTC Pre-application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of the pre-application fee for a Competitive HTC pre-application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 50% of the review, threshold review prior to a deficiency being issued will constitute 30% of the review, and review after deficiencies are submitted and reviewed will constitute 20% of the review. In no instance will a refund of the pre-application fee be made after the Full Application Delivery Date.

(3) Application Fee. Each Application must be accompanied by an Application fee.

(A) Housing Tax Credit Applications. For Applicants having submitted a Competitive Housing Tax Credit pre-application which met the pre-application threshold requirements, and for which a pre-application fee was paid, the Application fee will be $20 per Unit based on the total number of Units in the full Application. Otherwise, the Application fee will be $30 per Unit based on the total number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General

Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated Application fee, provided such documentation is submitted with the fee. (§2306.6716(d))

(B) Direct Loan Applications. The fee will be $1,000 per Application except for those Applications that are layered with Housing Tax Credits and submitted simultaneously with the Housing Tax Credit Application. Pursuant to Tex. Gov't Code §2306.147(b), the Department is required to waive Application fees for private nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services and if Direct Loan funds are awarded. In lieu of the Application fee, these organizations must include proof of their exempt status and a description of their supportive services as part of the Application. The Application fee is not a reimbursable cost under the Direct Loan Program.

(4) Refunds of Application Fees. Upon written request from the Applicant, the Department shall refund the balance of the Application fee for an Application that is withdrawn by the Applicant and that is not fully processed by the Department. The withdrawal must occur prior to any Board action regarding eligibility or appeal. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 10% of the review, the site visit will constitute 10% of the review, program evaluation review will constitute 40% of the review, and the underwriting review will constitute 40% of the review. For Competitive HTC Applications, in no instance will a refund of the Application fee be made after final awards are made in July.

(5) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation in whole or in part of a Development by an independent external underwriter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment or Determination Notice Fee, as applicable, established in paragraphs (6) and (7) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(6) Housing Tax Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and returns the credits by November 1 of the current Application Round, then a refund of 50% of the Commitment Fee may be issued upon request.

(7) Tax Exempt Bond Development Determination Notice Fee. No later than the expiration date in the Determination Notice, unless an extension was requested, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and is not able close on the bonds, then a refund of 50% of the Determination Notice Fee may be issued upon request. The refund must be requested no later than 30 days after the Certificate of Reservation expiration deadline.

(8) Tax-Exempt Bond Credit Increase Request Fee. Requests for increases to the credit amounts to be issued on IRS Forms 8609 than what was reflected in the Determination Notice for Tax-Exempt Bond Developments must be submitted with a fee equal to 4% of the amount of the credit increase for one year.

(9) Extension Fees. All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), Construction Status Reports, or Cost Certification requirements submitted at least 30 calendar days in advance of the applicable original deadline will not be required to submit an extension fee. Any extension request submitted fewer than 30 days in advance or after the original deadline must be accompanied by an extension fee of $2,500. Fees for each subsequent extension request on the same activity will increase by increments of $500, regardless of whether the first request was submitted thirty (30) calendar days in advance of the applicable deadline. An extension fee will not be required for extensions requested on Developments that involve Rehabilitation when the Department or U.S. Department of Agriculture (USDA) is the primary lender, if USDA or the Department is the cause for the Applicant not meeting the deadline. For each Construction Status Report received after the applicable deadline, extension fees will be automatically due (regardless of whether an extension request is submitted). Unpaid extension fees related to Construction Status Reports will be accrued and must be paid prior to issuance of IRS Forms 8609. For purposes of Construction Status Reports, each report will be considered a separate activity. An extension fee of the deadline to submit the Determination Notice and associated documents will not be required, provided a written request was submitted to the Department.

(10) Amendment Fees. An amendment request for a non-material change that has not been implemented will not be required to pay an amendment fee. Material amendment requests (whether implemented or not), or non-material amendment requests that have already been implemented will be required to submit an amendment fee of $2,500 in order for the request to be processed. Fees for each subsequent amendment request related to the same Application will increase by increments of $500. A subsequent request, related to the same Application, regardless of whether the first request was non-material and did not require a fee, must include a fee of $3,000. Amendment fees and fee increases are not required for the Direct Loan programs during the Federal Affordability Period.

(11) Right of First Refusal Fee. Requests for approval of the satisfaction of the Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of $2,500.

(12) Qualified Contract Pre-Request Fee. A Development Owner must file a preliminary Qualified Contract Request to confirm eligibility to submit a Qualified Contract request. The Pre-Request must be accompanied by a non-refundable processing fee of $250.

(13) Qualified Contract Fee. Upon eligibility approval of the Qualified Contract Pre-Request, the Development Owner may file a Qualified Contract Request. Such request must be accompanied by a non-refundable processing fee of $3,000.

(14) Ownership Transfer Fee. Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of $1,000. Ownership Transfer fees are not required for Direct Loan only Developments during the Federal Affordability Period.

(15) Unused Credit or Penalty Fee for Competitive HTC Applications. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of IRS Form 8609. A penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of IRS Form 8609 if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director may recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate

for any Application in an Application Round occurring concurrent to the return of credits as further provided for in §11.9(f) of this chapter (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds), or if no Application Round is pending, the Application Round immediately following the return of credits. If any such point penalty is recommended to be assessed and presented for final determination by the Board, it must include notice from the Department to the affected party not less than 14 calendar days prior to the scheduled Board meeting. The Executive Director may, but is not required to, issue a formal notice after disclosure if it is determined that the matter does not warrant point penalties.

(16) Compliance Monitoring Fee. Upon receipt of the cost certification for HTC Developments, HTC Developments that are layered with Direct Loan funds, or upon the completion of the Development Period and the beginning of the repayment period for Direct Loan only Developments, the Department will invoice the Development Owner for compliance monitoring fees. For HTC only the amount due will equal $40 per low-income unit. For Direct Loan Only Developments the fee will be $34 per Direct Loan Units, including HOME Match Eligible Units. Developments with both HTCs and Direct Loan, including HOME Match Eligible Units, will only pay one fee equal to $40 per low income unit. Existing HTC developments with a Land Use Restriction Agreement that require payment of a compliance monitoring fee that receive a second allocation of credit will pay only one fee; the fee required by the original Land Use Restriction Agreement will be disregarded. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For Direct Loan only Developments, the fee will be collected beginning with the first year of after Project Completion. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. For Direct Loan only Developments, the fee must be paid prior to the release of final retainage. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. Compliance fees may be adjusted from time to time by the Department.

(17) Public Information Request Fee. Public information requests are processed by the Department in accordance with the provisions of Tex. Gov't Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(18) Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the Housing Tax Credit and Direct Loan programs may be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

§11.902. Appeals Process.

(a) For Competitive HTC Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to Tex. Gov't Code §2306.0321 and §2306.6715 using the process identified in this section. For Tax-Exempt Bond Developments and Direct Loan Developments (not layered with a Competitive HTC Application), an Applicant or Development Owner may appeal decisions made by the Department pursuant to §1.7 of this title (relating to Appeals). Matters that can be appealed include:

(1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications), pre-application threshold criteria, and underwriting criteria;

(2) The scoring of the Application under the applicable selection criteria;

(3) A recommendation as to the amount of Department funding to be allocated to the Application;

(4) Misplacement of an Application or parts of an Application, mathematical errors in scoring an Application, or procedural errors resulting in unequal consideration of the Applicant's proposal;

(5) Denial of a requested change to a Commitment or Determination Notice;

(6) Denial of a requested change to a loan agreement;

(7) Denial of a requested change to a LURA;

(8) Any Department decision that results in the termination or change in set-aside of an Application; and

(9) Any other matter for which an appeal is permitted under this chapter.

(b) An Applicant or Development Owner may not appeal a decision made regarding an Application filed by or an issue related to another Applicant or Development Owner.

(c) An Applicant or Development Owner must file its appeal in writing with the Department not later than the seventh calendar day after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be made by a Person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.

(d) The Executive Director may respond in writing not later than 14 calendar days after the date of actual receipt of the appeal by the Department. If the Applicant is not satisfied with the Executive Director's response to the appeal or the Executive Director does not respond, the Applicant may appeal directly in writing to the Board. While information can be provided in accordance with any rules related to public comment before the Board, full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal must be disclosed in the appeal documentation filed with the Executive Director.

(e) An appeal filed with the Board must be received in accordance with Tex. Gov't Code §2306.6715(d).

(f) If there is insufficient time for the Executive Director to respond to a Competitive Housing Tax Credit Application appeal prior to the agenda being posted for the July Board meeting at which awards from the Application Round will be made, the appeal may be posted to the Board agenda prior to the Executive Director's issuance of a response.

(g) Board review of an Application related appeal will be based on the original Application. A witness in an appeal may not present or refer to any document, instrument, or writing not already contained within the Application as reflected in the Department's records.

(h) The decision of the Board regarding an appeal is the final decision of the Department.

(i) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of an Application related appeal. (§2306.6717(a)(5))

§11.903. Adherence to Obligations. (§2306.6720).

Any Applicant, Development Owner, or other Person that fails to adhere to its obligations with regard to the programs of the Department, whether contractual or otherwise, made false or misleading representations to the Department with regard to an Application, request for funding, or compliance requirements, or otherwise violated a provision of Tex. Gov't Code, Chapter 2306 or a rule adopted under that chapter, may be subject to:

(1) Assessment of administrative penalties in accordance with Chapter 2, Subchapter C of this title (relating to Administrative Penalties) the Department's rules regarding the assessment of such penalties. Each day the violation continues or occurs is a separate violation for purposes of imposing a penalty; or

(2) In the case of the competitive Low Income Housing Tax Credit Program, a point reduction for any Application involving that Applicant over the next two Application Rounds succeeding the date on which the Department first gives written notice of any such failure to adhere to obligations or false or misleading representations. Point reductions under this section may be appealed to the Board.

§11.904. Alternative Dispute Resolution (ADR) Policy.

In accordance with Tex. Gov't Code §2306.082, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Tex. Gov't Code, Chapter 2010, to assist in resolving disputes under the Department's jurisdiction, as provided for in §1.17 of this title (relating to Alternative Dispute Resolution).

§11.905. General Information for Commitments or Determination Notices.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount in accordance with §42(m)(2)(A) or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and the Department's rules, all provisions of Commitment, Determination Notice, and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board's issuance of a Commitment Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C of Chapter 11 of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§11.906. Commitment and Determination Notice General Requirements and Required Documentation.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this title (relating to Fee Schedule), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. For Tax-Exempt Bond Developments utilizing a local issuer, the Determination Notice expiration date may be extended for a period not to exceed 5 calendar days, upon request. For Tax-Exempt Bond Developments utilizing TDHCA as the bond issuer, the expiration date may be extended to coincide with the closing date. If the requirements of the Determination Notice, and any conditions of the Determination Notice are met, the Determination Notice shall be valid for a period of one year from the effective date of the Determination Notice, without distinction between a Certificate of Reservation or Traditional Carryforward Reservation. In instances where the Certificate of Reservation is withdrawn after the Determination Notice has been issued and a new Certification of Reservation is issued, staff will not re-issue the Determination Notice. After one year from the effective date of the Determination Notice, if a new Certificate of Reservation or Traditional Carryforward Reservation is issued, the Applicant will be required to contact the Department in order to have a new Determination Notice issued and a new Application must be submitted. Such Application submission must meet the requirements of §11.201(2) of

this chapter (relating to Procedural Requirements for Application Submission). If more than a year has not passed from the effective date of the Determination Notice, yet an Applicant desires to have a new Determination Notice issued that reflects a different recommended credit amount, then a new Application must be submitted that meets the requirements of §11.201(2) of this chapter.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (7) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded.

(1) For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect.

(2) For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect.

(3) Evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application.

(4) Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan.

(5) Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, any conditions provided for in Chapter 1, Subchapter C of this title (relating to the Previous Participation Review , or any other conditions of the award required to be met at Commitment or Determination Notice.

(6) Documentation of any changes to representations made in the Application subject to §10.405 of this title (relating to Amendments and Extensions).

(7) For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes (PILOT) agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(8) For Competitive HTC Applications, for any documentation that must be submitted in accordance with this section, staff may grant relief of the associated deadline, for unusual or unpredictable circumstances that are outside of the Applicant's control such as inclement weather or failed deliveries. Applicants must submit any payment due under this chapter and operate under the assumption that the deadline for such payment is final.

(d) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (6) of this subsection.

(1) Training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended and passed at least five hours of Fair Housing training. The certificate(s) must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates. The Development Owner individual reflected on the certificate must be identified on the organizational chart as having Control.

(2) A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. The certificate must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates.

(3) Evidence that the financing has closed, such as an executed settlement statement.

(4) A confirmation from the Compliance Division evidencing receipt of the CMTS Filing Agreement form pursuant to §10.607(a) of this title (relating to Reporting Requirements).

(5) An initial construction status report consisting of items from subsection (h)(1) - (5) of this title (relating to Construction Status Reports).

(6) A current survey or plat of the Development Site prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the floodplain areas and show all easements recorded against the property and encroachments.

§11.907. Carryover Agreement General Requirements and Required Documentation.

Carryover (Competitive HTC Only). All Developments that received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this title (relating to Amendments and Extensions).

(4) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

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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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER F. SUPPLEMENTAL HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1009

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.1001. General.

(a) This subchapter applies only to 2024 State Housing Tax Credits to supplement Competitive HTC awards during the July Board meeting of the Department at which final awards of credits are authorized or to supplement Tax-Exempt Bond Developments.

(b) For Competitive HTC Applications, submissions required to make a request for State Housing Tax Credits are considered a supplement to the original Application. Requests for State Housing Tax Credits are not considered Applications under the 2024 HTC Competitive Cycle nor are they part of the 2024 Application Round.

(c) For Competitive HTC Applications, an allocation of State Housing Tax Credits will be processed as a Material Amendment to the Application under §10.405 of this title (relating to Amendments and Extensions).

(d) For Competitive HTC Applications, revisions to costs included in a request for State Housing Tax Credits will not have an impact on points originally awarded for Costs of Development per Square Foot or Leveraging (§§11.9(e)(2) and (4) of this title, respectively).

(e) Tax-Exempt Bond Developments shall meet the requirements of §11.1009 of this chapter (relating to State Housing Tax Credits for Tax-Exempt Bond Developments).

(f) Developments with HOME funds from the Department or another Participating Jurisdiction, will enter into a Contract and a LURA for HOME Match Eligible Units.

§11.1002. Program Calendar for State Housing Tax Credits Associated with Competitive HTC Applications.

Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension.
Figure: 10 TAC §11.1002

§11.1003. State Housing Tax Credit Allocation Process Associated with Competitive HTC Applications.

(a) Intent to Request State Housing Tax Credit Allocation. Only those Applicants who elect to request an allocation of State Housing Tax Credits from the Department by the Full Application Delivery Date specified in §11.2(a) or §11.2(b) of this subchapter (relating to Program Calendar) are eligible to submit a Request for State Housing Tax Credits. This subsection does not apply to prior year applications eligible for a Priority Allocation under §11.1004

(b) Requests for State Housing Tax Credits must be received by the deadline specified in §11.1002 of this subchapter (relating to Program Calendar for State Housing Tax Credits) in the format required by the Department.

(c) Third Party Requests for Administrative Deficiency. Due to the nature of the State Housing Tax Credit process and reliance on the Original Application and scores, the Third Party Request for Administrative Deficiency process will not be utilized during the State Housing Tax Credit process under this subchapter.

§11.1004. Set-Aside for Previously Awarded Developments for Competitive HTC Applications.

As established under §171.566 of the Tax Code, a Priority Allocation of five million will be allocated to previously awarded Developments which the Department determines require an allocation of credits under this subsection to secure feasibility. Requests for the allocation under this subsection must meet the following criteria to be eligible for the award.

(1) Must not be financed through tax exempt bonds;

(2) The Owners or Developers of which have owned the land necessary for the Development since at least December 31, 2022; and

(3) Received an allocation of federal tax credits under the QAP issued by the Department for 2021 or 2022.

§11.1005. Procedural Requirements for Requests for State Housing Tax Credits Associated with Competitive HTC Applications.

(a) The procedures and requirements of §11.201 of this chapter (relating to Procedural Requirements for Application Submission) will generally apply to Requests for State Housing Tax Credits, unless otherwise specified in this Subchapter.

(b) The Original Application will be relied upon, as deemed final and reviewed by staff as part of the original award; the request for State Housing Tax Credits must only include the items authorized in this subchapter. Architectural drawings, or other documents that relate to changes to the Application other than revisions to the financing structure may not be submitted. The Applicant must submit the required documents as a single PDF document and all spreadsheet exhibits must also be provided in a usable spreadsheet format as further

specified in the Department's released materials, which will be incorporated into the Original Application by staff, and become the full Request for State Housing Tax Credits.

§11.1006. Required Documentation for State Housing Tax Credit Request Submission Associated with Competitive HTC Applications.

(a) The purpose of this section is to identify the threshold documentation that is specific to the Request for State Housing Tax Credits submission, unless specifically indicated or otherwise required by Department rule. Only those documents listed herein may be submitted.

(b) Certification, Acknowledgement, and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified. Applicants must certify that there has been no change to the Applicant Eligibility or Original Owner Certification since the Original Application was submitted.

(c) Site Requirements and Restrictions. The Applicant must certify that there have been no changes from the Original Application that would require additional disclosure or mitigation, or render the proposed Development Site ineligible. Any change must be addressed under the requirements of §10.405 of this title (relating to Amendments and Extensions).

(d) Site Control. Applicants must certify that there has been no change to Site Control, other than extensions or purchase by the Applicant, since the Original Application was submitted. If the nature of Site Control has changed, State Housing Tax Credit Request must submit the appropriate documentation as described in §11.204(9) of this chapter.

(e) Zoning. (§2306.6705(5)) If the zoning status of the Development has changed since the Original Application, the Request for State Housing Tax Credits must include all requirements of §11.204(10) of this chapter (relating to Zoning).

(f) Applicants who elect to request an allocation of State Housing Tax Credits must include a term sheet from a syndicator that, at a minimum, includes:

(1) An estimate of the amount of equity dollars expected to be raised for the Development;

(2) The amount of State Housing Tax Credits requested for allocation to the Development Owner

(3) Pay-in schedules;

(4) Syndicator consulting fees and other syndication costs; and

(5) An acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

§11.1007. State Housing Tax Credits Underwriting and Loan Policy Associated with Competitive HTC.

Requests for State Housing Tax Credits will only be reviewed for items addressed in this subchapter. In requests for State Housing Tax Credits the Total Developer Fee and Developer Fee included in Eligible Basis cannot exceed the Developer Fee amounts in the published Real Estate Analysis report for the Original Application. The Real Estate Analysis Division will publish a memo for the State Housing Tax Credit allocation serving as a supplement to the report for the Original Application.

§11.1008. State Housing Tax Credits Selection Criteria Associated with Competitive HTC Applications.

(a) For Qualified Developments not financed through tax exempt bonds, for years in which the Department receives requests for more State Housing Tax Credits than are available, the Department shall prioritize applications proposing the most additional low income Units for households at or below 30% of AMGI relative to the State Housing Tax Credit Request. Units for households at or below 30% of AMGI proposed in the original application shall not be considered. The Department will award based solely upon new Units proposed in exchange for tax credit equity. The initial State Housing Tax Credit award shall be made to the Applicant with the lowest request amount per additional Units provided. Subsequent awards shall be made using the same metric until the Department can no longer fund a full credit request. In the case of a tie, preference shall be determined based upon the Original Application scores under §11.9 and, if applicable, the tie breaker factors established under §11.7.

(b) An Application shall be ineligible for selection if the Development is located in an area with any Neighborhood Risk Factor described in §11.101(a)(3), and it did not receive an allocation of federal tax credits under the QAP issued by the department for 2021 or 2022.

§11.1009. State Housing Tax Credits for Tax-Exempt Bond Developments.

(a) The request for State Housing Tax Credits shall be reflected in the Uniform Multifamily Application, as prescribed by the Department and further explained in the Multifamily Programs Procedures Manual, and shall include a term sheet from a syndicator that includes the amount of State Housing Tax Credits requested and pricing information.

(b) For Applications that will receive a Certificate of Reservation from the Texas Bond Review Board in January, an Applicant may submit the complete Application (which may or may not include Third Party Reports, as more fully described under §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission)), from January 2 through January 31. The Department shall utilize a first-come, first-served system for establishing priority of requests for the portion of the State Housing Tax Credit available for Tax-Exempt Bond Developments.

(c) Once the number of Applications submitted exceed the amount of State Housing Tax Credits for Tax-Exempt Bond Developments the Department can allocate, Applicants for those Applications will be provided notice to that effect and be given the opportunity to modify their Application through the Administrative Deficiency process to exclude the request for the State Housing Tax Credit.

(d) Should there be an amount of State Housing Tax Credits to allocate to an Application and that Application is withdrawn or terminated, or the Certificate of Reservation is withdrawn from the Bond Review Board, the next Application in line, based on the received date will be notified that their Application will be underwritten with the State Housing Tax Credit. Alternatively, in cases where staff can make seamless adjustments to other line items to account for the lack of State HTC, staff may make such adjustments automatically and notify the Applicant accordingly.

(e) Applications submitted after January 31 and for which a Certificate of Reservation has been issued, may include a request for State Housing Tax Credits only if the Department has not reached the maximum amount of State Housing Tax Credits to allocate for Tax-Exempt Bond Developments.

(f) Qualified Developments will be issued a Determination Notice that will reflect both the State and Federal Housing Tax Credit Amounts, which for purposes of the State Housing Tax Credit will constitute the Allocation Certificate pursuant to Tex. Gov't Code Chapters 171 and 233.

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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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rules). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, the issuance of Private Activity Bonds (PAB) by the Department.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, the issuance of PABs by the Department.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.

The proposed repeal does not contemplate or authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).

Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the issuance of PAB by the Department. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).

Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 15, 2023, to October 15, 2023, to receive stakeholder comment on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Liz Cline, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Liz Cline, Bond Rule Public Comments, or by email to liz.cline@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time OCTOBER 15, 2023.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§12.1. General.
§12.2. Definitions.
§12.3. Bond Rating and Investment Letter.
§12.4. Pre-Application Process and Evaluation.
§12.5. Pre-Application Threshold Requirements.

§12.6. Pre-Application Scoring Criteria.
§12.7. Full Application Process.
§12.8. Refunding Application Process.
§12.9. Occupancy Requirements.
§12.10. Fees.

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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10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rule). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.67022 and to reflect relatively minor policy revisions, and ensure that it is reflective of changes made in the Department's Qualified Allocation Plan where applicable.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action pursuant to item (9), which excepts rule changes necessary to implement legislation. The proposed rule provides compliance with Tex. Gov't Code §2306.359, which requires the Department to provide for specific scoring criteria and underwriting considerations for its multifamily private activity bond activities.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, the issuance of Private Activity Bonds (PAB) by the Department.

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The proposed rule changes will not result in an increase in fees paid to the Department, but may, under certain circumstances, result in a decrease in fees paid to the Department regarding Tax-Exempt Bond Developments.

5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rule will not limit, expand or repeal an existing regulation but merely revises a rule.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.359. Although these rules mostly pertain to the filing of a bond pre-application, some stakeholders have reported that their average cost of filing a full Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures in place for entities applying for multifamily PAB. Only those small or micro-businesses that participate in this program are subject to this rule. There are approximately 100 to 150 businesses, which could possibly be considered small or micro-businesses, subject to the proposed rule for which the economic impact of the rule would be a fee of approximately $11,000 which includes the filing fees associated with submitting a bond pre-application.

The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for PABs (and accompanying housing tax credits). There could be additional costs associated with pre-applications depending on whether the small or micro-businesses outsource how the application materials are compiled. The fee for submitting an Application for PAB layered with LIHTC is based on $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units.

These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are approximately 1,300 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 12 places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. In an average year the volume of applications for PAB that are located in rural areas is not more than 20% of all PAB applications received. In those cases, a rural community securing a PAB Development will experience an economic benefit, includ-

ing by not limited to the potential increased property tax revenue from a large multifamily Development if the Development is not seeking an exemption of such property tax revenue.

3. The Department has determined that because there are rural PAB awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive PAB awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate or authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since PAB Developments, layered with housing tax credits, often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until PABs and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that significant construction activity is associated with any PAB Development layered with LIHTCs and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions and positive effects may ensue in those communities where developers receive PAB awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the issuances of PABs by the Department and corresponding allocation of housing tax credits. There is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing a pre-application and application remain unchanged based on these rules changes. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 15, 2023, to October 15, 2023, to receive stakeholder comment on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Liz Cline, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Liz Cline, Bond Rule Public Comments, or by email to liz.cline@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time OCTOBER 15, 2023.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds, notes, or other evidences of indebtedness (Bonds) by the Texas Department of Housing and Community Affairs (Department). The Department is authorized to issue Bonds pursuant to Tex. Gov't Code, Chapter 2306. Notwithstanding anything in this chapter to the contrary, Bonds which are issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex. Gov't Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code (Code), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this part (relating to the Housing Tax Credit Program Qualified Allocation Plan) for the current program year. In general, the Applicant will be required to satisfy the eligibility and threshold requirements of the Qualified Allocation Plan (QAP) in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board (TBRB). If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in this chapter except in an instance of a conflicting statutory requirement, which shall always take precedence. To the extent applicable to each specific Bond issuance, the Department's conduit multifamily Bond transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (relating to Bond Review Board Rules) and Tex. Gov't Code, Chapter 1372.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs related to the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any point during the process, the Applicant is solely responsible for determining whether to proceed with

the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis. Taxable bonds will not be eligible for an allocation of tax credits.

(e) Waivers and Appeals. Requests for any permitted waivers of program rules must be made in accordance with §11.207 of this part (relating to Waiver of Rules). The process for appeals and grounds for appeals may be found under §1.7 of this part (relating to Appeals Process).

§12.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, and Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan).

(1) Institutional Buyer--Shall have the meaning prescribed under 17 CFR §230.501(a), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)), or as defined by 17 CFR §230.144(a), promulgated under the Securities Act of 1933, as amended.

(2) Persons with Special Needs--Shall have the meaning prescribed under Tex. Gov't Code, §2306.511.

(3) Bond Trustee--A financial institution, usually a trust company or the trust department in a commercial bank, that holds collateral for the benefit of the holders of municipal securities. The Bond Trustee's obligations and responsibilities are set forth in the Indenture.

§12.3. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, evidenced by a resolution authorizing the issuance of the credit enhanced Bonds.

(b) Investment Letters. Bonds rated less than "A" or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investor letter acceptable to the Department. Subsequent purchasers of such Bonds must also be qualified as Institutional Buyers and must execute and deliver to the Department an investor letter in a form satisfactory to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and must carry a legend requiring any purchasers of the Bonds to be Institutional Buyers and sign and deliver to the Department an investor letter in a form acceptable to the Department.

§12.4. Pre-Application Process and Evaluation.

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can have a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call or meeting. Prior to the submission of a pre-application, it is essential that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Neighborhood Risk Factors. If the Development Site has any of the characteristics described in §11.101(a)(3)(D) of this part (relating to Neighborhood Risk Factors), the Applicant must disclose the presence of such characteristics to the Department. Disclosure may be done at time of pre-application and handled in connection with the inducement or it can be addressed at the time of Application submission. The Applicant understands that any determination made by staff or the Board at the time of bond inducement regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated and presented to the Board.

(c) Pre-Application Process. An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as set forth by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility, fulfillment of threshold requirements in connection with the full Application, and documentation submission requirements pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria). The selection criteria, as further described in §12.6 of this chapter, reflects a structure that gives priority consideration to specific criteria as outlined in Tex. Gov't Code, §2306.359, as well as other important criteria.

(1) Tie Breakers. Should two or more pre-applications receive the same score, the Department will utilize the factors in this section, which will be considered in the order they are presented herein, to determine which pre-application will receive preference in consideration of a Certificate of Reservation:

(A) To the pre-application that was on the waiting list with the TBRB but did not have an active Certificate of Reservation at the time of the TBRB lottery and achieved the maximum number of points under §12.6(12) of this chapter (relating to Waiting List); and

(B) To the pre-application with the highest number of positive points achieved under §12.6(9)of this chapter (relating to Development Support/Opposition).

(d) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff

may recommend that the Board not approve an inducement resolution for a pre-application. Notwithstanding the foregoing, Department staff may, but is not required to, recommend that an inducement resolution be approved despite the presence of neighborhood risk factors, undesirable site features, or requirements that may necessitate a waiver, that have not fully been evaluated by staff at pre-application. The Applicant recognizes the risk involved in moving forward should this be the case and the Department assumes no responsibility or liability in that regard. Each Development is unique, and therefore, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is considered by the Board.

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (8) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 11, Subchapter D of this part (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application. The threshold requirements of a pre-application include:

(1) Submission of the required tabs of the Uniform Application as prescribed by the Department in the Multifamily Bond Pre-Application Procedures Manual;

(2) Submission of the completed Bond Pre-Application Supplement in the form prescribed by the Department;

(3) Completed Bond Review Board Residential Rental Attachment for the current program year;

(4) Site Control, evidenced by the documentation required under §11.204(10) of this part (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of both the Board meeting at which the inducement resolution is considered and subsequent submission of the application to the TBRB. For Lottery applications, Site Control must meet the requirements of 34 TAC §190.3(b)(13).

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Organizational Chart showing the structure of the Development Owner and of any Developer and Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, and completed List of Organizations form, as provided in the pre-application. The List of Organizations form must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development;

(7) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State; and

(8) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §11.203 of this part (relating to Public Notifications (§2306.6705(9)). In general, notifications should not be older than three months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10% or a 5% increase in density (calculated as Units per acre) as a result of a change in the size of the Development Site. In addition, should the jurisdiction of the official holding any position or role described in §11.203 of this part change between the submission of a pre-application and the submission of an Application in a manner that results in the Development being within a new jurisdiction, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

§12.6. Pre-Application Scoring Criteria.

This section identifies the scoring criteria used in evaluating and ranking pre-applications. Any scoring items that require supplemental information to substantiate points must be submitted in the pre-application, as further outlined in the Multifamily Bond Pre-Application Procedures Manual. Applicants proposing multiple sites will be required to submit a separate pre-application for each Development Site, unless staff determines that one pre-application is more appropriate based on the specifics of the transaction. Each individual pre-application will be scored on its own merits and the final score will be determined based on an average of all of the individual scores. Ongoing requirements, as selected in the pre-application, will be reflected in the Bond Regulatory and Land Use Restriction Agreement and must be maintained throughout the State Restrictive Period, unless otherwise stated or required in such Agreement.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to ten (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) set aside 50% of Units rent capped at 50% AMGI and the remaining 50% of Units rent capped at 60% AMGI; or

(ii) set aside 15% of Units rent capped at 30% AMGI and the remaining 85% of Units rent capped at 60% AMGI; or

(iii) set aside 100% of Units rent capped at 60% AMGI for Developments located in a census tract with a median income that is higher than the median income of the county, MSA, or PMSA in which the census tract is located.

(B) Priority 2 designation requires the set aside of at least 80% of the Units rent capped at 60% AMGI (7 points).

(C) Priority 3 designation. Includes any qualified residential rental development. Market rate Units can be included under this priority (5 points).

(2) Cost of Development per Square Foot. (1 point) For this item, costs shall be defined as the Building Cost as represented in the Development Cost Schedule, as originally provided in the pre-application. This calculation does not include indirect construction costs or site work. Pre-applications that do not exceed $150 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation Developments will automatically receive this point.

(3) Unit Sizes. (6 points) The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction).

(A) Five-hundred (500) square feet for an Efficiency Unit;

(B) Six-hundred (600) square feet for a one Bedroom Unit;

(C) Eight-hundred-fifty (850) square feet for a two Bedroom Unit;

(D) One-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(E) One-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(4) Extended Affordability. A pre-application may qualify for up to three (3) points under this item.

(A) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 40 years (3 points).

(B) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 35 years (2 points).

(5) Unit and Development Construction Features. A pre-application may qualify for nine (9) points, as certified in the pre-application, for providing specific amenity and quality features in every Unit at no extra charge to the tenant. The amenities and corresponding point structure is provided in §11.101(b)(6)(B) of this part (relating to Unit, Development Construction, and Energy and Water Efficiency Features), which includes a minimum number of points that must come from Energy and Water Efficiency Features. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments will start with a base score of (5 points).

(6) Common Amenities. All Developments must provide at least the minimum threshold of points for common amenities based on the total number of Units in the Development as provided in subparagraphs (A) - (F) of this paragraph. An Applicant may choose to exceed the minimum number of points necessary based on Development size; however, the maximum number of points under this item which a Development may be awarded under this section shall not exceed 22 points. The common amenities include those listed in §11.101(b)(5) of this part and must meet the requirements as stated therein. The Owner may change, from time to time, the amenities offered; however, the overall points as selected at Application must remain the same.

(A) Developments with 16 to 40 Units must qualify for (2 points);

(B) Developments with 41 to 76 Units must qualify for (4 points);

(C) Developments with 77 to 99 Units must qualify for (7 points);

(D) Developments with 100 to 149 Units must qualify for (10 points);

(E) Developments with 150 to 199 Units must qualify for (14 points); or

(F) Developments with 200 or more Units must qualify for (18 points).

(7) Resident Supportive Services. A pre-application may qualify for up to ten (10) points for this item. By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §11.101(b)(7) of this part, appropriate for the residents and that there will be adequate space for the intended services. The Owner may change, from time to time, the services offered; however, the overall points as selected at pre-application must remain the same. Should the QAP in subsequent years provide different services than those listed in §11.101(b)(7)(A) - (E), the Development Owner may be allowed to select services as listed therein upon written consent from the Department and any services selected must be of similar value to the service it is intending to replace. The Development Owner will be required to substantiate such service(s) at the time of compliance monitoring, if requested by staff. The services provided should be those that will directly benefit the Target Population of the Development and be accessible to all. No fees may be charged to the residents for any of the services. Unless otherwise specified, services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) The Development Owner shall provide resident services sufficient to substantiate ten (10) points; or

(B) The Development Owner shall provide resident services sufficient to substantiate eight (8) points.

(8) Underserved Area. An Application may qualify to receive up to four (4) points if the Development Site meets the criteria described in §11.9(c)(6)(A) - (E) of this title. The pre-application must include evidence that the Development Site meets this requirement. Regardless of the varying point options listed under §11.9(c)(6), the number of points attributed to this scoring item shall be four (4) points.

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 points and must be received 10 business days prior to the Board's consideration of the pre-application. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials must be in office when the pre-application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points. Neutral letters that do not specifically refer to the Development or do not explicitly state support will receive (zero points). A letter that does not directly express support but expresses it indirectly by inference (i.e., "the local jurisdiction supports the Development and I support the local jurisdiction") counts as a neutral letter except in the case of State elected officials. A letter from a State elected official that does not directly indicate support by the official, but expresses support on behalf of the official's constituents or community (i.e., "My constituents support the Development and I am relaying their support") counts as a support letter. A resolution specifically expressing support that is adopted by the applicable Governing Body will count as support under this scoring item for a maximum of 3 points.

(A) State Senator and State Representative of the districts whose boundaries include the proposed Development Site;

(B) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(C) Elected member of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction) who represents the district in which the Development Site is located;

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) Elected member of the Governing Body of the county who represents the district in which the Development Site is located;

(F) Superintendent of the school district in which the Development Site is located; and

(G) Presiding officer of the board of trustees of the school district in which the Development Site is located.

(10) Preservation Initiative. (2 points) Preservation Developments, including Rehabilitation proposals on Properties which are

nearing expiration of an existing affordability requirement within the next two years or for which there has been a rent restriction requirement in the past 10 years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) A pre-application may receive points if the Development Site is located in an area declared a disaster area under Tex. Gov't Code §418.014 at the time of submission, or at any time within the two-year period preceding the date of submission.

(12) Waiting List. (5 points) A pre-application that is on the Department's waiting list with the TBRB and does not have an active Certificate of Reservation at the time of the Private Activity Bond Lottery may receive points under this item if participating in the Lottery for the upcoming program year. These points will be added by staff once all of the scores for Lottery applications have been finalized.

(A) For pre-applications that participated in the prior year Private Activity Bond Lottery (5 points); or

(B) For pre-applications that had an Inducement Resolution adoption date of November of the prior calendar year through March of the current calendar year (3 points); or

(C) For pre-applications that had an Inducement Resolution adoption date of April through July of the current calendar year (1 point).

(13) Tax-Exempt Bond 50% Test. (5 points) A pre-application may receive points under this item based on the amount of the Development financed with Tax-Exempt Bond proceeds relative to the amount necessary to meet the 50% Test. The 50% Test is calculated by dividing the Tax-Exempt Bond proceeds by the aggregate basis of the Development and shall be based on such amounts as reflected in the pre-application once staff's review is complete and all Administrative Deficiencies have been resolved. Normal rounding shall apply. Should there be changes to this federal requirement, the percentage ranges noted below shall be modified accordingly by the same range. Moreover, should the Private Activity Bond ceiling be subject to the restrictions under Tex. Gov't Code Section 1372.037(b), the amount of bond proceeds to be utilized at closing will be capped at the percentage as stated therein and not based on the points claimed under this scoring item.

(A) The pre-application reflects a 50% Test amount that is greater than or equal to 55.0% and less than 60% (5 points); or

(B) The pre-application reflects a 50% Test amount that is greater than or equal to 60% and less than or equal to 64% (3 points).

(14) Assisting Households with Children. (42(m)(1)(C)(vii)) A pre-application may receive one point under this item if at least 15% of the Units in the Development contain three or more bedrooms. The specific number of three or more bedrooms may change from pre-application to full Application, but the minimum percentage must still be met. Applications proposing Rehabilitation (excluding Reconstruction) and Elderly Developments will automatically receive this point.

§12.7. Full Application Process.

(a) Application Submission. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a full Application to the Department must submit the complete tax credit Application pursuant to §11.201 of this part (relating to Procedural Requirements for Application Submission). While a Certificate of Reservation is required under §11.201 of this part (relating to Procedural Requirements for Application Submission) prior to submission of the complete tax credit Application, staff may allow the Application to be submitted prior to the issuance of a Certificate of Reservation depending on circumstances associated with the Development Site, structure of the transaction, volume cap environment, or other factors in the Department's sole discretion.

(b) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan). If there are changes to the Application at any point prior to closing that have an adverse effect on the score and ranking order and that would have resulted in the pre-application being placed below another pre-application in the ranking, the Department may terminate the Application and withdraw the Certificate of Reservation from the Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the requirements set forth in Chapter 11 of this part in addition to Tex. Gov't Code, Chapter 1372, the applicable requirements of Tex. Gov't Code Chapter 2306, and the Code. The Applicant will also be required to select a Bond Trustee from the Department's approved list as published on its website.

(c) Bond Documents. Once the Application has been submitted and the Applicant has deposited funds to pay initial costs, the Department's bond counsel shall draft Bond documents.

(d) Public Hearings. The Department will hold a public hearing to receive comments pertaining to the Development and the issuance of the Bonds. A representative of the Applicant or member of the Development Team must be present at the public hearing and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should include at minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is Rehabilitation, the presentation should include the proposed scope of work that is planned for the Development. The handouts must be submitted to the Department for review at least two days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant, as well as any facility rental fees or required deposits, if applicable.

(e) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, financial feasibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board will consider the approval of the final Bond resolution relating to the issuance, substantially final Bond documents and in the instance of privately placed Bonds, the pricing, terms and interest rate of the Bonds. For Applications that include local funding, Department staff may choose to delay Board consideration of the Bond issuance until such time it has been confirmed that the amount or terms associated with such local funding will not change and remain consistent with what was represented in the Department's underwriting analysis.

(f) Local Permits. Prior to closing on the Bond financing, all necessary approvals, including building permits from local municipalities, counties, or other jurisdictions with authority over the Development Site must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees. In instances where such permits will be not received prior to bond closing, the Department may, on a limited and case-by-case basis allow for the closing to occur, subject to receipt of confirmation, acceptable to the Department, by the lender and/or equity investor that they are comfortable proceeding with closing.

§12.8. Refunding Application Process.

(a) Application Submission. Owners who wish to refund or modify tax-exempt bonds that were previously issued by the Depart-

ment must submit to the Department a summary of the proposed refunding plan or modifications. To the extent such modifications constitute a re-issuance under state law the Applicant shall then be required to submit a refunding Application in the form prescribed by the Department pursuant to the Bond Refunding Application Procedures Manual.

(b) Bond Documents. Once the Department has received the refunding Application and the Applicant has deposited funds to pay initial costs, the Department's bond counsel will draft the necessary Bond documents.

(c) Public Hearings. Depending on the proposed modifications to existing Bond covenants a public hearing may be required. Such hearing must take place prior to obtaining Board approval and must meet the requirements pursuant to §12.7(d) of this chapter (relating to Full Application Process) regarding the presence of a member of the Development Team and providing a summary of proposed Development changes.

(d) Rule Applicability. Refunding Applications must meet the applicable requirements pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan). At the time of the original award the Application would have been subject to eligibility and threshold requirements under the QAP in effect the year the Application was awarded. Therefore, it is anticipated the Refunding Application would not be subject to the site and development requirements and restrictions pursuant to §11.101 of this part (relating to Site and Development Requirements and Restrictions). The circumstances surrounding a refunding Application are unique to each Development; therefore, upon evaluation of the refunding Application, the Department is authorized to utilize its discretion in the applicability of the Department's rules as it deems appropriate.

§12.9. Occupancy Requirements.

(a) Filing and Term of Regulatory Agreement. A Bond Regulatory and Land Use Restriction Agreement will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. Such Regulatory and Land Use Restriction Agreement shall include provisions relating to the Qualified Project Period, the State Restrictive Period, along with points claimed for other provisions that will be required to be monitored throughout the State Restrictive Period, and shall also include provisions relating to Persons with Special Needs. The minimum term of the Regulatory Agreement will be based on the criteria as described in paragraphs (1) - (3) of this subsection, as applicable:

(1) 30 years, or such longer period as elected under §12.6(4) of this chapter (relating to Extended Affordability), from the date the Development Owner takes legal possession of the Development;

(2) The end of the remaining term of the existing federal government assistance pursuant to Tex. Gov't Code, §2306.185; or

(3) The period required by the Code.

(b) Federal Set Aside Requirements.

(1) Developments which are financed from the proceeds of Private Activity Bonds must be restricted under one of the two minimum set-asides as described in subparagraphs (A) and (B) of this paragraph. Regardless of an election that may be made under Section 42 of the Code relating to income averaging, a Development will be required under the Bond Regulatory and Land Use Restriction Agreement to meet one of the two minimum set-asides described in subparagraphs (A) and (B) of this paragraph. Any proposed market rate Units shall be limited to 140% of the area median income and be considered restricted units under the Bond Regulatory and Land Use Restriction Agreement for purposes of using Bond proceeds to construct such Units.

(A) At least 20% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 50% of the area median income; or

(B) At least 40% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 60% of the area median income.

(2) The Development Owner must, at the time of Application, indicate which of the two federal set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with Tex. Gov't Code, §1372.0321. Units intended to satisfy set-aside requirements must be distributed equally throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the minimum federal set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit. However, should a tenant's income, as of the most recent determination thereof, exceed 140% of the applicable federal set-aside income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant.

§12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, a pre-application fee of $1,000, along with the fees noted on the Schedule of Fees posted on the Department's website specific to the Department's bond counsel and the Texas Bond Review Board (TBRB) pursuant to Tex. Gov't Code, §1372.006(a)). These fees cover the costs of pre-application review by the Department and its bond counsel and filing fees associated with application submission for the Certificate of Reservation to the TBRB.

(b) Application Fees. At the time of Application the Applicant is required to submit a tax credit application fee of $30 per Unit based on the total number of Units and a bond application fee of $20 per Unit based on the total number of Units, unless otherwise modified by a specific program NOFA. Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as a portfolio the bond application fees may be reduced on a case by case basis at the discretion of Department staff.

(c) Closing Fees. The closing fee for Bonds, other than refunding Bonds, is equal to 50 basis points of the issued principal amount of the Bonds, unless otherwise modified by a program NOFA. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points of the issued principal amount of the Bonds, with the first year prorated based on the actual closing date, and a Bond compliance fee equal to $25/Unit (excludes market rate Units). Such compliance fee shall be applied to the third year following closing.

(d) Application and Issuance Fees for Refunding Applications. For refunding an Application the application fee will be $10,000 unless the refunding is not required to have a public hearing, in which case the fee will be $5,000. The closing fee for refunding Bonds is equal to 25 basis points of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at clos-

ing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Manual. Transactions previously issued that involved a financing structure that would constitute a re-issuance under state law, but do not fit under §12.8, will be required to pay a closing fee that shall not exceed 25 basis points of the re-issued principal amount of the bonds which may be reduced in the sole determination of the Department as commensurate with the review by staff in obtaining Board approval at the time of conversion.

(e) Administration Fee. The annual administration fee is equal to 10 basis points of the outstanding bond amount at the inception of each payment period and is paid as long as the Bonds are outstanding, unless otherwise modified by a specific program NOFA.

(f) Bond Compliance Fee. The Bond compliance monitoring fee is equal to $25/Unit (excludes market rate Units as defined in the Regulatory Agreement), and is paid for the duration of the State Restrictive Period under the Regulatory Agreement, regardless of whether the Bonds have been paid off and are no longer outstanding. For Developments for which (1) the Department's Bonds are no longer outstanding and (2) new bonds or notes have been issued and delivered by the Department, the bond compliance monitoring fee may be reduced on a case by case basis at the discretion of Department staff.

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303344
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 475-3959

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

16 TAC §70.100, §70.101

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 70, §70.100 and §70.101, regarding the Industrialized Housing and Building program. These proposed changes are referred to as the "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 70, implement Texas Occupations Code, Chapter 1202, Industrialized Housing and Buildings.

The proposed changes to 16 TAC §70.100 update the mandatory building codes used for the construction of all industrialized housing and buildings, modules, and modular components to more recent versions. The proposed changes to 16 TAC §70.101 amend the mandatory building codes after a determination by the code council that the amendments are in the public interest. These amendments will become effective no earlier than 180 days from the determination date. The proposed rules are necessary to ensure the mandatory building codes used are up to date.

Code Council Recommendations

The proposed rules were presented to and discussed by the Texas Industrialized Building Code Council at its meeting on July 27, 2023. The Code Council did not make any changes to the proposed rules. The Code Council voted and recommended that the proposed rules be published in the *Texas Register* for public comment. Following the meeting, staff made technical corrections.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §70.100(a) to set the effective date of the mandatory building codes for April 1, 2024.

The proposed rules amend §70.100(c) through (g) and §70.100(i) to reflect the adoption of the 2021 versions of each mandatory building code.

The proposed rules amend §70.100(h) to reflect the adoption of the 2015 version of the *International Energy Conservation Code* (IECC), identifies the applicable edition of the *IECC* as the edition adopted by rule by State Energy Conservation Office, and describes how conflict between editions of the individual international codes are settled.

The proposed rules amend §70.100(j) to reflect the adoption of the 2020 version of the *National Electrical Code*.

The proposed rules amend §70.100(k) to update the graphic table of past editions of mandatory building codes.

The proposed rules amend §70.101(c)(3) to modify *Section 107.1* of the *2021 International Building Code* to allow the filing of submittal documents in a digital format if allowed by the building official.

The proposed rules amend §70.101(c)(4)(A) to modify *Section 111.1* of the *2021 International Building Code* to clarify how a certificate of occupancy should be construed.

The proposed rules amend §70.101(c)(6)(A) to reflect the renumbering of former *Section 1101.2* to *Section 1102.1*.

The proposed rules amend §70.101(c)(6)(B) to delete *Sections 1103* through *1112*.

The proposed rules amend §70.101(c)(7)(A) to reflect the renumbering of former *Section ICC A117.1-09* to *ICC A117.1-17*.

The proposed rules amend §70.101(c)(7)(B) to update the referenced code sections.

The proposed rules amend §70.101(c)(7)(C) to update the *NFPA Standard* to *70-20, National Electrical Code*.

The proposed rules amend §70.101(d) to reflect the adoption of the *2021 International Residential Code*.

The proposed rules amend §70.101(d)(2)(D) by updating the appendices considered part of the code.

The proposed rules amend §70.101(d)(4) to add language regarding the submission of submittal documents.

The proposed rules amend §70.101(d)(5)(A) to clarify how a certificate of occupancy should be construed.

The proposed rules amend §70.101(d)(7) to reflect code language that has been reorganized and is now set out in *Section R302.2.2 Common Walls*. The language specifies characteristics of common walls in townhouses. The exception previously stated has been removed from the rules and replaced with new language as result of a reorganization of *Section R302.2 Townhouses*.

The proposed rules add §70.101(d)(7)(A), which amends *Section R302.2.2(1)* to apply when a Section P2904-compliant fire sprinkler system is provided.

The proposed rules add §70.101(d)(7)(B), which amends *Section R302.2.2(2)* to apply when a Section P2904-compliant fire sprinkler system is not provided.

The proposed rules add §70.101(d)(7)(C), which amends *Section R302.2.2* to apply an exception in a specific circumstance.

The proposed rules amend §70.101(d)(8) to reflect the renumbering of former *Section R303.9* to *R303.10*.

The proposed rules amend §70.101(d)(11)(B) to delete *Section N1101.3* through *Section N1113.*

The proposed rules amend §70.101(d)(13)(B) to reflect the adoption of the *2020 National Electrical Code*.

The proposed rules amend §70.101(e) to reflect the adoption of the *2021 International Fuel Gas Code*.

The proposed rules amend §70.101(e)(2)(A) to add language stating that "Additions, alterations or repairs shall not cause an existing installation to become unsafe, hazardous or overloaded."

The proposed rules amend §70.101(e)(3) to reflect the adoption of the *2021 International Existing Building Code*.

The proposed rules amend §70.101(f) to reflect the adoption of the *2021 International Mechanical Code*.

The proposed rules amend §70.101(f)(2)(A) to add language stating that "Additions, alterations or repairs shall not cause an existing installation to become unsafe, hazardous or overloaded."

The proposed rules amend §70.101(f)(3) to reflect the adoption of the *2021 International Existing Building Code*.

The proposed rules amend §70.101(g) to reflect the adoption of the *2021 International Plumbing Code*.

The proposed rules amend §70.101(g)(2)(C) to identify the terms under which moved buildings would be considered compliant with current mandatory building codes.

The proposed rules amend §70.101(g)(3)(A) to reflect the renumbering of former *Section 403.5* to *Section 403.7*.

The proposed rules amend §70.101(g)(3)(B) to reflect the renumbering of former *Section 403.5.1* to *Section 403.7.1*.

The proposed rules amend §70.101(g)(3)(C) to reflect the renumbering of former *Section 403.5.2* to *Section 403.7.2*.

The proposed rules amend §70.101(g)(3)(D) to reflect the renumbering of former *Section 403.5.3* to *Section 403.7.3*.

The proposed rules amend §70.101(g)(4) to reflect the adoption of the *2021 International Existing Building Code*.

The proposed rules amend §70.101(i) to reflect the adoption of the *2021 International Existing Building Code*.

The proposed rules amend §70.101(i)(1) to reflect the changing of the title of the section from *Section 101 General* to *Section 101 Scope and General Requirements*.

The proposed rules amend §70.101(i)(3) to reflect the renumbering of former *Section 1401.2* to *Section 1301.2*. The proposed rules also clarify the applicability of the code's provisions to existing occupancies.

The proposed rules amend §70.101(i)(4)(B) to add the effective month and year, March 2012, of the referenced standard.

The proposed rules amend §70.101(j) to reflect the reflect the adoption of the *2020 National Electrical Code*.

The proposed rules amend §70.101(j)(1) to add language clarifying the requirements for conductors rated up to 2000 volts.

The proposed rules add §70.101(j)(3) to remove Section 210.8(F) of the *2020 National Electrical Code* regarding ground-fault circuit interrupters.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rule does not have foreseeable implications relating to costs or revenues of state or local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect a local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be continued consistency with local jurisdictions in addition to making newer and more efficient materials available to Industrialized Manufacturers and Builders. The proposed rules would also provide a minimum level of protection from hazards, accessibility to users, and maintenance of public health. Manufacturers would also have the regulatory consistency necessary to invest in the production and development of products that meet these common needs. Lastly, designers, contractors, and inspectors would have consistent criteria to follow.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. The majority of the new requirements in the proposed codes mirror the codes currently adopted and in use by local jurisdictions. Any increase in costs caused by the use of newly developed products is optional and the authorization of the use of these products does not create a requirement to use a more expensive product.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules.

Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase or decrease in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules expand, limit, or repeal an existing regulation. New versions of the applicable codes are being adopted; thus, the previous versions of the applicable codes will no longer be effective.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules*; by facsimile to (512) 475-3032; or by mail to Shamica Mason, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 1202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 1202. No other statutes, articles, or codes are affected by the proposed rules.

§70.100. Mandatory Building Codes.

(a) Effective April 1, 2024 [~~August 1, 2017~~], all industrialized housing and buildings, modules, and modular components, shall be constructed in accordance with the codes referenced in subsection (c) - (j). The 2015 editions of the International codes as identified in subsection (c) - (i), as well as the 2014 edition of the *National Electrical Code* identified in subsection (j), shall remain in effect through March 31, 2024. All work permitted or started before April 1, 2024, may be completed with the 2015 editions of the International codes and the 2014 edition of the *National Electrical Code*.

(b) Other codes referenced in any of the mandatory building codes adopted in subsection (c) - (j), shall be considered part of the requirements of these codes to the prescribed extent of each such reference.

(c) The *International Building Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Building Code of the Texas Industrialized Housing and Buildings Program.

(d) The *International Residential Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Residential Code for one- and two-family dwellings of the Texas Industrialized Housing and Buildings Program.

(e) *The International Fuel Gas Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Fuel Gas Code of the Texas Industrialized Housing and Buildings Program.

(f) The *International Mechanical Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Mechanical Code of the Texas Industrialized Housing and Buildings Program.

(g) The *International Plumbing Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Plumbing Code of the Texas Industrialized Housing and Buildings Program.

(h) The *International Energy Conservation Code,* 2015 edition, published by the International Code Council, is adopted as the Energy Conservation Code of the Texas Industrialized Housing and Buildings Program.

(1) The applicable edition of the *International Energy Conservation Code* is the edition adopted by rule by the State Energy Conservation Office pursuant to Chapter 388, Health and Safety Code.

(2) Conflicts between editions of the International Building Codes and the adopted version of the *International Energy Conservation Code* shall be resolved in favor of the more stringent code. If the more stringent code cannot be determined, the department shall make a determination as to which code controls.

(i) The *International Existing Building Code,* 2021 [~~2015~~] edition, published by the International Code Council, is adopted as the Existing Building Code for industrialized buildings that are altered in accordance with §70.74(f).

(j) The *National Electrical Code,* 2020 [~~2014~~] edition, published by the National Fire Protection Association, is adopted as the Electrical Code of the Texas Industrialized Housing and Buildings Program.

(k) The effective dates of adoption of past editions of the mandatory building codes are as follows:
Figure: 16 TAC §70.100(k)
~~Figure: 16 TAC §70.100(k)~~

§70.101. Amendments to Mandatory Building Code.
(a) - (b) (No change.)

(c) The *2021* [~~2015~~] *International Building Code* shall be amended as follows.

(1) Amend Section 101 *Scope and* General *Requirements* as follows.

(A) - (G) (No change.)

(2) (No change.)

(3) Amend *Section 107.1 General* to read as follows [~~by adding the following~~]: "Submittal documents consisting of construction documents, statement of special inspections, geotechnical report and other data shall be submitted in two or more sets, or in a digital format if allowed by the *building official,* with each permit application. The construction documents shall be prepared by a registered design professional where required by the statutes of the jurisdiction in which the project is to be constructed. Where special conditions exist, the *building official* is authorized to require additional construction documents to be prepared by a registered design professional. Construction documents depicting the structural design of buildings to be located in hurricane prone regions shall be prepared and sealed by a Texas licensed professional engineer."

(4) Amend *Section 111 Certificate of Occupancy* as follows.

(A) Amend *Section 111.1 Change of [~~Use and~~]* occupancy to read as follows: "A building or structure shall not be used or occupied in whole or in part, and a change in the existing use or occupancy classification of a building or structure or portion thereof shall not be made, until the local building official has issued a certificate of occupancy in accordance with the locally adopted rules and regulations. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid. Exception: Certificates of occupancy are not required for work exempt from permits under Section 105.2."

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

(5) (No change.)

(6) Amend *Chapter 11 Accessibility* as follows.

(A) Amend *Section 1102.1 [~~1101.2~~] Design* to read as follows: "Buildings and facilities shall be designed and constructed to be accessible in accordance with this code and the *Texas Accessibility Standards* (TAS)."

(B) Delete *Section 1103* [~~1102~~] through *Section 1112* [~~1111~~].

(7) Amend *Chapter 35 Referenced Standards* as follows.

(A) Delete the following standard: "ICC A117.1-17, Accessible and Usable Buildings and Facilities". [*~~"ICC A117.1-09, Accessible and Usable Buildings and Facilities."~~*]

(B) Add TDLR, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711 as a promulgating agency; add 2012 TAS, *Texas Accessibility Standards* as adopted under 16 Texas Administrative Code, Chapter 68 as the referenced standard; and add code sections 202, 907.5.2.3.3, 1009.8.2, 1009.9, 1009.11, 1010.2.13.1, [~~1010.1.9.7,~~] 1012.1, 1012.6.5, 1012.10, 1013.4, 1023.9, 1102.1, 1108.2, 1110.1, 1110.2, 1110.5.1, 1110.5.2, 1111.3, 1111.4, 1111.4.2, 1112.3, 1112.4, 1112.5, and 1112.5.2 [~~and 1101.2,~~] as the referenced code sections.

(C) Add code section 101.4.8 as a referenced code section for *NFPA Standard 70-20* [~~70-14~~], *National Electrical Code*.

(8) (No change.)

(d) The *2021 [~~2015~~] International Residential Code* shall be amended as follows.

(1) Amend *Section R101 Scope and General Requirements* as follows.

(A) - (B) (No change.)

(2) Amend *Section R102 Applicability* as follows.

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

(D) Amend *Section R102.5 Appendices* by adding the following: "Appendices AG, AH, AK, AP, AQ, and AT [~~G, H, K, P, S and U~~] shall be considered part of this code."

(E) (No change.)

(3) (No change.)

(4) Amend *Section R106.1 Submittal documents* by adding the following: "Submittal documents consisting of construction documents, and other data shall be submitted in two or more sets, or in a digital format if allowed by the building official, with each application for a permit. The construction documents shall be prepared by a registered design professional where required by the statutes of the jurisdiction in which the project is to be constructed. Where special conditions exist, the building official is authorized to require additional construction documents to be prepared by a registered design professional. Construction documents depicting the structural design of buildings to be located in hurricane prone regions and in the first tier counties along the Texas coast and designated catastrophe areas as defined by the Texas Department of Insurance (TDI) shall be prepared and sealed by a Texas licensed professional engineer."

(5) Amend *Section R110 Certificate of Occupancy* as follows.

(A) Amend *Section R110.1 Use and change ofoccupancy* [~~by amending the first sentence~~] to read as follows: "A building or structure shall not be used or occupied in whole or in part, and a change in the existing use or occupancy classification of a building or structure or portion thereof shall not be made, until the local *building official* has issued a certificate of occupancy in accordance with locally adopted rules and regulations. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid."

(B) - (F) (No change.)

(6) (No change.)

(7) Amend *Section R302.2.2 Common walls*, to read as follows: "Common walls separating townhouse units shall be assigned a fire-resistance rating in accordance with item (1) or (2) and shall be

rated for fire exposure from both sides. Common walls shall extend to and be tight against the exterior sheathing of the exterior walls, or the inside face of exterior walls without stud cavities, and the underside of the roof sheathing. The common wall shared by two townhouse units shall be constructed without plumbing or mechanical equipment, ducts or vents, other than water-filled fire sprinkler piping in the cavity of the common wall. The wall shall be rated for fire exposure from both sides and shall extend to and be tight against exterior walls and the underside of the roof sheathing. Electrical installations shall be in accordance with the National Electrical Code, NFPA 70 as adopted. Penetrations of the membrane of common walls for electrical outlet boxes shall be in accordance with Section R302.4.

(A) *Amend Section R302.2.2(1),* to read as follows: "Where a fire sprinkler system in accordance with Section P2904 is provided, the common wall shall be not less than a 1-hour fire-resistance-rated wall assembly tested in accordance with ASTM E119 or UL 263 or Section 703.2.2 of the International Building Code."

(B) Amend *Section R302.2.2(2),* to read as follows: "Where a fire sprinkler system in accordance with Section P2904 is not provided, the common wall shall be not less than a 2-hour fire-resistance-rated wall assembly tested in accordance with ASTM E119 or UL 263 or Section 703.2.2 of the International Building Code."

(C) Amend *Section R302.2.2 Common walls* - Exception to read as follows: Exception: "Common walls are permitted to extend to and be tight against the inside of the exterior walls if the cavity between the end of the common wall and the exterior sheathing is filled with a minimum of two 2-inch nominal thickness wood studs."

~~[(7) Amend *Section R302.2 Townhouses Item #2*, by adding the following exception: Exception: Two structurally independent one-hour fire-resistance-rated wall assemblies, tested in accordance with ASTM E 119 or UL 263 with exposure from both sides, may be substituted for a 2-hour fire-resistance-rated common wall assembly. The walls shall be constructed without plumbing or mechanical equipment, ducts or vents in the cavity of the walls. Penetrations of each wall for electrical outlet boxes shall be in accordance with Section R302.4.]~~

(8) Amend *Section R303.10 ~~[R303.9]~~ Required heating* to read as follows: "Every dwelling unit shall be provided with heating facilities capable of maintaining a minimum room temperature of 68Â°F (20Â°C) at a point 3 feet (914 mm) above the floor and 2 feet (610 mm) from exterior walls in habitable rooms at the design temperature. The installation of one or more portable space heaters shall not be used to achieve compliance with this section."

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

(11) Amend *Chapter 11 Energy Efficiency* as follows.

(A) (No change.)

(B) Delete *Section N1101.3* through *Section N1113 ~~[N1111]~~*.

(12) (No change.)

(13) Amend *Chapter 44 Referenced Standards* as follows.

(A) (No change.)

(B) Add code section R102.3 and delete code sections E3401.1, E3401.2, E4301.1, Table E4303.2, E4304.3, and E4304.4 as referenced code sections for *NFPA Standard 70-20 ~~[70-14]~~, National Electrical Code*.

(C) (No change.)

(14) (No change.)

(e) The *2021 ~~[2015]~~ International Fuel Gas Code* shall be amended as follows.

(1) (No change.)

(2) Amend *Section 102 Applicability* as follows.

(A) Amend *Section 102.4 Additions, alterations or repairs* to read as follows [~~by replacing the first sentence with the following~~]: "The provisions of the *International Existing Building Code* shall apply to all matters governing the repair, alterations, or additions of existing previously occupied industrialized buildings that are designed to be transported from one commercial site to another commercial site. Additions, alterations, or repairs shall not cause an existing installation to become unsafe, hazardous, or overloaded."

(B) - (D) (No change.)

(3) Amend *Chapter 8 Referenced Standards* by adding *ICC Standard IEBC-21 ~~[IEBC-15]~~ International Existing Building Code*, referenced in code sections 102.4 and 102.5.

(f) The *2021 ~~[2015]~~ International Mechanical Code* shall be amended as follows.

(1) (No change.)

(2) Amend *Section 102 Applicability*as follows.

(A) Amend *Section 102.4 Additions, alterations or repairs* to read as follows [~~by replacing the first sentence with the following~~]: "The provisions of the *International Existing Building Code* shall apply to all matters governing the repair, alterations, or additions of existing previously occupied industrialized buildings that are designed to be transported from one commercial site to another commercial site. Additions, alterations or repairs shall not cause an existing installation to become unsafe, hazardous or overloaded."

(B) - (D) (No change.)

(3) Amend *Chapter 15 Referenced Standards* by adding *ICC Standard IEBC-21 ~~[IEBC-15]~~, International Existing Building Code,* referenced in code sections 102.4 and 102.5.

(g) The *2021 ~~[2015]~~ International Plumbing Code* shall be amended as follows.

(1) (No change.)

(2) Amend *Section 102 Applicability* as follows.

(A) - (B) (No change.)

(C) Amend *Section 102.7 Moved buildings* to read as follows [~~add the following sentence~~]: "Moved industrialized buildings that bear approved certification decals or insignia, and that may also bear an alteration decal, in accordance with the requirements of Texas Occupations Code, Chapter 1202 and 16 Texas Administrative Code, Chapter 70, and that have not been altered or modified since the decal, insignia, or alteration decal was attached, shall be considered to be in compliance with the current mandatory building codes adopted by the Texas Industrialized Building Code Council."

(D) (No change.)

(3) Amend *Section 403 Minimum Plumbing Facilities* as follows.

(A) Add new *Section 403.7 ~~[403.5]~~ Industrialized housing and buildings exceptions* to read as follows: "Plumbing fixtures for industrialized buildings shall be provided as required by Table 403.1 except as allowed in Sections 403.7.1, 403.7.2 and 403.7.3 [~~403.5.1, 403.5.2, and 403.5.3~~]."

(B) Add new *Section 403.7.1 [403.5.1] Buildings that are not normally occupied* to read as follows: "Buildings, such as equipment or communication shelters, that are not normally occupied or that are only occupied to service equipment, shall not be required to provide plumbing facilities. EXCEPTION: Buildings that are not normally occupied that are also classified as a Group H occupancy must be provided with plumbing facilities required for this type of occupancy such as requirements for emergency showers and eyewash stations."

(C) Add new *Section 403.7.2 [403.5.2] Other industrialized buildings* to read as follows: "All other industrialized buildings shall contain the minimum plumbing fixtures required in accordance with Table 403.1 unless the building is a non-site specific building and the plans and the data plate contain a special condition/limitation note that the minimum number of required fixtures shall be provided in another building located on the installation site with a path of travel that does not exceed a distance of 500 feet. The plumbing facilities must be accessible to the occupants of the industrialized building. Non-site specific buildings and special condition limitation notes shall be as defined in the 16 Texas Administrative Code, Chapter 70, rules governing the Texas Industrialized Housing and Buildings Program."

(D) Add new *Section 403.7.3 [403.5.3] Requirements for service sinks for industrialized buildings* to read as follows: "Commercial industrialized buildings with areas of less than or equal to 1,800 square feet shall not be required to contain a service sink provided that the building contains a lavatory and water closet that can be substituted for the service sink. EXCEPTION: A building of less than 1,800 square feet in area without any plumbing facilities shall comply with section 403.7.2 [403.5.3]."

(4) Amend *Chapter 15 [13] Referenced Standards* by adding *ICC Standard IEBC-21[IEBC-15], International Existing Building Code*, referenced in code sections 102.4 and 102.5.

(h) (No change.)

(i) The *2021 [2015] International Existing Building Code* shall be amended as follows.

(1) Amend *Section 101 Scope and General Requirements* as follows.

(A) - (B) (No change.)

(2) (No change.)

(3) Amend [the first sentence] of *Section 1301.2 [1401.2] Applicability* to read as follows: "Existing buildings in which there is work involving additions, alterations or changes of occupancy shall be made to conform to the requirements of this chapter or the provisions of Chapters 6 through 12. The provisions of Sections 1301.2.1 through 1301.2.6 shall apply to existing occupancies that will continue to be, or are proposed to be, in Groups A, B, E, F, I-2, M, R and S. These provisions shall also apply to Group U occupancies where such occupancies are undergoing a change of occupancy or a partial change in occupancy with separations in accordance with Section 1301.2.2. These provisions shall not apply to buildings with occupancies in Group H, I-1, I-3, or I-4 [Structures existing prior to August 1, 2017, in which there is work involving additions, alterations or changes of occupancy shall be made to conform to the requirements of this chapter or the provisions of Chapters 5 through 13]."

(4) Amend *Chapter 16 [15] Referenced Standards* as follows.

(A) (No change.)

(B) Amend to read as follows: [Add] "TDLR, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas [TX] 78711 as a promulgating agency; add 2012 TAS - effective March 2012, *Texas Accessibility Standards* as adopted under 16 Texas Administrative Code, Chapter 68 as the referenced standard; and add code sections 102.4, 410.8.2, 410.8.3, 410.8.10, 705.1.2, and 705.1.3 as the referenced code sections."

(j) The *2020 [2014] National Electrical Code* shall be amended as follows.

(1) Amend [Add the following to] *Article 310.1 Scope*to read as follows: "This article covers general requirements for conductors rated up to and including 2000 volt and their type designations, insulations, markings, mechanical strengths, ampacity ratings, and uses. These requirements do not apply to conductors that form an integral part of equipment, such as motors, motor controllers, and similar equipment, or to conductors specifically provided for elsewhere in this *Code*. "Aluminum and copper-clad aluminum shall not be used for branch circuits in buildings classified as a residential occupancy. Aluminum and copper-clad aluminum conductors, of size number 4 AWG or larger, may be used in branch circuits in buildings classified as occupancies other than residential."

(2) Add new *Article 545.14, Testing,* to read as follows.

(A) - (B) (No change.)

(3) Remove Section 210.8(F).

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

Filed with the Office of the Secretary of State on September 11, 2023.

TRD-202303368
Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦

CHAPTER 91. DOG OR CAT BREEDERS PROGRAM

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 91, §§91.10, 91.20, 91.22 - 91.24, 91.27 - 91.30, 91.50 - 91.55, 91.57, 91.58, 91.66, 91.73, 91.74, 91.76, 91.77, 91.80, 91.90 - 91.92, 91.100 - 91.105, 91.107, 91.112, and 91.202; proposes new rules at §§91.61 - 91.65; and proposes the repeal of existing rules at §91.65, regarding the Licensed Breeder program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 91, implement Texas Occupations Code, Chapter 802. This rulemaking implements Senate Bill 876, 88th Legislature, Regular Session (2023), which amended Chapter 802.

S.B. 876 made four significant changes to Chapter 802. First, it lowered the minimum number of adult intact female dogs or cats possessed by a person who is engaged in the business of breeding and selling them from 11 to five, thus increasing the number of breeders now required to obtain a license. Second,

the condition that a person sell at least 20 animals per year before being subject to licensure was removed, so the number of dogs or cats sold is irrelevant to the license requirement. Third, a new exemption from licensing was added for those who breed dogs primarily for breed or conformation shows or similar organized performance events. Finally, the existing exemptions for breeders engaged in breeding dogs primarily for personal use for herding or other agricultural uses; hunting, including tracking, chasing, pointing, flushing, or retrieving game; or for competing in field trials, hunting tests, or similar organized performance events were expanded to exempt those who breed dogs for these activities to sell or exchange.

In addition to implementing these statutory changes, the rules add a new license fee for breeders newly subject to the licensing requirement because they possess five to 10 intact adult female animals and are in the business of breeding them for direct or indirect sale or for exchange in return for consideration. The proposed rules also make minor changes to the responsibilities of license holders, and numerous changes that are non-substantive and update, correct, or clarify language, terminology, usage, grammar, punctuation, citations, numbering and lettering.

Chapter 802 requires the Department to impose on licensed dog or cat breeders the federal specifications for the humane handling, care, treatment, and transportation of dogs and cats in Title 9 of the Code of Federal Regulations (CFR). The new state legislation requires those breeders now subject to the requirement to hold a license to do so by January 1, 2024. Given the limited time available to adopt updated rules to implement the statutory changes, the Department decided to forego substantial rule amendments unrelated to the changes brought by S.B. 876 in this rulemaking. Many CFR requirements have changed and the Department must implement those, so a substantive rulemaking will follow that more thoroughly updates the rules to match the CFR requirements, resolves other outstanding issues, and addresses comments and staff recommendations collected during the most recent four-year review of Chapter 91.

The proposed rules add a new authorization from the CFR to keep records for animals housed in a group in a single group record rather than requiring an individual record for each animal. Further, the proposed rules authorize the license holder to make corrective actions that fit the license holder's budget and resources, as long as the actions achieve compliance, instead of having to make corrective actions in a manner recommended by TDLR. The proposed rules also authorize an applicant for an initial license to provide evidence to TDLR that deficiencies noted in a pre-license inspection have been corrected and the facility meets the requirements of the rules, rather than requiring the applicant to request and pay for another pre-license inspection.

Advisory Committee Recommendations

The proposed rules were presented to and discussed by the Licensed Breeder Advisory Committee at its meeting on September 1, 2023. The Advisory Committee made one change to remove some unnecessary wording in §91.22. The Advisory Committee voted and recommended that the proposed rules with that change be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §91.10 by adding a definition for "the Act," "licensee," and "representative," and correcting a citation and adding a reference to the CFR that was moved from §91.100. The definition of a "dog or cat breeder" is amended for consistency with the new statutory language. The provisions in the section are renumbered.

The proposed rules amend §91.20, Applicability, to update a citation.

The proposed rules amend §91.22, License Required, to clarify the license requirement and to provide the date by which those who are newly subject to the licensing requirement must be licensed.

The proposed rules amend §91.23, License Requirements, to update, clarify, and reorganize the section.

The proposed rules amend §91.24, License Renewal, to update and clarify language.

The proposed rules amend §91.27, 91.28, and 91.29 relating to notice to licensees and term of license, to remove outdated language that refers to registration.

The proposed rules amend §91.30, Exemptions, to add an exemption from the licensing requirement for dogs bred with the intent that they will be used primarily for breed or conformation shows. Existing exemptions are also expanded, and language is amended to match the new statutory provisions for exemptions. A cross-reference is updated.

The proposed rules amend §91.50, Inspections-Prelicense, to clarify that licensees need not request and pay for a second inspection to demonstrate that deficiencies have been corrected but may instead provide evidence of corrected deficiencies to the Department.

The proposed rules amend §91.51, Inspections-Prelicense Exemption, to update language.

The proposed rules amend §91.52, Inspections-Periodic, to update language and to provide that the Department may indicate recommended corrective actions for violations noted in an inspection report.

The proposed rules amend §91.53, Out-of-Cycle Inspections, to update language and to provide that the Department may indicate recommended corrective actions for violations noted in an inspection report.

The proposed rules amend §91.54, relating to corrective action following inspection, to clarify that licensees are not obligated to perform corrective actions recommended by the Department but may choose alternative corrective actions to achieve compliance.

The proposed rules amend §91.55, relating to the Department maintaining a directory of licensed breeders, to clarify language.

The proposed rules amend §91.57, relating to consumer information, to add provisions stemming from Occupations Code Chapter 51 regarding complaint-handling and immunity from liability for qualified persons who aid in Department investigations.

The proposed rules amend §91.58, relating to donations, to correct a term.

The proposed rules create new §§91.61-91.65 to update existing requirements and add standard provisions for advisory committee duties, membership, terms, vacancies, officers, and meetings.

The proposed rules repeal §91.65, Advisory Committee, to move, update, and standardize advisory committee requirements in new §§91.61 - 91.65.

The proposed rules amend §91.66, relating to inspector responsibilities, to update and correct language.

The proposed rules amend §91.73, relating to keeping a copy of the law and rules at each facility, to clarify the wording of the requirement.

The proposed rules amend §91.74, relating to contract provisions, to remove unnecessary language.

The proposed rules amend §91.76, relating to animal inventory, to update language.

The proposed rules amend §91.77, relating to animal records, to correct terminology and to implement a CFR change that allows routine husbandry records for a group of animals to be kept on a single record.

The proposed rules amend §91.80, Fees, to add license and license renewal fees for the new category of licensed breeders who possess for breeding and sale between five and ten intact female animals. Standard provisions relating to Department fees are also added and language is updated and corrected.

The proposed rules amend §§91.90, 91.91, and 91.92, relating to penalties and enforcement, to update and clarify language.

The proposed rules amend §91.100, relating to housing, to move a provision from this section to §91.10, Definitions, and to renumber the section.

The proposed rules amend §91.101, relating to indoor housing, to correct a term.

The proposed rules amend §91.102 and §91.103, relating to sheltered housing and outdoor housing, to clarify language.

The proposed rules amend §91.104, relating to primary enclosures, to clarify language and to renumber the provisions of the section.

The proposed rules amend §91.105, relating to compatible grouping, to clarify and renumber the provisions.

The proposed rules amend §91.107, related to feeding, to correct usage.

The proposed rules amend §91.112, relating to veterinary care, to add a citation and clarify the requirements.

The proposed rules amend §91.202, relating to primary enclosures for transport, to clarify language.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local governments as a result of enforcing or administering the proposed rules.

Mr. Couvillon has also determined that for each year of the first five years the proposed rules are in effect, there is no estimated loss in revenue to the state government, and no estimated increase or loss in revenue to local governments as a result of enforcing or administering the proposed rules. Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there will be an increase in revenue to the state due to an estimated 50 additional breeders who will need to become licensed because they possess between five and ten adult intact female animals and are in the business of breeding them to be sold directly or indirectly, or exchanged for consideration. The proposed yearly license fee for these breeders is $150; therefore, the increase in revenue to the state is expected to be $7,500 annually.

The proposed rules newly exempt from licensure any breeder who breeds dogs to be used primarily for breed or conformation shows. The proposed rules also expand the exemption for those who breed dogs primarily to be used for herding or other agricultural uses, hunting (tracking, chasing, pointing, flushing, or retrieving game), or competing in field trials, hunting tests, or similar organized performance events. These exemptions formerly applied only to dog breeders who bred these types of dogs for personal use. Therefore, the Department expects some of these types of breeders to forego licensing. This will result in a reduction in license and renewal fees of $300 or $500 annually for each licensed breeder who qualifies for the expanded exemptions. TDLR does not have information on how many current license holders would be exempted from licensure by the change to the statute and would therefore not be required to pay fees to the State. The resulting loss in revenue from these fees cannot be predicted at this time.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect a local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be the health, safety and humane treatment of dogs and cats bred in licensed facilities, which benefits the customers who purchase these animals. The benefits that result from the regulation of dog and cat breeders will now extend to animals that are bred in facilities with a smaller number of adult intact females and to the customers who purchase from those facilities. The minimum requirements for care of the animals that are imposed by licensing will help to ensure healthy, safe conditions for the animals. The possible reduction in overall quantities of dogs or cats bred for sale is likely to result in reduced surplus animals and result in reduced costs for taxpayer-funded animal shelter and animal rescue entities.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSED RULES

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be additional costs to persons who are required to comply with the proposed rules. The breeders who will now be subject to licensure under the proposed rules will have a cost of $150 per year for an application fee. There could also be additional costs for any breeders who will have to make adjustments to parts of their facility that do not comply with the standards of care that Chapter 802 mandates, to come into compliance.

The proposed rules give license holders opportunities to reduce their costs by authorizing records for animals housed in groups to be kept in a group record rather than requiring an individual record for each animal; and authorizing the license holder to make corrective actions that fit the license holder's budget and resources, as long as the actions achieve compliance, instead of having to make corrective actions in a manner recommended by TDLR that might not be economical for the license holder. The proposed rules also authorize an applicant for an initial license to provide evidence to TDLR that deficiencies noted in a pre-li-

cense inspection have been corrected and the facility meets the requirements of the rules, rather than requiring the applicant to request and pay for another pre-license inspection.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Although almost all breeders would probably qualify as small or micro-businesses, TDLR does not require information on employees or gross receipts from license applicants and does not have information on the number of small or micro-businesses breeding dogs or cats that will need to become licensed as a result of the statute change. Nor does TDLR have information to estimate accurately how many of the currently licensed breeders of any number of females will qualify for the new and expanded exemptions from licensing.

Occupations Code Chapter 802 requires dog or cat breeders in the business of breeding five or more females for sale or exchange to be licensed and requires them to comply with the federal regulations for dog or cat breeders in the CFR. There is very little imposed by the proposed rules that is over and above what the statute and the federal regulations require, or that increases any costs for breeders who are subject to the licensing requirements of the statute. The $150 annual license fee is modest and is not expected to have an adverse economic effect on any small or micro-business. The possession of a license and compliance with its attendant health and safety requirements is likely to enhance the salability of the animals produced by breeders newly required to obtain a license. Any marginal costs that might be attributable to the proposed rules will be minimal and will not have an adverse economic effect on any business. The proposed rules do give license holders opportunities to reduce their costs as explained in this preamble.

Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules have a fiscal note that imposes a cost on regulated persons; however, the proposed rules fall under the exception for rules that are necessary to implement legislation unless the legislature specifically applies the one-for-one requirement. It has not; therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules require an increase in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules expand, limit, or repeal an existing regulation.

7. The proposed rules increase the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules;* by facsimile to (512) 475-3032; or by mail to Monica M. Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

16 TAC §§91.10, 91.20, 91.22 - 91.24, 91.27 - 91.30, 91.50 -91.55, 91.57, 91.58, 91.61 - 91.66, 91.73, 91.74, 91.76, 91.77, 91.80, 91.90 - 91.92, 91.100 - 91.105, 91.107, 91.112, 91.202

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 802, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 802. No other statutes, articles, or codes are affected by the proposed rules. The legislation that enacted the statutory authority under which the proposed rules are proposed to be adopted is Senate Bill 876, 88th Legislature, Regular Session (2023).

§91.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. A word or term not defined in this chapter shall have the meaning set forth in 9 C.F.R. Chapter I, Subchapter A, Part 1.

(1) Act--Texas Occupations Code, Chapter 802, relating to Dog or Cat Breeders.

(2) [~~(1)~~] Adult animal--An animal six months of age or older.

(3) [~~(2)~~] Animal--A dog or a cat.

(4) [~~(3)~~] Cat--A mammal that is wholly or partly of the species *Felis domesticus.*

(5) [~~(4)~~] Commission--The Texas Commission of Licensing and Regulation under Texas Occupations Code, Chapter 51.

(6) [~~(5)~~] Controlling person--An individual who:

(A) is a partner, manager, director, officer, or member of a dog or cat breeder;

(B) possesses the authority to set policy or direct management of a dog or cat breeder; or

(C) possesses a direct or indirect control of 25 percent or more of a dog or cat breeder.

(7) [~~(6)~~] Department--The Texas Department of Licensing and Regulation under Texas Occupations Code, Chapter 51.

(8) [~~(7)~~] Dog--A mammal that is wholly or partly of the species *Canis familiaris.*

(9) [~~(8)~~] Dog or cat breeder--A person who possesses five [~~11~~] or more adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration [~~and who sells or exchanges, or offers to sell or exchange, not fewer than 20 animals in a calendar year~~].

(10) [~~(9)~~] Facility--The premises used by a dog or cat breeder for keeping or breeding animals. The term includes all buildings, property, and confinement areas used to conduct the breeding business.

(11) [~~(10)~~] Federal regulations--The specifications for the humane handling, care, treatment, and transportation of dogs and cats set forth in 9 C.F.R. Chapter I, Subchapter A, Part 3, Subpart A [~~9 C.F.R. Part 3, Subpart A~~].

(12) [~~(11)~~] Intact female animal--A female animal that has not been spayed and is capable of reproduction.

(13) [~~(12)~~] Kitten--A cat less than six months old.

(14) [~~(13)~~] Licensed breeder--A dog or cat breeder who holds a license issued under this chapter.

(15) Licensee--A licensed breeder.

(16) [~~(14)~~] Positive Physical Contact--Petting, stroking, or other touching, which is beneficial to the well-being of the animal.

(17) [~~(15)~~] Possess--To have custody of or control over.

(18) [~~(16)~~] Primary enclosure--Any structure used to restrict an animal to a limited amount of space. The term includes a room, pen, run, cage, or compartment.

(19) [~~(17)~~] Puppy--A dog less than six months old.

(20) Representative--A person authorized or delegated by a licensed breeder to speak, act, or otherwise stand for or on behalf of the licensee.

(21) [~~(18)~~] Veterinarian--A veterinarian in good standing and licensed to practice veterinary medicine in this state.

(22) [~~(19)~~] Wire or Wire Mesh--Any metal, alloy or other material which allows a free air flow through the material when used [~~as~~], or constructed to be used, as flooring for any structure required by this chapter. The strands of metal, alloy or other material must be completely encased in thick bonded vinyl, plastic or rubberized coating designed so the animal's paws are unable to extend through, or become caught in the openings.

§91.20. Applicability.

(a) This chapter does not affect the applicability of any other law, rule, order, ordinance, or other legal requirement of the federal government, this state, or a political subdivision of this state.

(b) This chapter does not prevent a municipality or county from prohibiting or further regulating by order or ordinance the possession, breeding, or selling of dogs or cats.

(c) This chapter does not apply to an animal regulated under the Texas Racing Act (Occupations Code, Title 13, Subtitle A-1) [~~(Article 179e, Vernon's Texas Civil Statutes)~~].

§91.22. License Required[~~--Dog or Cat Breeder~~].

(a) A person who possesses five or more adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration must be licensed as a dog or cat breeder under the Act and this chapter.

(b) [~~(a)~~] A person required to obtain a breeder's license under this chapter may not act as, offer to act as, or represent that the person is a dog or cat breeder in this state unless the person holds a license under this chapter for each facility that the person owns or operates in this state.

(c) [~~(b)~~] A license for a single facility may cover more than one building on the same premises.

(d) [~~(c)~~] For purposes of this section, each noncontiguous premise or physical location is a separate facility and must obtain a license under this chapter; unless the noncontiguous premises or physical locations are within 300 feet of each other.

(e) A dog or cat breeder who possesses five or more but fewer than 11 adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration is not required to hold a license to act as a dog or cat breeder before January 1, 2024.

§91.23. License Requirements[~~--Dog or Cat Breeder~~].

(a) Applicants for a license must submit all required information in a manner and form prescribed by the department. [~~To be eligible for a Dog or Cat Breeders license, except as provided for in subsection (b), an applicant must:~~]

(b) Applicants must submit the following:

(1) a complete application [~~submit a completed application on a department-approved form~~];

(2) [~~provide~~] a valid state sales tax identification number;

(3) [~~provide~~] the name and address of each controlling person; and

(4) the fee required under §91.80 [~~successfully pass a criminal background check for each applicant and controlling person~~];

(c) Each applicant and controlling person must successfully pass a criminal history background check.

(d) In addition to the requirements in subsections (b) and (c), each applicant must:

(1) [~~(5)~~] successfully pass a facility prelicense inspection conducted by a department-approved inspector; or

(2) provide a current Class A animal dealers license issued under the Animal Welfare Act (7 U.S.C. Section 2131 *et seq.*) and [~~together with~~] a statement certifying that the facility meets the requirements of this chapter; or [~~and~~]

[(6) pay the fee required under §91.80.]

(3) satisfy the following requirements:

[(b)] [A person may also be eligible for a Dog or Cat Breeders license if that person]

(A) successfully pass [passes] an administrative facility prelicense inspection conducted by a department-approved inspector by satisfying the requirements in subsections (b) and (c); [subsection (a)(1) - (4),] and

(B) provide a current Class B animal dealers license issued under the Animal Welfare Act (7 U.S.C. Section 2131 *et seq.*) and [together with]:

(i) [(1)] color photographs at least 4 x 6 inches of each primary enclosure located on the premises or location for licensure;

(ii) [(2)] a statement certifying the number and breed of animals housed in the primary enclosures photographed in clause (i) [subparagraph (A);] and

(iii) [(3)] a statement certifying that the facility meets the requirements of this chapter.

§91.24. License Renewal. [Requirements--Dog or Cat Breeders License Renewal.]

(a) To renew a breeder license, a person [an applicant] must:

(1) submit a completed application in a manner prescribed by the department [on a department-approved form];

(2) provide a valid state sales tax identification number;

(3) provide the name and address of each controlling person;

(4) successfully pass a criminal background check for each applicant and [or] controlling person;

(5) be in compliance with all commission or department orders [Commission Orders] directed to the applicant or a controlling person; and

(6) pay the fee required under §91.80.

(b) To renew and maintain continuous licensure, the renewal requirements under this section must be completed before [prior to] the expiration of the license. A late renewal means[--] the person [licensee] will have an unlicensed period from the expiration date of the expired license to the issuance date of the renewed license. During the unlicensed period, a person may not perform any functions of a breeder that require [requires] a license under this chapter.

(c) Non-receipt of a license renewal notice from the department does not exempt a person from any requirements of this chapter.

§91.27. License [or Registration]--Notice of Proposed Denial, Opportunity to Comply.

(a) If the department recommends denial of an application for a license [or registration] under this chapter, the department shall send written notice of the decision to the applicant at the address shown on the application by certified mail, return receipt requested.

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

§91.28. Department Notifications to Licensee [or Registrant].

Unless otherwise provided for by statute or this chapter, the department may send notice of department proposed actions and decisions through email sent to the last email address designated by the licensee [or registrant].

§91.29. License [or Registration--]Term.

A license [or registration] issued by the department is valid only for the person named on the license [or registration]; applies only to the single facility, agency, department or person named on the license [or registration]; is nontransferable; and is valid for 12 months from the date of issuance.

§91.30. Exemptions.

(a) This section applies only to a dog bred with the intent that it be used primarily for:

(1) herding livestock, as defined by §1.003, Agriculture Code, or other agricultural uses;

(2) hunting, including tracking, chasing, pointing, flushing, or retrieving game; or

(3) competing in field trials, hunting tests, breed or conformation shows, or similar organized performance events.

(b) This chapter does not apply to a person to the extent the person breeds dogs described by subsection (a) for a [personal] use described by subsection (a). A person described by this subsection may conduct direct or indirect sales or exchanges in return for consideration of dogs described by subsection (a).

(c) Notwithstanding subsection (b), a person described by subsection (b) may be subject to the requirements of this chapter based on the person's activities with respect to animals other than dogs that are bred and used as described by this section.

(d) Dogs described by subsection (a) may not be counted for purposes of determining the number of adult intact female animals possessed by a person as described by §91.10(9) [§91.10(8)].

§91.50. Inspections--Prelicense.

(a) Except as provided by §91.51, the department shall inspect a facility before a license is issued for the facility.

(b) The department may not issue a license to a breeder until the department receives a prelicense inspection report from the inspector in a format approved by the department certifying that the facility meets the prelicense inspection requirements for a license.

(c) An applicant whose facility does not meet the requirements of this chapter as revealed by a prelicense inspection may, after correcting deficiencies noted in the inspection report, request another prelicense inspection by paying the required fee to the department. Alternatively, the applicant may provide evidence, in a manner prescribed by the department, that deficiencies have been corrected and that the applicant's facility meets the requirements of this chapter.

§91.51. Inspections--Prelicense Exemption.

The department may not require a prelicense inspection of a facility for an applicant who:

(1) holds a current Class A animal dealers license issued under the Animal Welfare Act (7 U.S.C. Section 2131 *et seq.*); and

(2) submits to the department:

(A) a copy of the license; and

(B) in a manner [on a form] prescribed by the department, [provide] a statement certifying that the facility meets the requirements of the Act [this chapter] and [rules adopted under] this chapter.

§91.52. Inspections--Periodic.

(a) Each facility of a licensed breeder shall be inspected at least once in every 18-month period.

(b) The inspection must be conducted during the facility's normal business hours, and the licensed breeder or [~~a~~] representative [~~of the licensed breeder~~] must be given a reasonable opportunity to be present during the inspection.

(c) If necessary to adequately perform the inspection, the department inspector may determine it is appropriate to not provide advance notice to the licensed breeder or [~~a~~] representative [~~of the licensed breeder~~] before arriving at the facility. The licensed breeder or its representative shall, on request of an inspector, assist the inspector in performing the inspection.

(d) An inspector may not enter or access any portion of a private residence of a licensed breeder except as necessary to access animals or other property relevant to the care of the animals.

(e) The inspector may request that relevant documents or records be provided for inspection.

(f) The inspector shall submit an inspection report to the department not later than the 10th day after the date of the inspection on a form prescribed by the department and provide a copy of the report to the licensed breeder or its representative.

(g) Based on the results of the periodic inspection, a licensed facility may be moved to an out-of-cycle inspection provided for in §91.53. The department will notify the owner of the facility, in writing, if the facility becomes subject to out-of-cycle inspection and the scheduled frequency of inspections.

(h) The licensee[~~, manager,~~] or representative must, upon request, make available to the inspector all records and other documents required by this chapter.

(i) On completion of the periodic inspection and while at the facility, the inspector shall leave with the licensee or representative [~~of licensee~~] a preliminary report in a manner prescribed [~~on a form approved~~] by the department listing the items not meeting the requirements of this chapter. The preliminary report required by this section is in addition to the completed report required by this chapter and does not affect the validity of the completed detailed report.

(j) The inspection report will identify violations that must be corrected by the licensee. The report may [~~will~~] also indicate the corrective actions required to address the violations.

(k) The department may assess administrative penalties and/or administrative sanctions for violations disclosed during inspections under this chapter.

§91.53. Out-of-Cycle Inspections.

(a) Out-of-cycle inspections are those required in addition to periodic inspections required under §91.52 for licensed facilities to ensure compliance with this chapter.

(b) To determine which licensee will be subject to out-of-cycle inspections, the department has established criteria and frequencies for inspections.

(c) The owner of the facility shall pay the fee required under §91.80 for each out-of-cycle inspection.

(d) Facilities subject to out-of-cycle inspections may be scheduled for inspection based on the following risk criteria and inspection frequency:
Figure: 16 TAC §91.53(d) (No change.)

(e) At the time of inspection of a licensee, the licensee or [~~owner, manager, or their~~] representative must, upon request, make available to the inspector, records, notices and other documents required by this chapter.

(f) On completion of the out-of-cycle inspection and while at the facility, the inspector shall leave with the licensee or representative [~~of licensee~~] a preliminary report on a form approved by the department listing the items not meeting the requirements of this chapter. The preliminary report required by this section is in addition to the completed report required by this chapter and does not affect the validity of the completed detailed report.

(g) The inspection report will identify violations that must be corrected by the licensee. The report may [~~will~~] also indicate recommended [~~the~~] corrective actions required to address the violations. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations identified during the out-of-cycle inspection.

(h) Facilities on a Tier 1 out-of-cycle inspection schedule that have two inspections with no violations or Tier 2 out-of-cycle inspection schedule that have three inspections with no violations may be moved to a less frequent out-of-cycle inspection schedule or returned to a periodic schedule of inspections. The department will notify the licensee, in writing, if there is a change in the facility's out-of-cycle schedule or if the facility is returned to a periodic inspection schedule.

§91.54. Corrective Actions Following Periodic or Out-of-Cycle Inspections.

(a) When corrective actions to achieve compliance are required:

(1) the department may [~~shall~~] provide the licensee a list of recommendations for [~~required~~] corrective actions; and

(2) the licensee shall complete all corrective actions and provide written verification of the corrective actions to the department according to the following schedule:

(A) violations affecting an animal's health shall be corrected immediately; or

(B) after consultation with the licensee or [~~licensee's~~] representative, violations related to housing facilities must be corrected within a reasonable time as determined by the inspector based on a totality of the circumstances.

(3) The department may grant an extension, consistent with established procedures, if satisfactory evidence is presented showing that the time period specified is inadequate to perform the necessary corrections.

(b) The department may assess administrative penalties and/or administrative sanctions for violations or for failure to timely complete corrective actions or timely provide written verification of the completion of corrections to the department.

(c) Licensees are not obligated to perform the corrective actions recommended by the department and may choose alternative corrective actions to achieve compliance.

§91.55. Responsibilities of the Department--Directory.

(a) The department shall maintain a directory of dog or cat [~~licensed~~] breeders licensed [~~registered~~] under this chapter.

(b) The department shall make the directory available to the public.

§91.57. Responsibilities of the Department--Consumer Interest Information.

(a) The department shall prepare information of consumer interest describing:

(1) the functions performed by the department under this chapter; and

(2) the rights of a consumer affected by this chapter.

(b) The information must describe the procedure by which a consumer complaint is filed with and resolved by the department.

(c) The department shall make the information available to the public.

(d) The commission has adopted rules related to handling complaints pursuant to Texas Occupations Code §51.252. These rules are located at 16 Texas Administrative Code Chapter 60, Subchapter H.

(e) A qualified person may assist the department in the review and investigation of complaints and will be immune from liability related to these activities pursuant to Texas Occupations Code §51.252.

§91.58. Responsibilities of the Department--Donations, Disbursements and Reporting.

(a) The executive director shall develop procedures for the acceptance, conversion, and deposit of all donations offered by individuals, clubs, organizations, and all other sources.

(b) Conversion of donations of real or personal property into United States currency shall be accomplished by the executive director or designee.

(c) Donations received shall be deposited in a dedicated training and enforcement account in the general revenue fund to the credit of general revenue subject to exemption from the application of §403.095, Government Code.

(d) The executive director shall approve in writing all disbursements from the training and information account.

(e) A disbursement under this section may include but is not limited to promotional costs to enhance the fund.

(f) All donations may be used for these purposes unless otherwise specifically prohibited by the donor.

(g) All disbursements from the accounts will be by check signed by the executive director.

(h) The commission will be furnished a quarterly report detailing all deposits into and expenditures from the fund.

§91.61. Establishment of Licensed Breeder Advisory Committee; Duties.

(a) The commission establishes the Licensed Breeder Advisory Committee as required by the Act.

(b) The advisory committee shall advise the commission and make recommendations on matters related to the administration and enforcement of the Act, including licensing fees and standards.

§91.62. Advisory Committee--Membership.

(a) The advisory committee consists of nine members appointed by the presiding officer of the commission with the approval of the commission as follows:

(1) two members who are licensed breeders;

(2) two members who are veterinarians;

(3) two members who represent animal welfare organizations, each of which has an office based in this state;

(4) two members who represent the public; and

(5) one member who is an animal control officer as defined in §829.001, Health and Safety Code.

(b) Except for the members described by paragraph (a)(1), a person may not be a member of the advisory committee if the person or a member of the person's household:

(1) is required to be licensed under this chapter;

(2) is an officer, employee, or paid consultant of an entity required to be licensed under this chapter;

(3) owns or controls, either directly or indirectly, more than a 10 percent interest in an entity required to be licensed under this chapter; or

(4) is required to register as a lobbyist under Chapter 305, Government Code, because of the person's activities for compensation on behalf of an entity required to be licensed under this chapter.

(c) The presiding officer of the commission may remove from the advisory committee a member who is ineligible for membership under subsection (b).

§91.63. Advisory Committee--Terms; Vacancies.

(a) Members of the advisory committee serve staggered four-year terms. The terms of four or five members expire on February 1 of each odd-numbered year.

(b) If a vacancy occurs during a member's term, the presiding officer of the commission, with the approval of the commission, shall appoint a replacement member to serve for the remainder of the unexpired term.

(c) A member of the advisory committee may be removed from the advisory committee pursuant to Texas Occupations Code §51.209, Advisory Boards; Removal of Advisory Board Member.

§91.64. Advisory Committee--Officers.

(a) The presiding officer of the commission shall designate one member of the advisory committee to serve as presiding officer of the advisory committee for a two-year term.

(b) A member may serve more than one term as presiding officer of the advisory committee.

(c) The presiding officer of the advisory committee shall preside at all meetings at which the presiding officer is in attendance. The presiding officer of the advisory committee may vote on any matter before the advisory committee.

§91.65. Advisory Committee--Meetings.

(a) The advisory committee shall meet at the call of the presiding officer of the commission or the executive director.

(b) A quorum of the advisory committee is necessary to conduct official business. A quorum is five members.

(c) A decision of the advisory committee is effective only on a majority vote of the members present.

(d) A member may not receive compensation for service on the advisory committee. Subject to the department's budget and any limitation provided by the General Appropriations Act, a committee member may receive reimbursement for the actual and necessary expenses incurred while performing advisory committee duties.

§91.66. Responsibilities of Inspectors--Inspections, Investigations, and Reports of Animal Cruelty.

(a) Inspections.

(1) An inspector must conduct inspections during the facility's normal business hours, and the licensed breeder or [~~a~~] representative [~~of the licensed breeder~~] must be given a reasonable opportunity to be present during the inspection.

(2) If an inspector determines it is not appropriate to provide advance notice to the licensed breeder or [a] representative [~~of the licensed breeder~~] before arriving at the facility, the inspection report must describe the reasons supporting the determination.

(3) In conducting an inspection under this section, an inspector may not enter or access any portion of a private residence of a licensed breeder except as necessary to access animals or other property relevant to the care of the animals.

(4) An inspector may request that relevant documents or records be provided for inspection.

(5) Inspectors must submit inspection reports to the department not later than the 10th day after the date of the inspection in a manner [~~on a form and manners~~] prescribed by the department and provide a copy of the report to the licensed breeder or its representative.

(6) An inspector may not perform an inspection authorized by §91.52 and §91.53 unless assigned or requested by the department.

(7) Inspections must be conducted in accordance with:

(A) the training procedures and protocols approved by the department; or

(B) if good cause exists [~~exist~~] to deviate from the established procedures and protocols or if no procedure or protocol exists [~~exist~~] for the issues presented during the inspection, the inspection report must contain an explanation of the issues presented and procedures followed.

(b) Investigations. On receipt of a complaint alleging a violation of this chapter or a rule adopted under this chapter, the department shall investigate the alleged violation.

(c) Reports of Animal Cruelty. A person conducting an inspection or an investigation under this chapter shall notify the appropriate local law enforcement agency not later than 24 hours after discovering evidence of animal cruelty or neglect during the inspection or investigation.

§91.73. Responsibilities of Licensee--Onsite Availability of Law and Rules.

A licensed breeder must maintain at each of the breeder's facilities a current printed [~~and current~~] copy or an electronic copy, in a manner prescribed by the department, of Texas Occupations Code, Chapter 802 and rules adopted by the commission regulating licensed breeders[~~; or electronically in a manner prescribed by the department~~].

§91.74. Responsibilities of Licensee--Mandatory Contract Provisions.

A licensed breeder must include in each contract for the sale or transfer of an animal:

(1) the license number; and

(2) the following statement: "Dog and cat breeders are regulated by the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599, www.tdlr.texas.gov." [~~or a similar statement adopted by commission rule that includes the department's name, mailing address, telephone numbers, and Internet website address.~~]

§91.76. Responsibilities of Licensee--Annual Inventory.

(a) Not later than February 1 of each year, a licensed breeder shall submit to the department, in a manner [~~on a form~~] prescribed by the department, an accounting of all animals held at the facility at any time during the preceding calendar year.

(b) The licensed breeder shall keep copies of the items described by subsection (a) at the licensed breeder's facility and shall make them available on request to the department inspector.

(c) A licensed breeder that has more than one facility shall:

(1) keep separate records for each facility; and

(2) submit a separate accounting of animals for each facility.

§91.77. Responsibilities of Licensee--Animal Records Content, Availability, and Retention Period.

(a) A licensed breeder shall maintain, at the licensed facility where the animal is kept, a [~~separate~~] record for each animal in the breeder's facility documenting the animal's care.

(1) Records required by this section must be maintained for at least two (2) years and must include:

(A) the date on which the animal enters the facility or operation;

(B) the person from whom the animal was purchased or obtained, including the name, address and phone number of such person, and license or registration number if applicable;

(C) a description of each animal, including the species, color, breed, sex, date of birth (if not known, the approximate age) and weight;

(D) any tattoo, microchip, or other identification number carried by or appearing on the animal;

(E) for breeding females:

(i) breeding dates;

(ii) whelping or queening dates;

(iii) number of puppies or kittens per litter;

(iv) sire or tom for each litter; and

(F) the disposition of each animal with date of disposition.

(2) Records required by this section are in addition to records related to preventive [~~preventative~~] and therapeutic veterinary care provided each animal.

(3) The licensed breeder shall make the animal records available on request to the department inspector.

(b) Records required by this chapter shall be kept at the licensed facility where the animal was last housed for two years from the date of the last entry in the records or the date the animal is no longer housed at the facility, whichever is later.

(c) When an animal subject to this chapter is transferred from one licensed facility to another licensed facility, a copy of records related to that animal and required by this chapter must be transferred contemporaneously with the transferred animal.

(d) Records documenting routine husbandry, such as annual examinations, vaccinations, preventive medical procedures, or treatments or procedures performed on all animals in a group may be kept on a single record.

(1) Requirements to document in the medical records maintained for each animal or in the records related to each animal may include the single group record in addition to or instead of documenting in an individual record maintained for an animal.

(2) Requirements for approval or documentation by a veterinarian mean written documentation in the animal's group record, individual record, or both unless otherwise specified.

(3) The records related to an animal include all individual and group records related to that animal.

§91.80. Fees.

(a) Application Fees

(1) Dog or Cat Breeder License, 5-10 Intact Female Animals

(A) Original Application--$150

(B) Renewal--$150

(2) [~~(1)~~] Dog or Cat Breeder License, 11-25 Intact Female Animals [~~(11-25 Intact Female Animals)~~]

(A) Original Application--$300

(B) Renewal--$300

(3) [~~(2)~~] Dog or Cat Breeder License, 26 or more Intact Female Animals [~~(26 or more Intact Female Animals)~~]

(A) Original Application--$500

(B) Renewal--$500

(b) Out-of-Cycle Inspections--$150

(c) Revised/Duplicate License[~~/Certificate/Permit/Registration~~]--$25

(d) Late renewal fees for licenses under this chapter are provided under §60.83 [~~of this title (relating to Late Renewal Fees)~~].

(e) The fee for a dishonored/returned check or payment is the fee prescribed under §60.82.

(f) The fee for a criminal history evaluation letter is the fee prescribed under §60.42.

(g) [~~(e)~~] All fees paid to the department are nonrefundable [~~except as provided for by commission rules or statute~~].

§91.90. Administrative Sanctions and Penalties.

A person that violates any provision of the Texas Occupations Code, Chapters 51 and [~~Chapter~~] 802, this chapter [~~a rule~~], or a rule or an order of the executive director or commission will be subject to administrative sanctions and/or administrative penalties under Texas Occupations Code, Chapters 51 and 802, and applicable agency rules.

§91.91. Enforcement Authority.

The enforcement authority granted under Texas Occupations Code, Chapters 51 and 802 [~~and any associated rules~~] may be used to enforce the Act [~~Texas Occupations Code, Chapter 802~~] and this chapter.

§91.92. License Denial, Revocation, and Suspension.

(a) The department shall deny, refuse to renew, suspend, or revoke a license in accordance with Occupations Code, Chapters 51, 53, and 802.

(b) The department may deny, refuse to renew, revoke, or suspend a license held by a person who:

(1) fails to meet the requirements of the Act or [~~Occupations Code, Chapter 802 and~~] this chapter;

(2) has had a similar license issued by a federal, state, or local authority denied, revoked, or suspended;

(3) has falsified any material information requested by the department;

(4) has failed to meet a standard adopted by rule under this chapter; or

(5) has failed to comply with any corrective action required under an inspection report in the time provided by the report.

§91.100. Standards of Care--Housing Generally.

[~~A word or term not defined in this chapter shall have the meaning set forth in 9 C.F.R. Part 1.~~]

(a) [~~(1)~~] Structure; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(b) [~~(2)~~] Condition and site. Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices. Housing facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

(c) [~~(3)~~] Surfaces.

(1) [~~(A)~~] General requirements. The surfaces of housing facilities--including houses, dens, and other furniture-type fixtures and objects within the facility--must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(A) [~~(i)~~] be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(B) [~~(ii)~~] be free of jagged edges or sharp points that might injure the animals.

(2) [~~(B)~~] Maintenance and replacement of surfaces. All surfaces must be maintained on a regular basis. Surfaces of housing facilities--including houses, dens, and other furniture-type fixtures and objects within the facility--that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) [~~(C)~~] Cleaning. Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with §91.109(b) to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, concrete, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in §91.109(b)(3) for primary enclosures.

(d) [~~(4)~~] Water and electric power. The housing facility must have reliable electric power adequate for heating, cooling, ventilation, and lighting, and for carrying out other husbandry requirements in accordance with the regulations in this chapter. The housing facility must provide adequate running potable water for the dogs' and cats' drinking needs, for cleaning, and for carrying out other husbandry requirements.

(e) [~~(5)~~] Storage. Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

(f) [~~(6)~~] Drainage and waste disposal. Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

(g) [~~(7)~~] Washrooms and sinks. Washing facilities such as washrooms, basins, sinks, or showers must be provided for animal caretakers and must be readily accessible.

§91.101. Standards of Care--Indoor Housing Facilities.

(a) Heating, cooling, and temperature. Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50° F (10° C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by a veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50° F (10° C). The ambient temperature must not fall below 45° F (7.2° C) for more than 2 consecutive hours when dogs or cats are present, and must not rise above 85° F (29.5° C) for more than 2 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions [~~condition~~].

(b) Ventilation. Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85° F (29.5° C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of a veterinarian and generally accepted professional and husbandry practices, as documented in the medical records maintained for each animal.

(c) Lighting. Indoor housing facilities for dogs and cats must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs and cats. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs and cats from excessive light.

(d) Interior surfaces. The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

§91.102. Standards of Care--Sheltered Housing Facilities.

(a) Heating, cooling, and temperature. The sheltered part of sheltered housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. The ambient temperature in the sheltered part of the facility must not fall below 50° F (10° C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress and discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs or cats, except as approved by a veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50° F (10° C). The ambient temperature must not fall below 45° F (7.2° C) for more than 2 consecutive hours when dogs or cats are present, and must not rise above 85° F (29.5° C) for more than 2 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions.

(b) Ventilation. The enclosed or sheltered part of sheltered housing facilities for dogs and cats must be sufficiently ventilated when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, doors, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air-conditioning, must be provided when the ambient temperature is 85° F (29.5° C) or higher.

(c) Lighting. Sheltered housing facilities for dogs and cats must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs and cats. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs and cats from excessive light.

(d) Shelter from the elements. Dogs and cats must be provided with adequate shelter from the elements at all times to protect their health and well-being. The shelter structures must be large enough to allow each animal to sit, stand, and lie in a normal manner without its body being in contact with at least one side of the shelter walls [~~in a normal manner~~] and to turn about freely.

(e) Surfaces.

(1) The following areas in sheltered housing facilities must be impervious to moisture:

(A) indoor floor areas in contact with the animals, which may consist of flooring that is wire or wire mesh or slatted material;

(B) outdoor floor areas in contact with the animals, when the floor areas are not exposed to the direct sun, or are made of a hard material such as wire, wood, metal, or concrete; and

(C) all walls, boxes, houses, dens, and other surfaces in contact with the animals.

(2) Outside floor areas in contact with the animals and exposed to the direct sun may consist of compacted earth, absorbent bedding, sand, concrete, gravel, or grass.

§91.103. Standards of Care--Outdoor Housing Facilities.

(a) Restrictions.

(1) The following categories of dogs or cats must not be kept in outdoor facilities, unless that practice is specifically approved by a veterinarian and documented by a veterinarian in the medical records related to each dog or cat to which the exemption applies:

(A) dogs or cats that are not acclimated to the temperatures prevalent in the area or region where they are maintained;

(B) breeds of dogs or cats that cannot tolerate the prevalent temperatures of the area without stress or discomfort (such as short-haired breeds in cold climates); and

(C) sick, infirm, aged or young dogs or cats.

(2) When their acclimation status is unknown, dogs and cats must not be kept in outdoor facilities when the temperature is less than 50° F (10° C).

(b) Shelter from the elements. Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner without its body being in contact with at least one side of the shelter walls [~~in a normal manner,~~] and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) be provided with a wind break and rain break at the entrance; and

(4) contain clean, dry, bedding material if the ambient temperature is below 50° F (10° C). Additional clean, dry bedding is required when the temperature is 35° F (1.7° C) or lower.

(c) Construction. Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, concrete, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities--including houses, dens, etc.--that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§91.104. Standards of Care--Primary Enclosure.

(a) Primary enclosures for dogs and cats must meet the following minimum requirements:

(1) General requirements.

[~~(A)~~] Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair and shall not be placed on top of another primary enclosure unless an impervious barrier designed to prevent the transfer of fluid or animal waste separates the two primary enclosures.

(2) [~~(B)~~] Construction and maintenance. Primary enclosures must be constructed and maintained so that they:

(A) [~~(i)~~] have no sharp points or edges that could injure the dogs and cats;

(B) [~~(ii)~~] protect the dogs and cats from injury;

(C) [~~(iii)~~] contain the dogs and cats securely;

(D) [~~(iv)~~] keep other animals from entering the enclosure;

(E) [~~(v)~~] enable the dogs and cats to remain dry and clean;

(F) [~~(vi)~~] provide shelter and protection from extreme temperatures and weather conditions that may be uncomfortable or hazardous to all the dogs and cats;

(G) [~~(vii)~~] provide sufficient shade to shelter all the dogs and cats housed in the primary enclosure at one time;

(H) [~~(viii)~~] provide all the dogs and cats with easy and convenient access to clean food and water;

(I) [~~(ix)~~] enable all surfaces in contact with the dogs and cats to be readily cleaned and sanitized in accordance with §91.109(b), or be replaceable when worn or soiled;

(J) [~~(x)~~] have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor;

(K) [~~(xi)~~] provide sufficient space to allow each dog and cat to turn about freely, to sit, stand, [~~stand, sit,~~] and lie in a comfortable, normal position without its body being in contact with at least one side of the enclosure [~~shelter~~] walls [~~in a comfortable, normal position,~~] and to walk in a normal manner; and

(L) [~~(xii)~~] if the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than 1/8 of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

(b) [~~(2)~~] Additional requirements for cats.

(1) [~~(A)~~] Space. Each cat, including weaned kittens, that is housed in any primary enclosure must be provided minimum vertical space and floor space in accordance with this chapter.

(2) [~~(B)~~] Each primary enclosure housing cats must be at least 24 in. high (60.96 cm).

(3) [~~(C)~~] Cats up to and including 8.8 lbs (4 kg) must be provided with at least 3.0 ft^2 (0.28 m^2).

(4) [~~(D)~~] Cats over 8.8 lbs (4 kg) must be provided with at least 4.0 ft^2 (0.37 m^2).

(5) [~~(E)~~] Each queen with nursing kittens must be provided with an additional amount of floor space, based on her breed and behavioral characteristics, and in accordance with generally accepted husbandry practices. If the additional amount of floor space for each nursing kitten is equivalent to less than 5 percent of the minimum requirement for the queen, such housing must be approved by a veterinarian.

(6) [~~(F)~~] The minimum floor space required by this section is exclusive of any food or water pans. The litter pan may be considered part of the floor space if properly cleaned and sanitized.

(7) [~~(G)~~] Compatibility. All cats housed in the same primary enclosure must be compatible, as determined by observation. Not more than 12 adult nonconditioned cats may be housed in the same primary enclosure. Queens in heat may not be housed in the same primary enclosure with sexually mature males, except for breeding. Except when maintained in breeding colonies, queens with litters may not be housed in the same primary enclosure with other adult cats, and kittens under 6 months of age may not be housed in the same primary enclosure with adult cats, other than the dam or foster dam. Cats with a vicious or aggressive disposition must be housed separately.

(8) [~~(H)~~] Litter. In all primary enclosures, a receptacle containing sufficient clean litter must be provided to contain excreta and body wastes.

(9) [~~(I)~~] Resting surfaces. Each primary enclosure housing cats must contain a resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably. The resting surfaces must be elevated, impervious to moisture, and be able to be easily cleaned and sanitized, or easily replaced when soiled or worn. Low resting surfaces that do not allow the space under them to be comfortably occupied by the animal will be counted as part of the floor space.

(c) [~~(3)~~] Additional requirements for dogs.

(1) [~~(A)~~] Space.

(A) [~~(i)~~] Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

(B) [~~(ii)~~] Each bitch with nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics, and in accordance with generally accepted husbandry practices as determined by a veterinarian. If the additional amount of floor space for each nursing puppy is less than 5 percent of the minimum requirement for the bitch, such housing must be approved by a veterinarian and documented in the medical records related to each dog.

(C) [~~(iii)~~] The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position.

(2) [~~(B)~~] Compatibility. All dogs housed in the same primary enclosure must be compatible, as determined by observation. Not more than 12 adult nonconditioned dogs may be housed in the same primary enclosure. Bitches in heat may not be housed in the same primary enclosure with sexually mature males, except for breeding. Except when maintained in breeding colonies, bitches with litters may not be housed in the same primary enclosure with other adult dogs, and puppies under 6 months of age may not be housed in the same primary enclosure with adult dogs, other than the dam or foster dam. Dogs with a vicious or aggressive disposition must be housed separately.

(3) [~~(C)~~] Prohibited means of primary enclosure. Permanent tethering of dogs is prohibited for use as primary enclosure.

(4) [~~(D)~~] Prohibited stacking of primary enclosure. Primary enclosures may not be stacked above three vertical levels.

§91.105. Standards of Care--Compatible Grouping.

(a) Dogs and cats that are housed in the same primary enclosure must be compatible[~~, with the following restrictions~~].

(b) [~~(1)~~] Females [~~females~~] in heat (estrus) may not be housed in the same primary enclosure with males, except for breeding purposes.[~~;~~]

(c) [~~(2)~~] Any [~~any~~] dog or cat exhibiting a vicious or overly aggressive disposition must be housed separately.[~~;~~]

(d) [~~(3)~~] Puppies [~~puppies~~] or kittens 6 months of age or less may not be housed in the same primary enclosure with adult dogs or cats other than their dams or foster dams, except when permanently maintained in breeding colonies.[~~;~~]

(e) [~~(4)~~] Dogs [~~dogs~~] or cats may not be housed in the same primary enclosure with any other species of animals, unless they are compatible.[~~; and~~]

(f) [~~(5)~~] Dogs [~~dogs~~] and cats that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony, as directed by a veterinarian. When an entire group or room of dogs and cats is known to have or believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

§91.107. Standards of Care--Feeding.

(a) Dogs and cats must be fed at least once each day, except as otherwise might be required to provide adequate veterinary care. The food must be uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the normal condition and weight of the animal. The diet must be appropriate for the individual animal's age and condition.

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain, sleet and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with §91.109(b). Sanitization is achieved by using one of the methods described in §91.109(b)(3). If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept clean and must be sanitized in accordance with §91.109(b). Measures must be taken to ensure that there is no molding, deterioration, or [~~and~~] caking of feed.

§91.112. Standards of Care--Veterinary Care.

(a) Annual examination. A licensed breeder shall have each animal used for breeding examined by a veterinarian at least once in every twelve month period. The annual examination required by this section must be conducted in accordance with practices established under the Veterinary Licensing Act, Occupations Code Chapter 801, and

documented by a veterinarian in the medical records related to each animal.

(b) Euthanasia and surgical procedures. Only a veterinarian shall be allowed to euthanize an animal or perform a surgical birth.

(c) Routine and preventive [~~preventative~~] care. A licensed breeder shall develop and maintain at each of the breeder's facilities a written health care management protocol as required by this section that is approved by a veterinarian and that addresses routine and preventive [~~preventative~~] healthcare for each animal in the facility.

(1) The breeder shall ensure that the protocol is followed, and that routine and preventive healthcare is provided to each animal in the facility and that each animal receives [~~received~~] appropriate care and treatment for any injury, disease, or illness that may affect the animal's health or well-being.

(2) The written health care management protocol required by this section must contain all health care records required by this chapter including all exemptions authorized by this chapter and approved by a veterinarian.

(3) On transfer or sale of the animal, a copy of the written health care management protocol required by this section must be transferred with the animal and the original records retained by the licensee.

(d) Breeding cycles. A licensed breeder shall provide breeding females adequate rest between breeding cycles as recommended by a veterinarian based on the breed, age, and health of the individual breeding female and documented by a veterinarian in the medical records related to each animal.

§91.202. Transportation Standards--Primary Enclosure Used to Transport Live Dogs and Cats.

Licensees must not transport or deliver for transport in commerce a dog or cat unless the following requirements are met:

(1) Construction of primary enclosures. The dog or cat must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate. Primary enclosures used to transport dogs and cats must be constructed so that:

(A) The primary enclosure is strong enough to contain the dogs and cats securely and comfortably and to withstand the normal rigors of transportation;

(B) The interior of the primary enclosure has no sharp points or edges and no protrusions that could injure the animal contained in it;

(C) The dog or cat is at all times securely contained within the enclosure and cannot put any part of its body outside the enclosure in a way that could result in injury to itself, to handlers, or to persons or animals nearby;

(D) The dog or cat can be easily and quickly removed from the enclosure in an emergency;

(E) Unless the enclosure is permanently affixed to the conveyance, adequate devices such as handles or handholds are provided on its exterior, and enable the enclosure to be lifted without tilting it, and ensure that anyone handling the enclosure will not come into physical contact with the animal contained inside;

(F) Unless the enclosure is permanently affixed to the conveyance, it is clearly marked on top and on one or more sides with the words "Live Animals," in letters at least 1 inch (2.5 cm.) high, and with arrows or other markings to indicate the correct upright position of the primary enclosure;

(G) Any material, treatment, paint, preservative, or other chemical used in or on the enclosure is nontoxic to the animal and not harmful to the health or well-being of the animal;

(H) Proper ventilation is provided to the animal in accordance with paragraph (3); and

(I) The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray under a slatted or mesh floor that prevents seepage of waste products, such as excreta and body fluids, outside of the enclosure. If a slatted or mesh floor is used in the enclosure, it must be designed and constructed so that the animal cannot put any part of its body between the slats or through the holes in the mesh. Unless the dogs and cats are on raised slatted floors or raised floors made of mesh, the primary enclosure must contain enough previously unused litter to absorb and cover excreta. The litter must be of a suitably absorbent material that is safe and nontoxic to the dogs and cats.

(2) Cleaning of primary enclosures. A primary enclosure used to hold or transport dogs or cats in commerce must be cleaned and sanitized before each use in accordance with the methods provided in §91.109(b)(3). If the dogs or cats are in transit for more than 24 hours, the enclosures must be cleaned and any litter replaced, or other methods, such as moving the animals to another enclosure, must be utilized to prevent the soiling of the dogs or cats by body wastes. If it becomes necessary to remove the dog or cat from the enclosure in order to clean, or to move the dog or cat to another enclosure, this procedure must be completed in a way that safeguards the dog or cat from injury and prevents escape.

(3) Ventilation.

(A) Unless the primary enclosure is permanently affixed to the conveyance, there must be:

(i) Ventilation openings located on two opposing walls of the primary enclosure and the openings must be at least 16 percent of the surface area of each such wall, and the total combined surface area of the ventilation openings must be at least 14 percent of the total combined surface area of all the walls of the primary enclosure; or

(ii) Ventilation openings on three walls of the primary enclosure, and the openings on each of the two opposing walls must be at least 8 percent of the total surface area of the two walls, and the ventilation openings on the third wall of the primary enclosure must be at least 50 percent of the total surface area of that wall, and the total combined surface area of the ventilation openings must be at least 14 percent of the total combined surface area of all the walls of the primary enclosure; or

(iii) Ventilation openings located on all four walls of the primary enclosure and the ventilation openings on each of the four walls must be at least 8 percent of the total surface area of each such wall, and the total combined surface area of the openings must be at least 14 percent of total combined surface area of all the walls of the primary enclosure; and

(iv) At least one-third of the ventilation area must be located on the upper half of the primary enclosure.

(B) Unless the primary enclosure is permanently affixed to the conveyance, projecting rims or similar devices must be located on the exterior of each enclosure wall having a ventilation opening, in order to prevent obstruction of the openings. The projecting rims or similar devices must be large enough to provide a minimum air circulation space of 0.75 in. (1.9 cm) between the primary enclosure and anything the enclosure is placed against.

(C) If a primary enclosure is permanently affixed to the primary conveyance so that there is only a front ventilation opening for the enclosure, the primary enclosure must be affixed to the primary conveyance in such a way that the front ventilation opening cannot be blocked, and the front ventilation opening must open directly to an unobstructed aisle or passageway inside the conveyance. The ventilation opening must be at least 90 percent of the total area of the front wall of the enclosure, and must be covered with bars, wire mesh, or smooth expanded metal having air spaces.

(4) Compatibility.

(A) Live dogs or cats transported in the same primary enclosure must be of the same species and be maintained in compatible groups, except that dogs and cats that are private pets, are of comparable size, and are compatible, may be transported in the same primary enclosure.

(B) Puppies or kittens 6 months of age or less may not be transported in the same primary enclosure with adult dogs or cats other than their dams.

(C) Dogs or cats that are overly aggressive or exhibit a vicious disposition must be transported individually in a primary enclosure.

(D) Any female dog or cat in heat (estrus) may not be transported in the same primary enclosure with any male dog or cat.

(5) Space and placement.

(A) Primary enclosures used to transport live dogs and cats must be large enough to ensure that each animal contained in the primary enclosure has enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position.

(B) Primary enclosures used to transport dogs and cats must be positioned in the primary conveyance so as to provide protection from the elements.

(6) Transportation by air.

(A) No more than one live dog or cat, 6 months of age or older, may be transported in the same primary enclosure when shipped via air carrier.

(B) No more than one live puppy, 8 weeks to 6 months of age, and weighing over 20 lbs (9 kg), may be transported in a primary enclosure when shipped via air carrier.

(C) No more than two live puppies or kittens, 8 weeks to 6 months of age, that are of comparable size, and weighing 20 lbs (9 kg) or less each, may be transported in the same primary enclosure when shipped via air carrier.

(D) Weaned live puppies or kittens less than 8 weeks of age and of comparable size, or puppies or kittens that are less than 8 weeks of age that are littermates and are accompanied by their dam, may be transported in the same primary enclosure when shipped to research facilities, including federal research facilities.

(7) Transportation by surface vehicle or privately owned aircraft.

(A) No more than four live dogs or cats, 8 weeks of age or older, that are of comparable size, may be transported in the same primary enclosure when shipped by surface vehicle (including ground and water transportation) or privately owned aircraft, and only if all other requirements of this section are met.

(B) Weaned live puppies or kittens less than 8 weeks of age and of comparable size, or puppies or kittens that are less than 8 weeks of age that are littermates and are accompanied by their dam, may be transported in the same primary enclosure when shipped to research facilities, including federal research facilities, and only if all other requirements in this section are met.

(8) Accompanying documents and records. Shipping documents that must accompany shipments of dogs and cats may be held by the operator of the primary conveyance, for surface transportation only, or must be securely attached in a readily accessible manner to the outside of any primary enclosure that is part of the shipment, in a manner that allows them to be detached for examination and securely reattached, such as in a pocket or sleeve. Instructions for administration of drugs, medication, and other special care must be attached to each primary enclosure in a manner that makes them easy to notice, to detach for examination, and to reattach securely. Food and water instructions must be securely attached to the outside of the primary enclosure in a manner that makes them [~~it~~] easily noticed and read [~~legible~~].

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303299
Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 475-4879

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16 TAC §91.65

STATUTORY AUTHORITY

The proposed repeal is proposed under Texas Occupations Code, Chapters 51 and 802, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapters 51 and 802. No other statutes, articles, or codes are affected by the proposed repeal.

§91.65. Advisory Committee.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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General Counsel
Texas Department of Licensing and Regulation
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CHAPTER 98. MOTORCYCLE OPERATOR TRAINING AND SAFETY

16 TAC §§98.10, 98.20 - 98.24, 98.27, 98.50, 98.60, 98.65, 98.70, 98.71, 98.76, 98.80, 98.104, 98.108, 98.112, 98.116

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 98, §§98.10, 98.20 - 98.23, 98.27, 98.50, 98.60, 98.65, 98.70, 98.76, 98.80, 98.104, 98.108, 98.112, and 98.116; and new rules at §98.24 and §98.71, regarding the Motorcycle Operator Training and Safety program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 98, implement Texas Transportation Code, Chapter 662, Motorcycle Operator Training and Safety.

The proposed rules are necessary to implement Senate Bill (SB) 478, 88th Legislature, Regular Session (2023), which amends Chapter 662 by changing the requirements relating to instructor license eligibility and instructor training; creating the instructor training provider license; and altering the membership of the Motorcycle Safety Advisory Board. The proposed rules are also necessary to implement recommendations by the Advisory Board to remove unnecessary and burdensome requirements for motorcycle schools and instructors.

SB 478 changes the eligibility requirements for an instructor license by adding a requirement for the applicant to not have been convicted during the previous three years of two moving violations that resulted in an accident or three total moving violations; adding a requirement for the applicant to not have been convicted during the previous seven years of driving while intoxicated or certain similar offenses; and adding a requirement for the applicant to submit fingerprints for a national criminal history background check.

SB 478 changes the requirements relating to instructor training by replacing the existing requirement for the training to be administered by the Texas A&M Engineering Extension Service (TEEX) with a new requirement for the training to be conducted at any licensed motorcycle school by a licensed instructor training provider in accordance with Department rules and a course curriculum approved by the Department.

SB 478 creates the instructor training provider license and requires an applicant for the license to have held a motorcycle license for the previous two years, submit fingerprints for a national criminal history background check, and meet any additional requirement adopted by rule, including a fee for the issuance and renewal of the license. SB 478 also alters the membership of the advisory board by replacing the existing representative of TEEX with a member who holds an instructor training provider license.

The proposed rules implement SB 478 by making corresponding changes to the rules relating to definitions, instructor license eligibility, instructor training, audits, advisory board membership, fees, course requirements, and curriculum standards and by adding new rules relating to the eligibility for and responsibilities of an instructor training provider license.

The proposed rules implement recommendations by Department staff to ease reporting requirements for motorcycle schools and instructors by requiring them to report each injury, rather than each incident, and expedite reporting for serious injuries; to clarify how a motorcycle school may continue to operate through a change of ownership; and to remove unnecessary student admission requirements.

Advisory Board Recommendations

The proposed rules were presented to and discussed by the Motorcycle Safety Advisory Board at its meeting on August 31, 2023. The Advisory Board made changes to the proposed rules at §§98.21 - 98.24, 98.27, 98.50, and 98.70, as explained in the Section-By-Section Summary. The Advisory Board voted and recommended that the proposed rules with changes be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §98.10, Definitions, by removing the definition for "incident" because the term will be obsolete when motorcycle schools and instructors are required to report each injury instead of each incident; amending the definition for "instructor" to provide consistency with its statutory definition; replacing the term "instructor preparation course" with the term "instructor training course" and amending its definition to provide consistency with its statutory definition; creating a definition for "instructor training provider" to provide consistency with its statutory definition; amending the definition of "motorcycle school" to provide consistency with its statutory definition; and removing the definition for "TEEX" to reflect the removal of statutory references to TEEX in Chapter 662.

The proposed rules amend §98.20, "Instructor--License Required", by updating terminology to provide consistency with the changes made by SB 478.

The proposed rules amend §98.21, "Instructor--License Eligibility", to provide consistency with the changes made by SB 478 to the instructor license eligibility requirements in Transportation Code §662.0062. The Advisory Board made a change to subsection (a)(3) and removed subsection (b) to allow applicants from outside the state to be eligible under the same rules that apply to applicants from within the state. The Advisory Board also removed subsection (a)(7), which includes requirements for first aid and CPR certification, because the Advisory Board determined the requirements were unnecessary and burdensome. The remaining provisions are relabeled accordingly.

The proposed rules amend §98.22 by changing the section title to "Instructor--Training Course" and updating terminology to provide consistency with the changes made by SB 478. The Advisory Board made a change to subsection (a) to limit the section's applicability to instructor training courses conducted in Texas, to allow for applicants who have taken an instructor training course outside of Texas. Changes are also made to cross-references in subsection (b) to provide consistency with the Advisory Board's changes to §98.21.

The proposed rules amend §98.23, "Instructor--License Term; Renewal", by adding new subsection (d) to provide the process for notifying an instructor when new fingerprints are necessary for license renewal. Changes were made to cross-references in subsection (c)(2) to provide consistency with the Advisory Board's changes to §98.21.

The proposed rules add new §98.24, "Instructor Training Provider--License", to prohibit an individual from offering or conducting an instructor training course without an instructor training provider license, to provide the eligibility requirements for an instructor training provider license, and to provide the

license term for an instructor training provider license. Changes were made to cross-references in subsection (b)(2) to provide consistency with the Advisory Board's changes to §98.21.

The proposed rules amend §98.27, "Motorcycle School--License Term; Renewal". The Advisory Board made changes in subsection (c)(2) to remove the references to §98.26(4), (5), and (7), which consist of requirements to submit lists of property, motorcycles, and instructors, respectively. The Advisory Board determined that it is unnecessary and burdensome to require motorcycle schools to submit this information upon renewal.

The proposed rules amend §98.50, "Motorcycle School--Reporting Requirements", to require motorcycle schools to report each injury, rather than each incident, and require expedited reporting for injuries that require immediate medical attention beyond first aid. The Advisory Board made changes to subsection (a)(1) to require injuries that require medical attention beyond first aid to be reported within two business days following the end of each course, and to subsection (a)(2) to require any other injury to be reported within three business days following the end of each course.

The proposed rules amend §98.60, Audits, to allow for department audits of instructor training providers.

The proposed rules amend §98.65, Advisory Board Membership, to provide consistency with the changes made by SB 478 to the advisory board membership in Transportation Code §662.0037.

The proposed rules amend §98.70, "Instructor--Responsibilities", to require instructors to report to the motorcycle school each injury, rather than each incident. Changes were made to subsections (a)(3) and (a)(4) to provide consistency with the Advisory Board's changes to §98.21, and the remaining provisions were relabeled accordingly.

The proposed rules add new §98.71, "Instructor Training Provider--Responsibilities", to provide the responsibilities applicable to the holder of an instructor training provider license, including the reporting and records maintenance requirements for each instructor training course provided.

The proposed rules amend §98.76, "Motorcycle School--Change of Ownership", to provide clarity on the continued operation of a motorcycle school in the event of a change of its ownership.

The proposed rules amend §98.80, Fees, to provide the fees for the issuance or renewal of an instructor training provider license, the approval of an instructor training course, duplicate or replacement licenses, late renewals, dishonored payments, and criminal history evaluation letters.

The proposed rules amend §98.104, Student Admission Requirements, by removing the requirement for an individual to hold a driver license or have completed driver education to enroll in an entry-level course. This requirement is unnecessary because an entry-level course does not involve the operation of a motorcycle on a public roadway or require knowledge of traffic laws.

The proposed rules amend §98.108, Course Requirements, by updating terminology to provide consistency with the changes made by SB 478.

The proposed rules amend §98.112, "Curriculum Standards--Entry-Level Course", by updating terminology to provide consistency with the changes made by SB 478.

The proposed rules amend §98.116 by changing the section title to "Curriculum Standards--Instructor Training Course" to update terminology and by adding a requirement that the curriculum for an instructor training course must have an evaluation process to ensure an individual can competently teach all components of the entry-level course.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated loss in revenue to state government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there will be an estimated increase in revenue to the state in the amount of approximately $300 each year as a result of fees paid by applicants for the issuance or renewal of instructor training provider licenses.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rules does not have foreseeable implications relating to costs or revenues of local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect a local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be the facilitation of an increase in the safety of motorcycle riders on Texas roadways. Trained riders are over 50% less likely to be involved in a motorcycle crash. By creating an instructor training provider license, which will allow for the training of more new instructors and make motorcycle safety training more accessible, motorcycle schools will be able to serve the needs of their customers and provide training in a timely manner in more areas of Texas. It has been found that many individuals currently experience long wait times to get into a motorcycle safety class due to instructor shortages, and often times choose to ride without training instead of waiting for a class. Those individuals are at a much higher risk of personal injury to themselves and others as well as damage to personal property. The Center for Disease Control estimates that motorcycle crashes in Texas cost $658 million in losses per year. Making motorcycle training more available can reduce this cost and save lives, and serve Texans as both a public benefit as well as an economic benefit. Additionally, the removal of different eligibility criteria for out-of-state applicants could allow more of those individuals to obtain instructor licenses and thereby provide more instructors in Texas to teach motorcycle operator safety.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be additional costs to persons who are required to comply with the pro-

posed rules. Any individual who applies for an instructor training provider license will pay a fee of $50 for the issuance of the license and a fee of $39.05 for submission of fingerprints for a national criminal history background check and will thereafter pay a fee of $50 every two years for renewal of the license. Instructor license applicants will no longer have to first obtain CPR certification, which could save applicants the cost of attending a CPR course.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government; however, the proposed rules fall under the exception for rules that are necessary to protect the health, safety, and welfare of the residents of this state under §2001.0045(c)(6) and the exception for rules that are necessary to implement legislation under §2001.0045(c)(9). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules require an increase in fees paid to the agency. The proposed rules require a fee for the issuance or renewal of an instructor training provider license.

5. The proposed rules create a new regulation. The proposed rules provide the regulations applicable to instructor training provider licenses and instructor training course approvals.

6. The proposed rules expand, limit, or repeal an existing regulation. The proposed rules expand an existing regulation by adding three new disqualifying crimes for an instructor license applicant and by authorizing department audits of instructor training providers. The proposed rules limit an existing regulation by narrowing the reporting requirement for motorcycle schools to report only injuries, instead of every incident, and removing the requirement for an individual who attends an entry-level motorcycle safety course to first hold a Class C driver license or learner license. The proposed rules repeal an existing regulation by removing the requirement for the instructor preparation course to be administered by TEEX, removing the requirement for an applicant for an instructor license to obtain a CPR certification, and removing different eligibility requirements for an out-of-state applicant for an instructor license.

7. The proposed rules increase the number of individuals subject to the rules' applicability. The proposed rules create an instructor training provider license and require instructor training courses to be delivered by a holder of the license.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules;* by facsimile to (512) 475-3032; or by mail to Shamica Mason, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 662, Motorcycle Operator Training and Safety.

The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51, and Texas Transportation Code, Chapter 662. No other statutes, articles, or codes are affected by the proposed rules.

The legislation that enacted the statutory authority under which the proposed rules are proposed to be adopted is Senate Bill 616, 86th Legislature, Regular Session (2019) and Senate Bill 478, 88th Legislature, Regular Session (2023).

§98.10. Definitions.

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

(1) Advisory board--The Motorcycle Safety Advisory Board.

(2) Change of ownership--A change in the control of a motorcycle school. The control of a school is considered to have changed:

(A) in the case of ownership by an individual, when more than 50% of the school has been sold or transferred;

(B) in the case of ownership by a partnership or corporation, when more than 50% of the school, or of the owning partnership or corporation, has been sold or transferred; or

(C) when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the school.

(3) Commission--Texas Commission of Licensing and Regulation.

(4) Controlling person--An individual who:

(A) is a sole proprietor;

(B) is a general partner of a partnership;

(C) is a controlling person of a business entity that is a general partner of a partnership;

(D) possesses direct or indirect control of at least 25 percent of the voting securities of a corporation;

(E) is the president, the secretary, or a director of a corporation; or

(F) possesses the authority to set policy or direct the management of a business entity.

(5) Department--Texas Department of Licensing and Regulation.

(6) Entry-level courses--Courses of instruction in motorcycle operation for novice or experienced motorcycle riders designed to meet the training requirement to obtain a Class M driver's license issued under Texas Transportation Code, Chapter 521.

[~~(7) Incident-- Any instance where any part of a motorcycle, other than the tires or side stand, touches the ground or another object.~~]

(7) [~~(8)~~] Instructor--An individual who holds a license issued [~~licensed~~] by the department that entitles the individual to provide instruction on [~~teach~~] motorcycle operation and safety as an employee of or under contract with a motorcycle school [~~operator training courses in Texas~~].

(8) [~~(9)~~] Instructor training [~~preparation~~] course--A course offered by an instructor training provider [~~designed~~] to prepare an individual for licensure as an instructor [~~to provide instruction in motorcycle operation~~].

(9) Instructor training provider--An individual who holds a license issued by the department that entitles the individual to offer and conduct instructor training courses for consideration.

(10) Motorcycle school--A person who holds a license issued by the department that entitles the person to offer and conduct courses on motorcycle operation and safety for consideration [~~An entity licensed by the department to provide motorcycle operator training courses in Texas~~].

(11) Offer--To do any of the following:

(A) make a written or oral proposal to perform;

(B) contract in writing or orally to perform; or

(C) advertise or imply, in any form through any medium, that a person is available to perform or contract to perform.

(12) Person--An individual or entity.

(13) Range--The area of a training site where on-cycle training is conducted.

[~~(14) TEEX--The Texas A&M Engineering Extension Service.~~]

(14) [~~(15)~~] Training site--A physical location, consisting of a classroom and range, where motorcycle operator training is conducted.

§98.20. Instructor--License Required.

(a) An individual may not offer or provide instruction in motorcycle operation to the public for consideration [~~or teach an instructor preparation course~~] unless the individual:

(1) holds an instructor license issued by the department;

(2) provides the instruction in accordance with a curriculum approved by the department; and

(3) provides the instruction as an employee of, or under contract with, a motorcycle school [~~or TEEX~~].

(b) An individual enrolled as a student in an instructor training [~~preparation~~] course approved by the department [~~administered by TEEX~~] does not violate this section by participating in activities conducted as part of the instructor training [~~preparation~~] course.

§98.21. Instructor--License Eligibility.

[~~(a)~~] To be eligible for an instructor license, an applicant must:

(1) be at least 18 years old;

(2) submit a completed application on a form prescribed by the department;

(3) have successfully completed a department-approved [~~an~~] instructor training [~~preparation~~] course [~~in accordance with §98.22~~];

(4) have held, continuously for the two years preceding the date of submitting the application, a valid driver's license that entitles the applicant to operate a motorcycle on a public road;

(5) not have been convicted during the preceding three years of:

(A) three or more moving violations described by Texas Transportation Code §542.304, or a comparable offense committed in another state, including violations that resulted in an accident; or

(B) two or more moving violations described by Texas Transportation Code §542.304, or a comparable offense committed in another state, that resulted in an accident;

(6) be a high school graduate or have obtained a general education development (GED) certificate, certificate of high school equivalency, or other credentials equivalent to a public high school degree;

[~~(7) possess current first aid and adult cardiopulmonary resuscitation (CPR) certification from a nationally recognized provider with training courses that require in-person attendance, provide hands-on skills practice, and meet or exceed the standards of the American Red Cross, the American Heart Association, or the National Highway Traffic Safety Administration;~~]

(7) [~~(8)~~] submit the fee required by §98.80;

(8) [~~(9)~~] undergo and successfully pass a criminal history background check, including submitting a complete and legible set of fingerprints on a form and manner prescribed by the department; and

(9) [(10)] not have been convicted during the preceding seven years of any of the following offenses or a comparable offense committed in another state:

(A) Texas Penal Code §49.04, Driving While Intoxicated;

(B) Texas Penal Code §49.045, Driving While Intoxicated with Child Passenger;

(C) Texas Penal Code §49.05, Flying While Intoxicated;

(D) Texas Penal Code §49.06, Boating While Intoxicated;

(E) Texas Penal Code §49.065, Assembling or Operating an Amusement Ride While Intoxicated;

(F) [(C)] Texas Penal Code §49.07, Intoxication Assault; or

(G) [(D)] Texas Penal Code §49.08, Intoxication Manslaughter.

[(b) Out-of-state applicants. The eligibility requirements in subsection (a)(3) and Texas Transportation Code §662.0062(a)(1) can alternatively be met by an applicant who has held, continuously for the previous year, authorization to provide instruction for a department-approved entry-level course, or its equivalent as determined by the department, by submitting to the department any information about the course requested by the department and:]

[(1) if the applicant is from a state or other jurisdiction that offers a motorcycle instructor license:]

[(A) an active motorcycle instructor license issued to the applicant by the state or other jurisdiction; and]

[(B) a document on official letterhead issued by the state or other jurisdiction stating that:]

[(i) the motorcycle instructor license has been active and in good standing continuously for the previous year; and]

[(ii) the applicant has taught both the classroom and range portions of the course at least six times; or]

[(2) if the applicant is from a state or other jurisdiction that does not offer a motorcycle instructor license:]

[(A) a certificate of completion of the instructor training required to teach the course issued by the administrator of the course; and]

[(B) a document on official letterhead issued by the administrator of the course stating that:]

[(i) the applicant's authorization to teach the course has been active and in good standing continuously for the previous year; and]

[(ii) the applicant has taught both the classroom and range portions of the course at least six times.]

§98.22. Instructor--Training [Instructor--Preparation] Course.

(a) An [The] instructor training [preparation] course conducted in Texas [required by §98.21(a)(3)] must be a training program on motorcycle operator training and safety instruction approved by the [executive director of the] department and conducted by an instructor training provider at a motorcycle school [administered by TEEX].

(b) To be eligible to enroll in an instructor training [preparation] course under this section, an individual must:

(1) meet the requirements of §98.21(4), (5), (6), and (9) [§98.21(a)(4), (5), (6), and (10)]; and

(2) not have a criminal history that will make the individual ineligible for an instructor license under §98.21(8) [§98.21(a)(9)].

(c) To determine whether an individual meets the requirement of subsection (b)(2), an individual may request a criminal history evaluation letter from the department, as provided by 16 T.A.C. §60.42, Criminal History Evaluation Letters.

§98.23. Instructor--License Term; Renewal.

(a) An instructor license is valid for two years after the date of issuance.

(b) Each licensee is responsible for renewing the license before the expiration date. Lack of receipt of a license renewal notice from the department will not excuse failure to file for renewal or late renewal.

(c) To renew a license, an instructor must:

(1) submit a completed renewal application on a department-approved form;

(2) meet the requirements of §98.21(4), (5), (8), and (9) [§98.21(a)(4), (5), (7), (9), and (10)]; and

(3) submit the fee required under §98.80.

(d) The department will notify the license holder if the person needs to submit new fingerprints for the criminal history background check.

§98.24. Instructor Training Provider--License.

(a) An individual may not offer or conduct an instructor training course unless the individual holds an instructor training provider license issued by the department.

(b) To be eligible for the issuance or renewal of an instructor training provider license, an applicant must:

(1) submit a completed application on a form prescribed by the department;

(2) meet the requirements of §98.21(1), (4), (5), (6), (8), and (9);

(3) hold a current instructor license issued by the department;

(4) hold current certification to conduct a department-approved instructor training course issued by the course owner or administrator; and

(5) submit the fee required under §98.80.

(c) An instructor training provider license is valid for two years after the date of issuance or renewal.

§98.27. Motorcycle School--License Term; Renewal.

(a) A motorcycle school license is valid for two years after the date of issuance.

(b) Each licensee is responsible for renewing the license before the expiration date. Lack of receipt of a license renewal notice from the department will not excuse failure to file for renewal or late renewal.

(c) To renew a license, a motorcycle school must:

(1) submit a completed renewal application on a department-approved form;

(2) meet the requirements of §98.26(2), (3), and (6) [~~(4), (5), (6), and (7)~~]; and

(3) submit the fee required under §98.80.

§98.50. Motorcycle School--Reporting Requirements.

(a) A motorcycle school must report each injury [~~incident~~] to the department [~~within three business days of the incident~~], in the form and manner prescribed by the department, within: [~~.~~]

(1) two business days following the end of each course for an injury that requires immediate medical attention beyond first aid; or

(2) three business days following the end of each course for any other injury.

(b) By the fifth business day following the end of each course, a motorcycle school must accurately report to the department, in the form and manner prescribed by the department, information relating to each student enrolled in the course. The report must include:

(1) each student's full legal name as shown on the student's driver's license, or other form of identification acceptable to the department;

(2) whether each student successfully completed the course; and

(3) all instructors who provided instruction for the course.

(c) A motorcycle school must report quarterly to the department, in the form and manner prescribed by the department:

(1) the number and types of courses provided during the quarter;

(2) the number of persons who took each course during the quarter;

(3) the number of instructors available to provide training under the school's program during the quarter;

(4) information collected by surveying persons taking each course as to the length of any waiting period the person experienced before being able to enroll in the course; and

(5) the number of persons on a waiting list for a course at the end of the quarter.

§98.60. Audits.

The department may conduct unannounced audits, during reasonable business hours, to ensure [~~a~~] motorcycle schools, [~~school and its~~] instructors, and instructor training providers comply with the requirements of this chapter and Texas Transportation Code, Chapter 662.

§98.65. Advisory Board Membership.

The Motorcycle Safety Advisory Board consists of nine members appointed by the presiding officer of the commission, on approval of the commission, as follows:

(1) three members:

(A) each of whom must be an [~~a licensed~~] instructor or represent a [~~licensed~~] motorcycle school; and

(B) who must collectively represent the diversity in size and type of the motorcycle schools licensed under this chapter;

(2) one member who represents the motorcycle dealer retail industry;

(3) one representative of a law enforcement agency;

(4) one representative of the Texas A&M Transportation Institute;

(5) one member who is an instructor training provider [~~representative of the Texas A&M Engineering Extension Service~~]; and

(6) two public members who hold a valid Class M driver's license issued under Texas Transportation Code, Chapter 521.

§98.70. Instructor--Responsibilities.

(a) An instructor must:

(1) notify the department of any change in the instructor's address, phone number, or email address within 15 days from the date of the change;

(2) maintain a valid driver's license that entitles the license holder to operate a motorcycle on a public road;

(3) maintain a driving record that meets the requirements of §98.21(5) [~~§98.21(a)(5)~~];

[~~(4) maintain first aid and CPR certification that meets the requirements of §98.21(a)(7);~~]

(4) [~~(5)~~] act immediately to appropriately address the medical needs of any person injured at the training site and summon emergency medical services if necessary;

(5) [~~(6)~~] report each injury [~~incident~~] to the motorcycle school in a timely manner;

(6) [~~(7)~~] cooperate with all department audits and investigations and provide all requested documents;

(7) [~~(8)~~] before each course, inspect each motorcycle to be used on the range to ensure the motorcycle meets the requirements of §98.102;

(8) [~~(9)~~] ensure that each motorcycle provided by a student meets the insurance requirements of §98.40 before the motorcycle is used on the range;

(9) [~~(10)~~] provide instruction only in compliance with a curriculum approved by the department;

(10) [~~(11)~~] be capable of instructing the entire course and providing technically correct riding demonstrations;

(11) [~~(12)~~] comply with the student-to-instructor ratio requirements in §98.108;

(12) [~~(13)~~] supervise all students and personnel on the range;

(13) [~~(14)~~] wear the protective gear required by §98.108(e) whenever riding a motorcycle to, from, or during rider training activities;

(14) [~~(15)~~] ensure all students wear the protective gear required by §98.108(e) when participating in the on-cycle activities of the course; and

(15) [~~(16)~~] deal honestly with members of the public and the department.

(b) An instructor must not:

(1) instruct a student if either the instructor or student exhibits signs of impairment from the use of an alcoholic beverage, controlled substance, drug, or dangerous drug, as defined in Texas Penal Code §1.07; or

(2) complete, issue, or validate a certificate of course completion to a person who has not successfully completed the course.

§98.71. Instructor Training Provider--Responsibilities.

(a) An instructor training provider must:

(1) comply with the requirements for instructors in §98.70;

(2) maintain a current instructor license issued by the department;

(b) For each instructor training course provided, an instructor training provider must:

(1) by the fifth business day following the end of each course, report to the department, in the form and manner prescribed by the department, information relating to each trainee enrolled in the course, including:

(A) each trainee's full legal name as shown on the trainee's driver's license, or other form of identification acceptable to the department;

(B) whether each trainee successfully completed the course; and

(C) all instructor training providers who conducted the course; and

(2) maintain, for three calendar years, records of instructor training courses conducted, including each individual who enrolled in the course and whether the individual successfully completed the course.

§98.76. Motorcycle School--Change of Ownership.

(a) A motorcycle school license is not transferable.

(b) If a motorcycle school has a change of ownership, the new owner must apply for a new motorcycle school license [~~within 30 days after the change of ownership~~]. The current license holder [~~motorcycle school~~] may continue to operate the motorcycle school while the department is processing the application.

§98.80. Fees.

(a) The fee for the issuance or renewal of an instructor license is $50.

(b) The fee for the issuance or renewal of a motorcycle school license is $100.

(c) The fee for the issuance or renewal of an instructor training provider license is $50.

(d) The fee for the approval [~~renewal~~] of a motorcycle operation and safety course [~~school license~~] is $0 [~~$100~~].

(e) The fee for the approval of an instructor training course is $0.

(f) A duplicate/replacement fee for a license issued under this chapter is $25.

(g) Late renewal fees for licenses issued under this chapter are provided under §60.83 (relating to Late Renewal Fees).

(h) A dishonored/returned check or payment fee is the fee prescribed under §60.82 (relating to Dishonored Payment Fee).

(i) The fee for a criminal history evaluation letter is the fee prescribed under §60.42 (relating to Criminal History Evaluation Letters).

§98.104. Student Admission Requirements.

(a) Entry-level courses are open to any individual who is at least 15 years old. [~~on the day the course begins and:~~]

[~~(1) has an unrestricted Class C, or higher, driver license;~~]

[~~(2) has a Class C learner license; or~~]

[~~(3) can present the proper driver education form verifying successful completion of the classroom portion phase of driver education.~~]

(b) Non-entry-level courses are open to any individual who holds a Class M driver's license or an equivalent out-of-state license.

(c) To be eligible for student admission to any course, an individual younger than 18 years of age must provide the motorcycle school with written consent, signed by the individual's parent or legal guardian, for the individual to participate as a student in the course and to receive medical treatment for any injury that may occur at the motorcycle school. The signature of the parent or legal guardian on the written consent must be notarized or provided in person at the training site.

(d) Prior to accepting payment from an individual for admission to an entry-level course, a motorcycle school must inform the individual in writing of:

(1) the school's policy regarding any attempts the school allows students to make to pass the knowledge examination, the riding skills test required for the course, and any associated fees; and

(2) the requirement that a student whose riding performance creates an unmanageable danger on the range, as determined by the instructor, must be removed from the course.

(e) A motorcycle school must inform each student in writing of the department's name, mailing address, telephone number, and website address for the purpose of directing complaints to the department.

(f) If registration is performed by telephone, the information required by subsection (d) must be provided to the individual before the payment becomes non-refundable.

§98.108. Course Requirements.

(a) All courses must be conducted in accordance with a department-approved curriculum.

(b) The student-to-instructor ratio for classroom instruction of a course may not exceed 36 students per instructor.

(c) The student-to-instructor ratio for range instruction may not exceed eight students per instructor, or a more restrictive ratio imposed by the approved curriculum.

(d) For two-wheeled motorcycle courses, a separate motorcycle must be available for each student. For three-wheeled motorcycle courses, no more than two students may share a motorcycle.

(e) All students and instructors must wear protective gear when participating in the on-cycle activities of the course. The minimum protective gear includes:

(1) a motorcycle helmet that meets the standards of the U.S. Department of Transportation;

(2) eye protection;

(3) over-the-ankle, sturdy footwear;

(4) a long-sleeved shirt or jacket;

(5) non-flare pants that cover the entire leg and are made from a material that is at least as sturdy as denim; and

(6) full-fingered gloves.

(f) No person shall be on the range during any phase of range instruction except:

(1) instructors who are providing instruction, assistance, or evaluation;

(2) students who are enrolled in the course being conducted;

(3) interpreters or other assistants providing services to accommodate a disability or other condition required by law to be accommodated; or

(4) range assistants who are:

(A) enrolled in an instructor training [~~preparation~~] course described in §98.22; or

(B) all of the following:

(i) at least 16 years old;

(ii) employed by or contracted with the motorcycle school; and

(iii) trained by the motorcycle school to provide non-instructional support.

(g) A range assistant may not provide any form of instruction or evaluation of students, but may provide non-instructional support, limited to:

(1) moving motorcycles;

(2) setting up, removing, or operating classroom equipment and materials;

(3) setting or removing cones or other objects for range exercises;

(4) performing on-site motorcycle maintenance; and

(5) conducting demonstrations of riding exercises under the supervision of an instructor, if allowed by the approved curriculum.

§98.112. Curriculum Standards--Entry-Level Course.

The curriculum for an entry-level course must:

(1) be determined by the department to meet the Model National Standards for Entry-Level Motorcycle Rider Training (August 2011) distributed by the U.S. Department of Transportation, National Highway Traffic Safety Administration, which the department adopts by reference;

(2) include a knowledge examination that is designed to ensure students comprehend important concepts covered in the curriculum;

(3) include a riding skills test that is designed to ensure students can perform the riding skills covered in the curriculum;

(4) be consistent with this chapter and Texas Transportation Code, Chapter 662; and

(5) be submitted in conjunction with an instructor training [~~preparation~~] course that meets the requirements of §98.116.

§98.116. Curriculum Standards--Instructor Training [~~Preparation~~] Course.

The curriculum for an instructor training [~~preparation~~] course must:

(1) prepare an individual to competently teach all components of an entry-level course approved by the department; [~~and~~]

(2) have an evaluation process to ensure the individual can competently teach all components of the entry-level course; and

(3) [~~(2)~~] be consistent with this chapter and Texas Transportation Code, Chapter 662.

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 111. SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 111, Subchapter A, §111.2; Subchapter U, §111.201; and Subchapter W, §111.220; and proposes a new rule at Subchapter A, §111.3, regarding the Speech-Language Pathologists and Audiologists program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 111, Texas Occupations Code, Chapter 401, Speech-Language Pathologists and Audiologists, and Chapter 51, the enabling statute of the Texas Commission of Licensing and Regulation (Commission) and the Department.

The proposed rules implement changes made to Texas Occupations Code, Chapter 401 by SB 2017, 88th Legislature, Regular Session (2023); implement changes made by the U.S. Food and Drug Administration (FDA) in its final rule regarding over-the-counter hearing aids and prescription hearing aids; and clarify the requirements regarding medical statements for sales of hearing instruments to individuals under 18 years of age.

Implementation of SB 2017 and the FDA Hearing Aid Rule

The proposed rules are necessary to implement the provisions of SB 2017, which changed Chapter 401 of the Occupations Code governing Speech-Language Pathologists and Audiologists, to address the new category of "over-the-counter hearing aids" established in federal law and rule.

In 2022, the FDA revised its federal rules, repealed prior rules, and adopted new rules for hearing instruments to include an "over-the-counter hearing aid" category of hearing instruments found in 21 CFR §800.30. The FDA Hearing Aid rule created a definition and framework for a new "over-the-counter hearing aid" category. The changes in the FDA Hearing Aid rule were designed to provide easier access to over-the-counter hearing aids by removing restrictions on the sale of those devices. To remain consistent with federal law, the state statutes and rules regulating the sale of hearing instruments required changes to reflect this new category and the new regulatory framework. The FDA Hearing Aid Rule may be found under Medical Devices; Ear, Nose, and Throat Devices; Establishing Over-the-Counter Hearing Aids, 87 Fed. Reg. 50698 (August 17, 2022) (later codified at 21 CFR Parts 800, 801, 808 and 874).

Since the definition of "hearing instrument" in Texas law would have included "over-the-counter hearing aids", S.B. 2017

changed Chapters 401 and 402 of the Occupations Code to reflect the changes in Federal law and to clarify the sale of "over-the-counter hearing aids" consistent with the FDA Hearing Aid Rule.

The proposed rules also make changes to reflect the FDA Hearing Aid Rule that repealed requirements related to certain medical waiver forms. To the extent that the Department has received prior comments during rule review or other rulemakings related to conformity of the Speech-Language Pathologists and Audiologists rules to the FDA rules, the Department has proposed changes to conform these rules to SB 2017 and the FDA Hearing Aid Rule.

Clarifying Requirements for Sales to Individuals under 18

The proposed rules amend the requirement to obtain a medical statement or waiver before the sale of a hearing instrument. The FDA ceased enforcement of the waiver requirement in 2017 and repealed that requirement as part of the FDA Hearing Aid Rule in 2022. The proposed rules require a written medical statement only when the client is under 18 years of age, as required in Texas Occupations Code §401.404. This ensures consistency with the repeal of the FDA waiver requirements and the requirements of Occupations Code §401.404.

Advisory Board Recommendations

The proposed rules were presented to and discussed by the Speech-Language Pathologists and Audiologists Advisory Board at its meeting on September 8, 2023. The Advisory Board did not make any changes to the proposed rules. The Advisory Board voted and recommended that the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

Subchapter A. General Provisions.

The proposed rules amend §111.2, Definitions. The proposed rules amend definitions for "fitting and dispensing hearing instruments," "hearing instrument," "Sale or purchase" to be "sale"; create definitions for "hearing aid," and "Over-the-counter hearing aid"; and renumber the remaining definitions. These new definitions and revisions incorporate statutory changes made by SB 2017.

The proposed rules add new §111.3, Over-the-Counter Hearing Aids. This new rule incorporates the exemption language added to the statute by SB 2017.

New §111.3(a) clarifies that except as provided in §111.3, Chapter 111 does not apply to the activities related to over-the-counter hearing aids.

New §111.3(b) provides that a person is not required to obtain a license to perform activities described in subsection (a).

New §111.3(c) provides that a person may not use the term "licensed dispenser" or "licensed seller" in regard to the sale of over-the-counter hearing aids unless the person is licensed as an audiologist or audiologist intern under this chapter or as a hearing instrument fitter and dispenser under Chapter 112.

New §111.3(d) provides that supervision, prescription, order, involvement, or intervention of a licensee is not required for a consumer to access over-the counter hearing aids.

New §111.3(e) provides that a licensee may engage in the activities described in subsection (a) regarding over-the-counter hearing aids, but that those activities do not exempt a licensee from any applicable provision of Chapter 111 unrelated to the activities in § 111.3(a).

Subchapter U. Fitting and Dispensing of Hearing Instruments.

The proposed rules amend §111.201, General Practice Requirements of Audiologists and Interns in Audiology Who Fit and Dispense Hearing Instruments.

The proposed rules amend §111.201(1) to delete references to the repealed federal rules 21 CFR §801.420, Hearing aid devices; professional and patient labeling, and 21 CFR §801.421, Hearing aid devices; conditions for sale. The proposed rule references new federal rule 21 CFR §801.422, which addresses prescription hearing aids. The proposed rules reflect the changes made by the FDA Hearing Aid Rule.

The proposed rules amend §111.201(2) to change "insure" to "ensure."

The proposed rules amend §111.201(3) because that section incorporated the legal requirements of 21 CFR §801.421 and that section has been repealed. The FDA ceased enforcement of the waiver requirement in 2017 and subsequently repealed that requirement as part of the FDA Hearing Aid Rule in 2022. The proposed rules now reads to require a written statement of a medical evaluation in instances where the client is under 18 as required in Texas Occupations Code §401.404. The proposed rule clarifies that a written statement is not required for clients 18 years of age or older.

Subchapter W. Joint Rule Regarding the Sale of Hearing Instruments.

The proposed rules amend §111.220. Requirements Regarding the Sale of Hearing Instruments.

The proposed rule amends §111.220(b) and §111.220(b)(1) to clarify that the 30-day trial period referenced relates to a hearing instrument.

The proposed amendments remove §111.220(b)(6) because it incorporates a reference to waiver forms required by 21 CFR §801.421 and §111.201(3). Since 21 CFR §801.421 was repealed by the FDA Hearing Aid Rule and §111.201(3) is proposed for amendment, this paragraph is also being proposed for removal. The remaining paragraphs in this subsection are renumbered.

The proposed rules amend §111.220(d)(3) to require medical evaluations or waivers of evaluation to be maintained only if they are provided. This change also reflects the changes in §111.201(3). This change reflects the previously referenced repeal of waiver requirements in 21 CFR 801.421 and is made for consistency with proposed amendments to §112.140(c)(6).

Since §111.220 is a joint rule required by Texas Occupations Code §401.2021 and §402.1021 to be adopted by the Commission with the assistance of the Speech-Language Pathologists and Audiologists Advisory Board and the Hearing Instrument Fitters and Dispensers Advisory Board, §111.220 will mirror the text of §112.140.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules. There is no impact to local government costs because local governments are not responsi-

ble for administering the state regulation of audiology under Occupations Code, Chapter 401. The proposed rules implement SB 2017 regarding the new FDA category of over-the-counter hearing aids, update definitions, and add clarifying language, but these changes do not impact program costs.

Mr. Couvillon also has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect a local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be implementation of SB 2017 regarding the new over-the-counter category of hearing aids created by the FDA. The FDA created the over-the-counter category of hearing aids to increase access to affordable hearing aids for individuals with mild to moderate hearing loss. The proposed rules will assist those individuals by making over-the-counter hearing aids easier to purchase. The proposed rules make it clear that a license is not required to sell over-the-counter hearing aids. However, if a licensee chooses to sell OTC hearing aids, they must continue to abide by applicable regulations for their license, such as Code of Ethics and Continuing Education requirements.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. The proposed rules have no significant economic costs to persons that are licensees, businesses, or the general public in Texas. The rules do not impose additional fees upon licensees, nor do they create requirements that would cause licensees to expend funds for equipment, technology, staff, supplies, or infrastructure.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

The Speech-Language Pathologists and Audiologists Program regulates individuals, many of which are small or micro-businesses. As of July 18, 2023, there are 1,610 Audiologists, 58 Audiology Interns and 55 Audiology Assistants licensed in Texas. It is unknown how many of these individuals or the entities that employ them fall within the definitions of a small or micro-business because data regarding the number of employees and gross annual sales is not collected by the agency. The proposed rule changes have no impact on the costs related to selling OTC hearing aids.

The proposed rules have no anticipated adverse economic effect on rural communities because the rule will not decrease the availability of audiology services in rural communities, nor will the rules increase the cost of audiology services in rural communities.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules create or eliminate a government program.

2. Implementation of the proposed rules do not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase or decrease in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules expand, limit, or repeal an existing regulation. The proposed rule repeals the requirement for an audiologist or audiologist intern to receive a written statement from a licensed physician regarding the medical evaluation of a client who is over 18 years of age.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules*; by facsimile to (512) 475-3032; or by mail to Monica Nuńez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §111.2, §111.3

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 401, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 401. No other statutes, articles, or codes are affected by the proposed rules.

§111.2. Definitions.

Unless the context clearly indicates otherwise, the following words and terms shall have the following meanings.

(1) ABA--The American Board of Audiology.

(2) Act--Texas Occupations Code, Chapter 401, relating to Speech-Language Pathologists and Audiologists.

(3) Acts--Texas Occupations Code, Chapter 401, relating to Speech-Language Pathologists and Audiologists; and Texas Occupations Code, Chapter 402, relating to Hearing Instrument Fitters and Dispensers.

(4) Advisory board--The Speech-Language Pathologists and Audiologists Advisory Board.

(5) ASHA--The American Speech-Language-Hearing Association.

(6) Assistant in audiology--An individual licensed under Texas Occupations Code §401.312 and §111.90 of this chapter and who provides audiological support services to clinical programs under the supervision of an audiologist licensed under the Act.

(7) Assistant in speech-language pathology--An individual licensed under Texas Occupations Code §401.312 and §111.60 of this chapter and who provides speech-language pathology support services under the supervision of a speech-language pathologist licensed under the Act.

(8) Audiologist--An individual who holds a license under Texas Occupations Code §401.302 and §401.304 to practice audiology.

(9) Audiology--The application of nonmedical principles, methods, and procedures for measurement, testing, appraisal, prediction, consultation, counseling, habilitation, rehabilitation, or instruction related to disorders of the auditory or vestibular systems for the purpose of providing or offering to provide services modifying communication disorders involving speech, language, or auditory or vestibular function or other aberrant behavior relating to hearing loss.

(10) Caseload--The number of clients served by the licensed speech-language pathologist or licensed speech-language pathology intern.

(11) Client--A consumer or proposed consumer of audiology or speech-language pathology services.

(12) Commission--The Texas Commission of Licensing and Regulation.

(13) Department--The Texas Department of Licensing and Regulation.

(14) Direct Supervision (Speech-Language Pathology and Audiology)--Real-time observation and guidance by the supervisor while a client contact or clinical activity or service is performed by the assistant or intern. Direct supervision may be performed in person or via tele-supervision as authorized and prescribed by this chapter.

(15) Ear specialist--A licensed physician who specializes in diseases of the ear and is medically trained to identify the symptoms of deafness in the context of the total health of the client, and is qualified by special training to diagnose and treat hearing loss. Such physicians are also known as otolaryngologists, otologists, neurotologists, otorhinolaryngologists, and ear, nose, and throat specialists.

(16) Executive director--The executive director of the department.

(17) Extended absence--More than two consecutive working days for any single continuing education experience.

(18) Extended recheck--Starting at 40 dB and going down by 10 dB until no response is obtained or until 20 dB is reached and then up by 5 dB until a response is obtained. The frequencies to be evaluated are 1,000, 2,000, and 4,000 hertz (Hz).

(19) Fitting and dispensing hearing instruments--The measurement of human hearing by the use of an audiometer or other means to make selections, adaptations, or sales of hearing instruments. The term includes prescribing, ordering, or authorizing the use of hearing instruments, the making of impressions for earmolds to be used as a part of the hearing instruments, and providing any necessary postfitting counseling for the purpose of fitting and dispensing hearing instruments.

(20) Hearing aid--Any wearable device designed for, offered for the purpose of, or represented as aiding persons with or compensating for impaired hearing. The term includes hearing instruments and over-the-counter hearing aids.

(21) [~~(20)~~] Hearing instrument--A prescription hearing aid as that term is defined in 21 C.F.R. 800.30. [~~Any wearable instrument or device designed for, or represented as, aiding, improving or correcting defective human hearing. This includes the instrument's parts and any attachment, including an earmold, or accessory to the instrument. The term does not include a battery or cord.~~]

(22) [~~(21)~~] Hearing screening--A test administered with pass/fail results for the purpose of rapidly identifying those persons with possible hearing impairment which has the potential of interfering with communication.

(23) [~~(22)~~] In-person--The licensee is physically present with the client while a client contact or clinical activity or service is performed. In the case of supervision, the supervisor is physically present with the assistant or intern while a client contact or clinical activity or service is performed.

(24) [~~(23)~~] Indirect supervision (Speech-Language Pathology and Audiology)--The supervisor performs monitoring activities or provides guidance to the assistant or intern, either of which does not occur during actual client contact by the assistant or intern or while the assistant or intern is providing a clinical activity or service. Tele-supervision may be used for indirect supervision as authorized and prescribed under this chapter.

(25) [~~(24)~~] Intern in audiology--An individual licensed under Texas Occupations Code §401.311 and §111.80 of this chapter and who is supervised by an individual who holds an audiology license under Texas Occupations Code §401.302 and §401.304.

(26) [~~(25)~~] Intern in speech-language pathology--An individual licensed under Texas Occupations Code §401.311 and §111.40 of this chapter and who is supervised by an individual who holds a

speech-language pathology license under Texas Occupations Code §401.302 and §401.304.

(27) [~~(26)~~] Intern Plan and Agreement of Supervision Form (for Interns in Speech-Language Pathology and Audiology)--An agreement between a supervisor and an intern in which the parties enter into a supervisory relationship and the supervisor agrees to assume responsibility for all services provided by the intern.

(28) Over-the-counter hearing aid--The term has the meaning assigned by 21 C.F.R. Section 800.30.

(29) [~~(27)~~] Provisional Licensee--An individual granted a provisional license under Texas Occupations Code §401.308.

(30) [~~(28)~~] Sale [~~or purchase~~]--The term includes a lease, rental, or any other purchase or exchange for value. The term does not include a sale at wholesale by a manufacturer to a person licensed under the Act or to a distributor for distribution and sale to a person licensed under the Act. [~~Includes the sale, lease or rental of a hearing instrument or augmentative communication device to a member of the consuming public who is a user or prospective user of a hearing instrument or augmentative communication device.~~]

(31) [~~(29)~~] Speech-language pathologist--An individual who holds a license under Texas Occupations Code §401.302 and §401.304, to practice speech-language pathology.

(32) [~~(30)~~] Speech-language pathology--The application of nonmedical principles, methods, and procedures for measurement, testing, evaluation, prediction, counseling, habilitation, rehabilitation, or instruction related to the development and disorders of communication, including speech, voice, language, oral pharyngeal function, or cognitive processes, for the purpose of evaluating, preventing, or modifying or offering to evaluate, prevent, or modify those disorders and conditions in an individual or a group.

(33) [~~(31)~~] Supervisor--An individual who holds a license under Texas Occupations Code §401.302 and §401.304 and whom the department has approved to oversee the services provided by the assigned assistant and/or intern. The term "supervisor" and "department-approved supervisor" have the same meaning as used throughout this chapter.

(34) [~~(32)~~] Supervisory Responsibility Statement (SRS) Form (for Assistants in Audiology or Speech-Language Pathology)--An agreement between a supervisor and an assistant in which the parties enter into a supervisory relationship, the supervisor agrees to assume responsibility for the assistant's activities, and the assistant agrees to perform only those activities assigned by the supervisor that are not prohibited under this chapter.

(35) [~~(33)~~] Telehealth--See definition(s) in Subchapter V, Telehealth.

(36) [~~(34)~~] Tele-supervision--Supervision of interns or assistants that is provided remotely using telecommunications technology.

§111.3. Over-the-Counter Hearing Aids.

(a) Except as provided in this section, this chapter does not apply to servicing, marketing, selling, dispensing, providing customer support for, acquiring, or distributing over-the-counter hearing aids.

(b) A person is not required to obtain a license under this chapter to engage in an activity described by subsection (a).

(c) A person may not use the title "licensed dispenser" or "licensed seller" with respect to over-the-counter hearing aids or otherwise represent that the person holds a license to sell or dispense over-the-counter hearing aids unless the person is licensed as an audiologist or audiologist intern under this chapter or as a hearing instrument fitter and dispenser under Chapter 112.

(d) The supervision, prescription, order, involvement, or intervention of a person licensed in this state is not required under this chapter for a consumer to access over-the-counter hearing aids.

(e) A person licensed under this chapter may service, market, sell, dispense, provide customer support for, or distribute over-the-counter hearing aids. These activities do not exempt a person licensed under this chapter from any applicable provision of this chapter unrelated to the activities in §111.3(a).

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

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SUBCHAPTER U. FITTING AND DISPENSING OF HEARING INSTRUMENTS

16 TAC §111.201

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 401, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 401. No other statutes, articles, or codes are affected by the proposed rules.

§111.201. General Practice Requirements of Audiologists and Interns in Audiology Who Fit and Dispense Hearing Instruments.

In accordance with the Act, a licensed audiologist or licensed intern in audiology, who fits and dispenses hearing instruments, shall:

(1) adhere to the federal Food and Drug Administration regulations in accordance with 21 Code of Federal Regulations §801.422 [~~§801.420 and~~ §801.421];

(2) ensure [~~insure~~] that all equipment used by the licensee within the licensee's scope of practice is calibrated in compliance with the American National Standards Institute (ANSI), S3.6, 1989, Specification for Audiometers, or S3.6, 1996, Specification for Audiometers;

(3) if the client is under age 18, receive a written statement before selling a hearing instrument that is signed by a licensed physician preferably one who specializes in diseases of the ear and states that the client's hearing loss has been medically evaluated during the preceding six-month period and that the client may be a candidate for a hearing instrument. A written statement is not required for clients 18 years of age or older; [~~If the client is age 18 or over, the audiologist or~~

~~intern in audiology may inform the client that the medical evaluation requirement may be waived as long as the audiologist or intern in audiology:~~]

[~~(A) informs the client that the exercise of the waiver is not in the client's best health interest;~~]

[~~(B) does not encourage the client to waive the medical evaluation; and~~]

[~~(C) gives the client an opportunity to sign this statement: "I have been advised by (the name of the individual dispensing the hearing instrument) that the Food and Drug Administration has determined that my best health interest would be served if I had a medical evaluation by a licensed physician (preferably a physician who specializes in diseases of the ear) before purchasing a hearing instrument. I do not wish medical evaluation before purchasing a hearing instrument;"~~]

(4) verify appropriate fit of the hearing instrument(s), which may include real ear measures, functional gain measures, or other professionally accepted measures; and

(5) use a written contract that contains the department's name, mailing address, telephone number, and Internet website address, when providing services in this state.

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

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SUBCHAPTER W. JOINT RULE REGARDING THE SALE OF HEARING INSTRUMENTS

16 TAC §111.220

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 401, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 401. No other statutes, articles, or codes are affected by the proposed rules.

§111.220. Requirements Regarding the Sale of Hearing Instruments.

(a) This subchapter constitutes the rules required by Texas Occupations Code §401.2021 and §402.1021 to be adopted by the commission with the assistance of the Speech-Language Pathologists and Audiologists Advisory Board and the Hearing Instrument Fitters and Dispensers Advisory Board. The requirements of this subchapter shall be repealed or amended only through consultation with, and mutual action by, both advisory boards.

(b) Guidelines for a 30 consecutive day trial period for a hearing instrument.

(1) All clients shall be informed of a 30 consecutive day trial period by written contract for services related to a hearing instrument. All charges associated with such trial period shall be included in this written contract for services, which shall include the name, address, and telephone number of the department.

(2) Any client purchasing one or more hearing instruments shall be entitled to a refund of the purchase price advanced by the client for the hearing instrument(s), less the agreed-upon amount associated with the trial period, upon return of the instrument(s), in good condition, to the licensed audiologist or licensed intern in audiology within the trial period ending 30 consecutive days from the date of delivery. Should the order be canceled by the client prior to the delivery of the hearing instrument(s), the licensed audiologist or licensed intern in audiology may retain the agreed-upon charges and fees as specified in the written contract for services. The client shall receive the refund due no later than the 30th day after the date on which the client cancels the order or returns the hearing instrument(s), in good condition, to the licensed audiologist or licensed intern in audiology.

(3) Should the hearing instrument(s) have to be returned to the manufacturer for repair or remake during the trial period, the 30 consecutive day trial period begins anew. The trial period begins on the day the client reclaims the repaired/remade hearing instrument(s). The expiration date of the new 30 consecutive day trial period shall be made available to the client in writing, through an amendment to the original written contract. The amendment shall be signed by both the licensed audiologist or licensed intern in audiology and the client.

(4) On delivery of a new replacement hearing instrument(s) during the trial period, the serial number of the new instrument(s), the delivery date of the hearing instrument(s), and the date of the expiration of the 30 consecutive day trial period must be stated in writing.

(5) If the date of the expiration of the 30 consecutive day trial period falls on a holiday, weekend, or a day the business is not open, the expiration date shall be the first day the business reopens.

(c) Upon the sale of any hearing instrument(s) or change of model or serial number of the hearing instrument(s), the owner shall ensure that each client receives a written contract that contains:

(1) the date of sale;

(2) the make, model, and serial number of the hearing instrument(s);

(3) the name, address, and telephone number of the principal place of business of the license holder who dispensed the hearing instrument;

(4) a statement that the hearing instrument is new, used, or reconditioned;

(5) the length of time and other terms of the guarantee and by whom the hearing instrument is guaranteed;

[~~(6) a copy of the written forms (relating to waiver forms);~~]

(6) [~~(7)~~] a statement on or attached to the written contract for services, in no smaller than 10-point bold type, as follows: "The client has been advised that any examination or representation made by a licensed audiologist or licensed intern in audiology in connection with the fitting and selling of the hearing instrument(s) is not an examination, diagnosis or prescription by a person duly licensed and qualified as a physician or surgeon authorized to practice medicine in the State of Texas and, therefore, must not be regarded as medical opinion or advice.";

(7) [~~(8)~~] a statement on the face of the written contract for services, in no smaller than 10-point bold type, as follows: "If you have a complaint against a licensed audiologist or intern in audiology, you may contact the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, Telephone (512) 463-6599, Toll-Free (in Texas): (800) 803-9202";

(8) [~~(9)~~] the printed name, license type, signature and license number of the licensed audiologist or licensed intern in audiology who dispensed the hearing instrument;

(9) [~~(10)~~] the supervisor's name, license type, and license number, if applicable;

(10) [~~(11)~~] a recommendation for a follow-up appointment within thirty (30) days after the hearing instrument fitting;

(11) [~~(12)~~] the expiration date of the 30 consecutive day trial period under subsection (b); and

(12) [~~(13)~~] the dollar amount charged for the hearing instrument and the dollar amount charged for the return or restocking fee, if applicable.

(d) Record keeping. The owner of the dispensing practice shall ensure that records are maintained on every client who receives services in connection with the fitting and dispensing of hearing instruments. Such records shall be preserved for at least five years after the date of the last visit. All of the business's records and contracts are solely the property of the person who owns the business. Client access to records is governed by the Health Insurance Portability and Accountability Act (HIPAA). The records must be available for the department's inspection and shall include, but are not limited to, the following:

(1) pertinent case history;

(2) source of referral and appropriate documents;

(3) medical evaluation or waiver of evaluation if provided;

(4) copies of written contracts for services and receipts executed in connection with the fitting and dispensing of each hearing instrument provided;

(5) a complete record of hearing tests, and services provided; and

(6) all correspondence specifically related to services provided to the client or the hearing instrument(s) fitted and dispensed to the client.

(e) The written contract and trial period information provided to a client in accordance with this section, orally and in writing, shall be in plain language designed to be easily understood by the average consumer.

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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Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 475-4879

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CHAPTER 112. HEARING INSTRUMENT FITTERS AND DISPENSERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 112, Subchapter A, §112.2; Subchapter H, §112.70; Subchapter J, §112.92 and §112.96; and Subchapter O, §112.140; and proposes a new rule at Subchapter A, §112.3, regarding the Hearing Instrument Fitters and Dispensers program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 112 implement Texas Occupations Code, Chapter 402, Hearing Instrument Fitters and Dispensers, and Chapter 51, the enabling statute of the Texas Commission of Licensing and Regulation (Commission) and the Department.

The proposed rules implement changes made to Texas Occupations Code, Chapter 402 by SB 2017, 88th Legislature, Regular Session (2023); implement changes made by the U.S. Food and Drug Administration (FDA) in its final rule regarding over-the-counter hearing aids and prescription hearing aids; make changes to provide continuing education credit for proctors of the practical test; and update language to reference the Department's website in contracts and signs.

Implementation of SB 2017 and the FDA Hearing Aid Rule

The proposed rules are necessary to implement the provisions of SB 2017, which changed Chapter 402 of the Occupations Code governing Hearing Instrument Fitters and Dispensers, to address the new category of "over-the-counter hearing aids" established in federal law and rule.

In 2022, the FDA revised its federal rules, repealed prior rules, and adopted new rules for hearing instruments to include an "over-the-counter hearing aid" category of hearing instruments found in 21 CFR §800.30. The FDA Hearing Aid rule created a definition and framework for the new "over-the-counter hearing aid" category. The changes in the FDA Hearing Aid rule were designed to provide easier access to over-the-counter hearing aids by removing restrictions on the sale of those devices. To remain consistent with federal law, the state statutes and rules regulating the sale of hearing instruments required changes to reflect this new category and the new regulatory framework. The FDA Hearing Aid Rule may be found under Medical Devices; Ear, Nose, and Throat Devices; Establishing Over-the-Counter Hearing Aids, 87 Fed. Reg. 50698 (August 17, 2022) (later codified at 21 CFR Parts 800, 801, 808 and 874).

Since the definition of "hearing instrument" in Texas law would have included "over-the-counter hearing aids," S.B. 2017 changed Chapters 401 and 402 of the Occupations Code to reflect the changes in Federal law and to clarify the sale of "over-the-counter hearing aids" consistent with the FDA Hearing Aid Rule.

The proposed rules also make changes to reflect the FDA Hearing Aid Rule that repealed requirements related to certain medical waiver forms. To the extent that the Department has received prior comments during rule review or other rulemakings related to conformity of the Hearing Instrument Fitters and Dispensers

rules to the FDA rules, the Department has proposed changes to conform these rules to SB 2017 and the FDA Hearing Aid Rule.

Continuing Education Credit for Proctors of the Practical Test

The proposed rules amend the continuing education categories to allow for continuing education credit for a licensee who proctors the practical test. A licensee may receive a single continuing education credit hour for each practical test date, not to exceed four continuing education credit hours per license term. The proposed rules are necessary to assist the program's function by making sure there is an adequate number of proctors for the practical test.

Update Language to Reference the Department's Website in Contracts and Signs

The proposed rules amend existing rules requiring that the Department's email address be included in every contract and on a sign in the licensee's primary place of business. The proposed rules require that the contracts and signs include the Department's website address instead of email address. This change is necessary to ensure proper complaint handling and to assist the public in contacting the Department in accordance with complaint handling processes.

Advisory Board Recommendations

The proposed rules were presented to and discussed by the Hearing Instrument Fitters and Dispensers Advisory Board at its meeting on August 30, 2023. The Advisory Board did not make any changes to the proposed rules. The Advisory Board did not vote on whether the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

Subchapter A. General Provisions.

The proposed rules amend §111.2, Definitions. The proposed rules amend definitions for "fitting and dispensing hearing instruments," "hearing instrument," "Sale or sell" to be "sale"; create definitions for "hearing aid," and "Over-the-counter hearing aid"; and renumber the remaining definitions. These new definitions and revisions incorporate statutory changes made by SB 2017.

The proposed rules add new §112.3, Over-the-Counter Hearing Aids. This new rule incorporates the exemption language added to the statute by SB 2017.

New §112.3(a) clarifies that except as provided in §112.3, Chapter 112 does not apply to activities related to over-the-counter hearing aids. These activities include servicing, marketing, selling, dispensing, providing customer support for, acquiring, or distributing over-the-counter hearing aids.

New §112.3(b) provides that a person is not required to obtain a license to perform activities described in (a).

New §112.3(c) provides that a person may not use the term "licensed dispenser" or "licensed seller" in regard to the sale of over-the-counter hearing aids unless the person is licensed as a hearing instrument fitter and dispenser or as an audiologist or audiologist intern under Chapter 111.

New §112.3(d) provides that supervision, prescription, order, involvement, or intervention of a licensee is not required for a consumer to access over-the counter hearing aids.

New §112.3(e) provides that a licensee may engage in the activities described in (a) regarding over-the-counter hearing aids, but that those activities do not exempt a licensee from any applicable provision of Chapter 112 unrelated to the activities in (a).

Subchapter H. Continuing Education Requirements.

The proposed rules amend §112.70. Continuing Education--Hours and Courses. The proposed rules amend §112.70(g)(2) and (3) by shifting "and/or" from (g)(2) to (g)(3) due to the addition of (g)(4).

New §112.70(g)(4) provides that a licensee who serves as a proctor for the practical test may receive up to one continuing education credit hour for each test date, with a maximum of four continuing education hours of credit earned each license term.

Subchapter J. Responsibilities of the Licensee.

The proposed rules amend §112.92, Consumer Information and Client Records. The proposed amendments require a licensee to inform each client of the website address of the Department in each written contract for services and on a sign prominently displayed in their primary place of business. This is a change from the existing requirement to inform clients of the email address of the Department.

The proposed rules amend §112.96 to delete references to the repealed federal rules 21 CFR §801.420, Hearing aid devices; professional and patient labeling, and 21 CFR §801.421, Hearing aid devices; conditions for sale. The proposed rule references new federal rule 21 CFR §801.422, which addresses prescription hearing aids. The proposed rules reflect the changes made by the FDA Hearing Aid Rule.

Subchapter O. Joint Rule Regarding the Sale of Hearing Instruments.

The proposed rules amend §112.140. Requirements Regarding the Sale of Hearing Instruments.

The proposed rules amend §112.140(b) and §112.140(b)(1) to clarify that the 30-day trial period referenced in this rule relates to a hearing instrument.

The proposed amendments remove §112.140(c)(6) because it incorporates a reference to waiver forms required by 21 CFR §801.421. Since 21 CFR §801.421 was repealed by the FDA in the FDA Hearing Aid Rule, this paragraph is also being proposed for deletion. The remaining paragraphs in this subsection are renumbered.

The proposed rules amend §112.140(d)(3) to require medical evaluations or waivers of evaluation to be maintained only if they are provided. This change reflects the previously referenced repeal of waiver requirements in federal law and is made for consistency with proposed amendments to §112.140(c)(6).

Since §112.140 is a joint rule required by Texas Occupations Code §401.2021 and §402.1021 to be adopted by the Commission with the assistance of the Speech-Language Pathologists and Audiologists Advisory Board and the Hearing Instrument Fitters and Dispensers Advisory Board, §112.140 will mirror the text of §111.220.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules. There is no impact to local government costs because local governments are not responsi-

ble for administering the state regulation of hearing instrument fitting and dispensing under Occupations Code, Chapter 402. The proposed rules implement SB 2017 regarding the new FDA category of over-the-counter hearing aids, update definitions, add clarifying language, and introduce a new way to earn continuing education hours, but these changes do not impact program costs.

Mr. Couvillon also has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect a local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be implementation of SB 2017 and the changes in the Final Hearing Aid Rule. The new category of over-the-counter hearing aids will increase access to affordable hearing aids for individuals with mild to moderate hearing loss. The proposed rules make it clear that a license is not required to sell over-the-counter hearing aids. However, if a licensee chooses to sell OTC hearing aids, they must continue to abide by applicable regulations for their license, such as Code of Ethics and Continuing Education requirements.

The proposed rules also grant continuing education credit for licensees who proctor the state practical test. More proctors are necessary so that the practical test can be administered more frequently, and the continuing education credit would be an incentive for licensees to become proctors. There is no cost to become a proctor, so proctoring a test would be a way to earn free continuing education at no cost. Additionally, the more tests that are administered, the more Temporary Training Permit Holders will move forward in their careers, which will increase access to the number of hearing instrument fitters and dispensers available to for the public.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

Some license holders may decide to earn continuing education credits by serving as proctors, which could result in a decrease in attendance of continuing education classes. However, the number of license holders who may become proctors is not expected to be large, and therefore any decrease in the attendance of continuing education classes and possible resulting loss in revenue for continuing education providers is expected to be minimal, if at all.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

The Hearing Instrument Fitters and Dispensers Program regulates individuals, many of which are small or micro-businesses. As of July 18, 2023, there are 706 Hearing Instrument Fitters and Dispensers, and 39 Apprentice Permit holders, and 105 Temporary Training Permit holders licensed in Texas. It is unknown how many of these individuals or the entities that employ them fall within the definitions of a small or micro-business because data regarding the number of employees and gross annual sales is not collected by the agency. The proposed rule changes have no impact on the costs related to selling OTC hearing aids.

Some providers of continuing education for the Hearing Fitter and Dispenser program may be small or micro-businesses, however the number which might be is unknown since TDLR does license these entities. Some hearing instrument fitters and dispensers may decide to avail themselves of the opportunity to earn continuing education credits by serving as proctors, which could result in less continuing education classes being attended and paid for. However, the number of license holders who may become proctors is not expected to be large, and therefore any decrease in the attendance of continuing education classes and possible resulting loss in revenue for continuing education providers is expected to be minimal, if at all. There will be no adverse economic impact for these businesses.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase or decrease in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules expand, limit, or repeal an existing regulation. The proposed rules expand an existing regulation by adding the opportunity to earn continuing education hours at no cost by serving as a proctor for practical tests.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules;* by facsimile to (512) 475-3032; or by mail to Monica Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §112.2, §112.3

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 402, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 402. No other statutes, articles, or codes are affected by the proposed rules.

§112.2. Definitions.

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

(1) Act--Texas Occupations Code, Chapter 402, concerning the licensing of persons authorized to fit and dispense hearing instruments.

(2) Advisory board--The Hearing Instrument Fitters and Dispensers Advisory Board.

(3) Applicant--An individual who applies for a license or permit under the Act.

(4) Apprentice permit--A permit issued by the department to an individual who meets the qualifications established by Texas Occupations Code, §402.207 and this chapter, and which authorizes the permit holder to fit and dispense hearing instruments under appropriate supervision from an individual who holds a license to fit and dispense hearing instruments without supervision under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312.

(5) Certification, proof of--A certificate of calibration, compliance, conformance, or performance.

(6) Commission--The Texas Commission of Licensing and Regulation.

(7) Contact hour--A period of time equal to 55 minutes.

(8) Continuing education hour--A period of time equal to 50 minutes.

(9) Contract--See definition for "written contract for services."

(10) Continuing education--Education intended to maintain and improve the quality of professional services in the fitting and dispensing of hearing instruments, to keep licensees knowledgeable of current research, techniques, and practices, and provide other resources which will improve skills and competence in the fitting and dispensing of hearing instruments.

(11) Continuing education provider--A provider of a continuing education activity.

(12) Department--The Texas Department of Licensing and Regulation.

(13) Direct supervision--The physical presence with prompt evaluation, review and consultation of a supervisor any time a temporary training permit holder is engaged in the act of fitting and dispensing of hearing instruments.

(14) Executive director--The executive director of the department.

(15) Fitting and dispensing hearing instruments--The measurement of human hearing by the use of an audiometer or other means to make selections, adaptations, or sales of hearing instruments. The term includes prescribing, ordering, or authorizing the use of hearing instruments, the making of impressions for earmolds to be used as a part of the hearing instruments, and providing any necessary post-fitting counseling for the purpose of fitting and dispensing hearing instruments.

(16) Hearing aid--Any wearable device designed for, offered for the purpose of, or represented as aiding persons with or compensating for impaired hearing. The term includes hearing instruments and over-the-counter hearing aids.

(17) [~~(16)~~] Hearing instrument--A prescription hearing aid as that term is defined by 21 C.F.R. Section 800.30. [~~Any wearable instrument or device designed for, or represented as, aiding, improving, or correcting defective human hearing. The term includes the instrument's parts and any attachment, including an earmold, or accessory to the instrument. The term does not include a battery or cord.~~]

(18) [~~(17)~~] Indirect supervision--The daily evaluation, review, and prompt consultation of a supervisor any time a permit holder is engaged in the act of fitting and dispensing hearing instruments.

(19) [~~(18)~~] License--A license issued by the department under the Act and this chapter to a person authorized to fit and dispense hearing instruments.

(20) [~~(19)~~] Licensee--Any person licensed or permitted by the department under Texas Occupations Code Chapter 401 or 402.

(21) [~~(20)~~] Manufacturer--The term includes a person who applies to be a continuing education provider who is employed by, compensated by, or represents an entity, business, or corporation engaged in any of the activities described in this paragraph. An entity, business, or corporation that:

(A) is engaged in manufacturing, producing, or assembling hearing instruments for wholesale to a licensee or other hearing instrument provider;

(B) is engaged in manufacturing, producing, or assembling hearing instruments for sale to the public;

(C) is a subsidiary of, or held by, an entity that is engaged in manufacturing, producing, or assembling hearing instruments as described in this definition;

(D) holds an entity, business, or corporation engaged in manufacturing, producing, or assembling hearing instruments as described in this definition; or

(E) serves as a buying group for an entity, business, or corporation engaged in manufacturing, producing, or assembling hearing instruments as described in this definition.

(22) [~~(21)~~] Non-Manufacturer--Any person, entity, buyer group, or corporation that does not meet the definition of a manufacturer.

(23) Over-the-counter hearing aid--The term has the meaning assigned by 21 C.F.R. Section 800.30.

(24) [~~(22)~~] Person--An individual, corporation, partnership, or other legal entity.

(25) [~~(23)~~] Sale [~~or sell~~]--The term includes a lease, rental, or any other purchase or exchange for value. [~~A transfer of title or of the right to use by lease, bailment, or other contract.~~] The term does not include a sale at wholesale by a manufacturer to a person licensed under the Act or to a distributor for distribution and sale to a person licensed under the Act.

(26) [~~(24)~~] Specific Product Information--Specific product information shall include, but not be limited to, brand name, model number, shell type, and circuit type.

(27) [~~(25)~~] Supervisor--A supervisor is an individual who holds a valid license to fit and dispense hearing instruments under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312, and who meets the qualifications established by Texas Occupations Code, §402.255 and this chapter.

(28) [~~(26)~~] Telehealth--See definition(s) in Subchapter N, Telehealth.

(29) [~~(27)~~] Temporary training permit--A permit issued by the department to an individual who meets the qualifications established by Texas Occupations Code, Chapter 402, Subchapter F, and this chapter, to authorize the permit holder to fit and dispense hearing instruments only under the direct or indirect supervision, as required and as appropriate, of an individual who holds a license to fit and dispense hearing instruments without supervision under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312.

(30) [~~(28)~~] Working days--Working days are Monday through Friday, 8:00 a.m. to 5:00 p.m.

(31) [~~(29)~~] Written contract for services--A written contract between the license holder and purchaser of a hearing instrument as set out in §112.140 (relating to Joint Rule Regarding the Sale of Hearing Instruments).

(32) [~~(30)~~] 30-day trial period--The period in which a person may cancel the purchase of a hearing instrument.

§112.3. Over-the-Counter Hearing Aids.

(a) Except as provided in this section, this chapter does not apply to servicing, marketing, selling, dispensing, providing customer support for, acquiring, or distributing over-the-counter hearing aids.

(b) A person is not required to obtain a license under this chapter to engage in an activity described by subsection (a).

(c) A person may not use the title "licensed dispenser" or "licensed seller" with respect to over-the-counter hearing aids or otherwise represent that the person holds a license to sell or dispense over-the-counter hearing aids unless the person is licensed as a hearing instrument fitter and dispenser under this chapter or as an audiologist or audiologist intern under Chapter 111.

(d) The supervision, prescription, order, involvement, or intervention of a person licensed in this state is not required under this chapter for a consumer to access over-the-counter hearing aids.

(e) A person licensed under this chapter may service, market, sell, dispense, provide customer support for, or distribute over-the-counter hearing aids. These activities do not exempt a person licensed under this chapter from any applicable provision of this chapter unrelated to the activities in (a).

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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Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
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SUBCHAPTER H. CONTINUING EDUCATION REQUIREMENTS

16 TAC §112.70

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 402, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 402. No other statutes, articles, or codes are affected by the proposed rules.

§112.70. Continuing Education--Hours and Courses.

(a) This section applies to a hearing instrument fitter and dispenser license holder.

(b) Except as provided under subsection (j), a license holder must complete 20 continuing education hours during each license term.

(c) Pursuant to 16 Texas Administrative Code (TAC), Chapter 59, a continuing education hour shall be 50 minutes of attendance in an approved continuing education course.

(d) No more than 10 continuing education hours per license term may be earned from an approved online continuing education course offered by an approved continuing education provider.

(e) No more than 5 continuing education hours per license term may be earned from an approved continuing education course offered by an approved manufacturer continuing education provider.

(f) A license holder may be credited with continuing education hours for a published book or article written by the license holder that contributes to the license holder's professional competence. The department may approve credit hours based on the degree that the published book or article advanced knowledge regarding the fitting and dispensing of hearing instruments. No more than 5 contact hours per license term may be approved for preparation of a publication.

(g) Continuing education shall be acceptable if the education is described in subsection (f) or falls in one or more of the following categories:

(1) participation in approved continuing education courses offered by approved continuing education providers;

(2) completion of academic courses at an accredited college or university in areas directly supporting development of skills and competence in the fitting and dispensing of hearing instruments; [~~and/or~~]

(3) participation or teaching in programs directly related to the fitting and dispensing of hearing instruments (e.g., institutes, seminars, workshops, or conferences), which are approved or offered by an accredited college or university; and/or[~~.~~]

(4) serving as a Proctor for the practical test, not to exceed one continuing education hour of continuing education credit for each test date and with a maximum of four continuing education hours of credit earned each license term.

(h) To receive credit for completion of academic work the license holder must submit an official transcript(s) from accredited school(s) showing completion of hours in appropriate areas for which the license holder received a passing grade.

(i) The department will not approve continuing education credit for any license holder for:

(1) education incidental to the regular professional activities of a license holder such as knowledge gained through experience or research;

(2) organization activity such as serving on committees or councils or as an officer in a professional organization; and

(3) any program which is not described in, or in compliance with, this section.

(j) Pursuant to Texas Occupations Code §402.305, the department may renew the license of a license holder who has not complied with the continuing education requirements if the license holder:

(1) submits proof from an attending physician that the license holder suffered a serious disabling illness or physical disability that prevented compliance with the continuing education requirements during the twenty-four (24) months before the end of the license term; or

(2) was licensed for the first time during the twenty-four (24) months before the end of the license term.

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SUBCHAPTER J. RESPONSIBILITIES OF THE LICENSEE

16 TAC §112.92, §112.96

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 402, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 402. No other statutes, articles, or codes are affected by the proposed rules.

§112.92. Consumer Information and Client Records.

(a) A licensee shall inform each client of the name, address, website address [~~email address~~], and telephone number of the department for the purpose of filing a complaint or reporting violations of the Act or this chapter on:

(1) each written contract for services; and

(2) a sign prominently displayed in the primary place of business.

(b) A licensee or a hearing instrument fitting and dispensing practice shall provide to a client, who provides a signed, written request, a copy of the client's records that pertain to the testing for, and fitting and dispensing of, hearing instruments.

§112.96. Conditions of Sale.

A license holder or permit holder shall comply with the federal regulations adopted by the U.S. Food and Drug Administration at Title 21 Code of Federal Regulations §801.422 [~~§801.420 and §801.421~~]. A link to the federal regulations will be available online through the department's website.

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

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SUBCHAPTER O. JOINT RULE REGARDING THE SALE OF HEARING INSTRUMENTS

16 TAC §112.140

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 402, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 402. No other statutes, articles, or codes are affected by the proposed rules.

§112.140. Requirements Regarding the Sale of Hearing Instruments.

(a) This subchapter constitutes the rules required by Texas Occupations Code §401.2021 and §402.1021 to be adopted by the commission with the assistance of the Speech-Language Pathology and Audiology Advisory Board and the Hearing Instrument Fitters and Dispensers Advisory Board. The requirements of this subchapter shall be repealed or amended only through consultation with, and mutual action by, both advisory boards.

(b) Guidelines for a 30 consecutive day trial period for a hearing instrument.

(1) All clients shall be informed of a 30 consecutive day trial period by written contract for services related to a hearing instrument. All charges associated with such trial period shall be included in this written contract for services, which shall include the name, address, and telephone number of the department.

(2) Any client purchasing one or more hearing instruments shall be entitled to a refund of the purchase price advanced by the client for the hearing instrument(s), less the agreed-upon amount associated with the trial period, upon return of the instrument(s), in good condition to the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder within the trial period ending 30 consecutive days from the date of delivery. Should the order be canceled by the client prior to the delivery of the hearing instrument(s), the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder may retain the agreed-upon charges and fees as specified in the written contract for services. The client shall receive the refund due no later than the 30th day after the date on which the client cancels the order or returns the hearing instrument(s), in good condition, to the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder.

(3) Should the hearing instrument(s) have to be returned to the manufacturer for repair or remake during the trial period, the 30 consecutive day trial period begins anew. The trial period begins on the day the client reclaims the repaired/remade hearing instrument(s). The expiration date of the new 30 consecutive day trial period shall be made available to the client in writing, through an amendment to the original written contract. The amendment shall be signed by both the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder and the client.

(4) On delivery of a new replacement hearing instrument(s) during the trial period, the serial number of the new instrument(s), the delivery date of the hearing instrument(s), and the date of the expiration of the 30 consecutive day trial period must be stated in writing.

(5) If the date of the expiration of the 30 consecutive day trial period falls on a holiday, weekend, or a day the business is not open, the expiration date shall be the first day the business reopens.

(c) Upon the sale of any hearing instrument(s) or change of model or serial number of the hearing instrument(s), the owner shall ensure that each client receives a written contract that contains:

(1) the date of sale;

(2) the make, model, and serial number of the hearing instrument(s);

(3) the name, address, and telephone number of the principal place of business of the license or permit holder who dispensed the hearing instrument;

(4) a statement that the hearing instrument is new, used, or reconditioned;

(5) the length of time and other terms of the guarantee and by whom the hearing instrument is guaranteed;

~~[(6) a copy of the written forms (relating to waiver forms);]~~

(6) [~~(7)~~] a statement on or attached to the written contract for services, in no smaller than 10-point bold type, as follows: "The client has been advised that any examination or representation made by a licensed hearing instrument dispenser or apprentice permit holder or temporary training permit holder in connection with the fitting and selling of the hearing instrument(s) is not an examination, diagnosis or prescription by a person duly licensed and qualified as a physician or surgeon authorized to practice medicine in the State of Texas and, therefore, must not be regarded as medical opinion or advice;"

(7) [~~(8)~~] a statement on the face of the written contract for services, in no smaller than 10-point bold type, as follows: "If you have a complaint against a licensed hearing instrument dispenser or apprentice permit holder or temporary training permit holder, you may contact the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, Telephone (512) 463-6599, Toll-Free (in Texas): (800) 803-9202, www.tdlr.texas.gov";

(8) [~~(9)~~] the printed name, license type, signature and license or permit number of the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder who dispensed the hearing instrument;

(9) [~~(10)~~] the supervisor's name, license type, and license number, if applicable;

(10) [~~(11)~~] a recommendation for a follow-up appointment within thirty (30) days after the hearing instrument fitting;

(11) [~~(12)~~] the expiration date of the 30 consecutive day trial period under subsection (b); and

(12) [~~(13)~~] the dollar amount charged for the hearing instrument and the dollar amount charged for the return or restocking fee, if applicable.

(d) Record keeping. The owner of the dispensing practice shall ensure that records are maintained on every client who receives services in connection with the fitting and dispensing of hearing instruments. Such records shall be preserved for at least five years after the date of the last visit. All of the business's records and contracts are solely the property of the person who owns the business. Client access to records is governed by the Health Insurance Portability and Accountability Act (HIPAA). The records must be available for the department's inspection and shall include, but are not limited to, the following:

(1) pertinent case history;

(2) source of referral and appropriate documents;

(3) medical evaluation or waiver of evaluation if provided;

(4) copies of written contracts for services and receipts executed in connection with the fitting and dispensing of each hearing instrument provided;

(5) a complete record of hearing tests, and services provided; and

(6) all correspondence specifically related to services provided to the client or the hearing instrument(s) fitted and dispensed to the client.

(e) The written contract and trial period information provided to a client in accordance with this subchapter, orally and in writing, shall be in plain language designed to be easily understood by the average consumer.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303304
Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 475-4879

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.12

The Texas State Board of Pharmacy proposes amendments to §283.12, concerning Licenses for Military Service Members, Military Veterans, and Military Spouses. The amendments, if adopted, establish procedures for a military service member who is currently licensed in good standing by a jurisdiction with licensing requirements that are substantially similar to Texas's requirements to obtain an interim pharmacist license, in accordance with Senate Bill 422 and make grammatical corrections.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the licensing requirements and procedures for military service member pharmacists to request an interim pharmacist license and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation by exempting military service members from certain licensing requirements in order to comply with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§283.12. Licenses for Military Service Members, Military Veterans, and Military Spouses.

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

(1) Active duty--Current full-time military service in the armed forces of the United States or active duty military service as a member of the Texas military forces, or similar military service of another state.

(2) Armed forces of the United States--The army, navy, air force, space force, coast guard, or marine corps of the United States or a reserve unit of one of those branches of the armed forces.

(3) Military service member--A person who is on active duty.

(4) Military spouse--A person who is married to a military service member.

(5) Military veteran--A person who has served on active duty and who was discharged or released from active duty.

(b) Alternative licensing procedure. For the purpose of §55.004, Occupations Code, an applicant for a pharmacist license who is a military service member, military veteran, or military spouse

may complete the following alternative procedures for licensing as a pharmacist.

(1) Requirements for licensing by reciprocity. An applicant for licensing by reciprocity who meets all of the following requirements may be granted a temporary license as specified in this subsection prior to completing the NABP application for pharmacist license by reciprocity, and taking and passing the Texas Pharmacy Jurisprudence Examination. The applicant shall:

(A) complete the Texas application for pharmacist license by reciprocity that includes the following:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application;

(B) meet the educational and age requirements as set forth in §283.3 of this title (relating to Educational and Age Requirements);

(C) present to the board proof of initial licensing by examination and proof that any current licenses and any other licenses granted to the applicant by any other state have not been suspended, revoked, canceled, surrendered, or otherwise restricted for any reason;

(D) meet all requirements necessary for the board to access the criminal history records information, including submitting fingerprint information, and such criminal history check does not reveal any disposition for a crime specified in §281.64 of this title (relating to Sanctions for Criminal Offenses) indicating a sanction of denial, revocation, or suspension;

(E) be exempt from the application and examination fees paid to the board set forth in §283.9(a)(2)(A) and (b) of this title (relating to Fee Requirements for Licensure by Examination, Score Transfer and Reciprocity); and

(F) provide documentation of eligibility, including:

(i) military identification indicating that the applicant is a military service member, military veteran, or military dependent, if a military spouse; and

(ii) marriage certificate, if a military spouse.

(2) Requirements for an applicant whose Texas pharmacist license has expired. An applicant whose Texas pharmacist license has expired within five years preceding the application date:

(A) shall complete the Texas application for licensing that includes the following:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application;

(B) shall provide documentation of eligibility, including:

(i) military identification indicating that the applicant is a military service member, military veteran, or military dependent, if a military spouse; and

(ii) marriage certificate, if a military spouse;

(C) shall pay the renewal fee specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees); however, the applicant shall be exempt from the fees specified in §295.7(3) of this title (relating to Pharmacist License Renewal);

(D) shall complete approved continuing education requirements according to the following schedule:

(i) if the Texas pharmacist license has been expired for more than one year but less than two years, the applicant shall complete 15 contact hours of approved continuing education;

(ii) if the Texas pharmacist license has been expired for more than two years but less than three years, the applicant shall complete 30 contact hours of approved continuing education; or

(iii) if the Texas pharmacist license has been expired for more than three years but less than five years, the applicant shall complete 45 contact hours of approved continuing education; and

(E) is not required to take the Texas Pharmacy Jurisprudence Examination.

(3) A temporary license issued under this section is valid for no more than six months and may be extended, if disciplinary action is pending, or upon request, as otherwise determined reasonably necessary by the executive director of the board.

(4) A temporary license issued under this section expires within six months of issuance if the individual fails to pass the Texas Pharmacy Jurisprudence Examination within six months or fails to take the Texas Pharmacy Jurisprudence Examination within six months.

(5) An individual may not serve as pharmacist-in-charge of a pharmacy with a temporary license issued under this subsection.

(c) Expedited licensing procedure. For the purpose of §55.005, Occupations Code, an applicant for a pharmacist license who is a military service member, military veteran, or military spouse and who holds a current license as a pharmacist issued by another state may complete the following expedited procedures for licensing as a pharmacist. The applicant shall:

(1) meet the educational and age requirements specified in §283.3 of this title (relating to Educational and Age Requirements);

(2) meet all requirements necessary in order for the board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs;

(3) complete the Texas and NABP applications for reciprocity. Any fraudulent statement made in the application for reciprocity is grounds for denial of the application. If such application is granted, any fraudulent statement is grounds for suspension, revocation, and/or cancellation of any license so granted by the board. The Texas application includes the following information:

(A) name;

(B) addresses, phone numbers, date of birth, and social security number; and

(C) any other information requested on the application;

(4) present to the board proof of initial licensing by examination and proof that their current license and any other license or licenses granted to the applicant by any other state have not been suspended, revoked, canceled, surrendered, or otherwise restricted for any reason;

(5) pass the Texas Pharmacy Jurisprudence Examination with a minimum grade of 75. (The passing grade may be used for the purpose of licensure by reciprocity for a period of two years from the

date of passing the examination.) Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, shall retake the Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum grade of 75 is achieved; and

(6) be exempt from the application and examination fees paid to the board set forth in §283.9(a)(2)(A) and (b) of this title.

(d) License renewal. As specified in §55.003, Occupations Code, a military service member who holds a pharmacist license is entitled to two years of additional time to complete any requirements related to the renewal of the military service member's license. [~~as follows:~~]

(1) A military service member who fails to renew their pharmacist license in a timely manner because the individual was serving as a military service member shall submit to the board:

(A) name, address, and license number of the pharmacist;

(B) military identification indicating that the individual is a military service member; and

(C) a statement requesting up to two years of additional time to complete the renewal.

(2) A military service member specified in paragraph (1) of this subsection shall be exempt from fees specified in §295.7(3) of this title (relating to Pharmacist License Renewal).

(3) A military service member specified in paragraph (1) of this subsection is entitled to two additional years of time to complete the continuing education requirements specified in §295.8 of this title (relating to Continuing Education Requirements).

(e) Inactive status. The holder of a pharmacist license who is a military service member, a military veteran, or a military spouse who holds a pharmacist license and who is not engaged in the practice of pharmacy in this state may place the license on inactive status as specified in §295.9 of this title (relating to Inactive License). The inactive license holder:

(1) shall provide documentation to include:

(A) military identification indicating that the pharmacist is a military service member, military veteran, or military dependent, if a military spouse; and

(B) marriage certificate, if a military spouse;

(2) shall be exempt from the fees specified in §295.9(a)(1)(C) and §295.9(a)(2)(C) of this title;

(3) shall not practice pharmacy in this state; and

(4) may reactivate the license as specified in §295.9 of this title (relating to Inactive License).

(f) Interim license for military service member or military spouse. In accordance with §55.0041, Occupations Code, a military service member or military spouse who is currently licensed in good standing by a jurisdiction with licensing requirements that are substantially equivalent to the licensing requirements in this state may be issued an interim pharmacist license. The military service member or military spouse:

(1) shall provide documentation to include:

(A) a notification of intent to practice form including any additional information requested;

(B) proof of the military service member or military spouse's residency in this state, including a copy of the permanent change of station order for the military service member or military service member to whom the military spouse is married;

(C) a copy of the military service member or military spouse's military identification card; and

(D) verification from the jurisdiction in which the military service member or military spouse holds an active pharmacist license that the military service member or military spouse's license is in good standing;

(2) may not practice pharmacy in this state until issued an interim pharmacist license;

(3) may hold an interim pharmacist license only for the period during which the military service member or military service member to whom the military spouse is married is stationed at a military installation in this state, but not to exceed three years from the date of issuance of the interim license; and

(4) may not renew the interim pharmacist license.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303329
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.3

The Texas State Board of Pharmacy proposes amendments to §291.3, concerning Required Notifications. The amendments, if adopted, require a pharmacy to notify the board in writing if the pharmacy temporarily closes for the loss of a pharmacist-in-charge and clarify the notification requirements for amending a pharmacy license.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and efficient regulatory processes. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments both limit and expand an existing regulation by allowing certain conduct while requiring written notification of the conduct;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.3. Required Notifications.

(a) Change of Location.

(1) When a pharmacy changes location, the following is applicable:

(A) A new completed pharmacy application containing the information outlined in §291.1 of this title (relating to Pharmacy License Application) must be filed with the board not later than 30 days before the date of the change of location of the pharmacy;

[~~(B) The previously issued license must be returned to the board office;~~]

(B) [~~(C)~~] An amended license reflecting the new location of the pharmacy will be issued by the board; and

(C) [~~(D)~~] A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for processing the application for change of location [~~issuance of the amended license~~].

(2) At least 14 days prior to the change of location of a pharmacy that dispenses prescription drug orders, the pharmacist-in-charge shall post a sign in a conspicuous place indicating that the pharmacy is changing locations. Such sign shall be in the front of the prescription department and at all public entrance doors to the pharmacy and shall indicate the date the pharmacy is changing locations.

(3) Disasters, accidents, and emergencies which require the pharmacy to change location shall be immediately reported to the board. If a pharmacy changes location suddenly due to disasters, accidents, or other emergency circumstances and the pharmacist-in-charge cannot provide notification 14 days prior to the change of location, the pharmacist-in-charge shall comply with the provisions of paragraph (2) of this subsection as far in advance of the change of location as allowed by the circumstances.

(4) When a Class A-S, C-S, or E-S pharmacy changes location, the pharmacy's classification will revert to a Class A, Class C, or Class E unless or until the board or its designee has inspected the new location to ensure the pharmacy meets the requirements as specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(5) When a Class B pharmacy changes location, the board shall inspect the pharmacy at the new location to ensure the pharmacy meets the requirements as specified in subchapter C of this title (relating to Nuclear Pharmacy (Class B)) prior to the pharmacy becoming operational.

(b) Change of Name. When a pharmacy changes its name, the following is applicable:

(1) A new completed pharmacy application containing the information outlined in §291.1 of this title (relating to Pharmacy License Application) must be filed with the board within 10 days of the change of name of the pharmacy;

[~~(2) The previously issued license must be returned to the board office;~~]

(2) [~~(3)~~] An amended license reflecting the new name of the pharmacy will be issued by the board; and

(3) [~~(4)~~] A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for processing the application for change of name [~~issuance of the amended license~~].

(c) Change of Managing Officers.

(1) The owner of a pharmacy shall notify the board in writing within 10 days of a change of any managing officer of a partnership or corporation which owns a pharmacy. The written notification shall include the effective date of such change, an updated sworn disclosure statement as required by §560.052(b) of the Act and as specified in §291.4 of this title (relating to Sworn Disclosure Statement), and the following information for all managing officers:

(A) name and title;

(B) home address and telephone number;

(C) date of birth;

(D) a copy of social security card or other official document showing the social security number as approved by the board; and

(E) a copy of current driver's license, state issued photo identification card, or passport.

(2) For purposes of this subsection, managing officers are defined as the top four executive officers, including the corporate officer in charge of pharmacy operations, who are designated by the partnership or corporation to be jointly responsible for the legal operation of the pharmacy.

(d) Change of Ownership.

(1) When a pharmacy changes ownership, a new pharmacy application must be filed with the board following the procedures as specified in §291.1 of this title (relating to Pharmacy License Application), including, as required by §560.052(b) of the Act, the submission

of a sworn disclosure statement as specified in §291.4 of this title (relating to Sworn Disclosure Statement). In addition, a copy of the purchase contract or mutual agreement between the buyer and seller must be submitted.

~~[(2) The license issued to the previous owner must be returned to the board.]~~

(2) [~~(3)~~] A fee as specified in §291.6 of this title will be charged for issuance of a new license.

(e) Change of Pharmacist Employment.

(1) Change of pharmacist employed in a pharmacy. When a change in pharmacist employment occurs, the pharmacist shall report such change in writing to the board within 10 days.

(2) Change of pharmacist-in-charge of a pharmacy. The incoming pharmacist-in-charge shall be responsible for notifying the board within 10 days in writing on a form provided by the board that a change of pharmacist-in-charge has occurred. The notification shall include the following:

(A) the name and license number of the departing pharmacist-in-charge;

(B) the name and license number of the incoming pharmacist-in-charge;

(C) the date the incoming pharmacist-in-charge became the pharmacist-in-charge; and

(D) a statement signed by the incoming pharmacist-in-charge attesting that:

(i) an inventory, as specified in §291.17 of this title (relating to Inventory Requirements), has been conducted by the departing and incoming pharmacists-in-charge; if the inventory was not taken by both pharmacists, the statement shall provide an explanation; and

(ii) the incoming pharmacist-in-charge has read and understands the laws and rules relating to this class of pharmacy.

(f) Notification of Theft or Loss of a Controlled Substance or a Dangerous Drug.

(1) Controlled substances. For the purposes of the Act, §562.106, the theft or significant loss of any controlled substance by a pharmacy shall be reported in writing to the board immediately on discovery of such theft or loss. A pharmacy shall be in compliance with this subsection by submitting to the board a copy of the Drug Enforcement Administration (DEA) report of theft or loss of controlled substances, DEA Form 106, or by submitting a list of all controlled substances stolen or lost.

(2) Dangerous drugs. A pharmacy shall report in writing to the board immediately on discovery the theft or significant loss of any dangerous drug by submitting a list of the name and quantity of all dangerous drugs stolen or lost.

(g) Fire or Other Disaster. If a pharmacy experiences a fire or other disaster, the following requirements are applicable.

(1) Responsibilities of the pharmacist-in-charge.

(A) The pharmacist-in-charge shall be responsible for reporting the date of the fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or the treatment of injury, illness, and disease; such notification shall be reported to the board, within 10 days from the date of the disaster.

(B) The pharmacist-in-charge or designated agent shall comply with the following procedures.

(i) If controlled substances, dangerous drugs, or Drug Enforcement Administration (DEA) order forms are lost or destroyed in the disaster, the pharmacy shall:

(I) notify the DEA and the board of the loss of the controlled substances or order forms immediately upon discovery; and

(II) notify the board in writing of the loss of the dangerous drugs by submitting a list of the dangerous drugs lost.

(ii) If the extent of the loss of controlled substances or dangerous drugs is not able to be determined, the pharmacy shall:

(I) take a new, complete inventory of all remaining drugs specified in §291.17(c) of this title (relating to Inventory Requirements);

(II) submit to the DEA a statement attesting that the loss of controlled substances is indeterminable and that a new, complete inventory of all remaining controlled substances was conducted and state the date of such inventory; and

(III) submit to the board a statement attesting that the loss of controlled substances and dangerous drugs is indeterminable and that a new, complete inventory of the drugs specified in §291.17(c) of this title was conducted and state the date of such inventory.

(C) If the pharmacy changes to a new, permanent location, the pharmacist-in-charge shall comply with subsection (a) of this section.

(D) If the pharmacy moves to a temporary location, the pharmacist shall comply with subsection (a) of this section. If the pharmacy returns to the original location, the pharmacist-in-charge shall again comply with subsection (a) of this section.

(E) If the pharmacy closes due to fire or other disaster, the pharmacy may not be closed for longer than 90 days as specified in §291.11 of this title (relating to Operation of a Pharmacy).

(F) If the pharmacy discontinues business (ceases to operate as a pharmacy), the pharmacist-in-charge shall comply with §291.5 of this title (relating to Closing a Pharmacy).

(G) The pharmacist-in-charge shall maintain copies of all inventories, reports, or notifications required by this section for a period of two years.

(2) Drug stock.

(A) Any drug which has been exposed to excessive heat, smoke, or other conditions which may have caused deterioration shall not be dispensed.

(B) Any potentially adulterated or damaged drug shall only be sold, transferred, or otherwise distributed pursuant to the provisions of the Texas Food Drug and Cosmetics Act (Chapter 431, Health and Safety Code) administered by the Bureau of Food and Drug Safety of the Texas Department of State Health Services.

(h) Notification to Consumers.

(1) Pharmacy.

(A) Every licensed pharmacy shall provide notification to consumers of the name, mailing address, Internet site address, and telephone number of the board for the purpose of directing complaints concerning the practice of pharmacy to the board. Such notification shall be provided as follows.

(i) If the pharmacy serves walk-in customers, the pharmacy shall either:

(I) post in a prominent place that is in clear public view where prescription drugs are dispensed:

(-a-) a sign which notifies the consumer that complaints concerning the practice of pharmacy may be filed with the board and list the board's name, mailing address, Internet site address, telephone number, and a toll-free telephone number for filing complaints; or

(-b-) an electronic messaging system in a type size no smaller than ten-point Times Roman which notifies the consumer that complaints concerning the practice of pharmacy may be filed with the board and list the board's name, mailing address, Internet site address, telephone number, and a toll-free number for filing complaints; or

(II) provide with each dispensed prescription a written notification in a type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number of the board, and a toll-free telephone number for filing complaints)."

(ii) If the prescription drug order is delivered to patients at their residence or other designated location, the pharmacy shall provide with each dispensed prescription a written notification in type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number, and a toll-free telephone number for filing complaints)." If multiple prescriptions are delivered to the same location, only one such notice shall be required.

(iii) The provisions of this subsection do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(B) A pharmacy that maintains a generally accessible site on the Internet that is located in Texas or sells or distributes drugs through this site to residents of this state shall post the following information on the pharmacy's initial home page and on the page where a sale of prescription drugs occurs.

(i) Information on the ownership of the pharmacy, to include at a minimum, the:

(I) owner's name or if the owner is a partnership or corporation, the partnership's or corporation's name and the name of the chief operating officer;

(II) owner's address;

(III) owner's telephone number; and

(IV) year the owner began operating pharmacies in the United States.

(ii) The Internet address and toll free telephone number that a consumer may use to:

(I) report medication/device problems to the pharmacy; and

(II) report business compliance problems.

(iii) Information about each pharmacy that dispenses prescriptions for this site, to include at a minimum, the:

(I) pharmacy's name, address, and telephone number;

(II) name of the pharmacist responsible for operation of the pharmacy;

(III) Texas pharmacy license number for the pharmacy and a link to the Internet site maintained by the Texas State Board of Pharmacy; and

(IV) the names of all other states in which the pharmacy is licensed, the license number in that state, and a link to the Internet site of the entity that regulates pharmacies in that state, if available.

(C) A pharmacy whose Internet site has been verified by the National Association of Boards of Pharmacy to be in compliance with the laws of this state, as well as in all other states in which the pharmacy is licensed shall be in compliance with subparagraph (B) of this paragraph.

(2) Texas State Board of Pharmacy. On or before January 1, 2005, the board shall establish a pharmacy profile system as specified in §2054.2606, Government Code.

(A) The board shall make the pharmacy profiles available to the public on the agency's Internet site.

(B) A pharmacy profile shall contain at least the following information:

(i) name, address, and telephone number of the pharmacy;

(ii) pharmacy license number, licensure status, and expiration date of the license;

(iii) the class and type of the pharmacy;

(iv) ownership information for the pharmacy;

(v) names and license numbers of all pharmacists working at the pharmacy;

(vi) whether the pharmacy has had prior disciplinary action by the board;

(vii) whether the pharmacy's consumer service areas are accessible to disabled persons, as defined by law;

(viii) the type of language translating services, including translating services for persons with impairment of hearing, that the pharmacy provides for consumers; and

(ix) insurance information including whether the pharmacy participates in the state Medicaid program.

(C) The board shall gather this information on initial licensing and update the information in conjunction with the license renewal for the pharmacy.

(i) Notification of Licensees or Registrants Obtaining Controlled Substances or Dangerous Drugs by Forged Prescriptions. If a licensee or registrant obtains controlled substances or dangerous drugs from a pharmacy by means of a forged prescription, the pharmacy shall report in writing to the board immediately on discovery of such forgery. A pharmacy shall be in compliance with this subsection by submitting to the board the following:

(1) name of licensee or registrant obtaining controlled substances or dangerous drugs by forged prescription;

(2) date(s) of forged prescription(s);

(3) name(s) and amount(s) of drug(s); and

(4) copies of forged prescriptions.

(j) Notification of Disciplinary Action. For the purpose of the Act, §562.106, a pharmacy shall report in writing to the board not later than the 10th day after the date of:

(1) a final order against the pharmacy license holder by the regulatory or licensing agency of the state in which the pharmacy is located if the pharmacy is located in another state; or

(2) a final order against a pharmacist who is designated as the pharmacist-in-charge of the pharmacy by the regulatory or licensing agency of the state in which the pharmacy is located if the pharmacy is located in another state.

(k) Temporary Closing for Loss of Pharmacist-in-Charge. A pharmacy that temporarily closes for loss of a pharmacist-in-charge as provided by §291.5(d)(2) of this title shall notify the board in writing on a form provided by the board. The pharmacy shall submit the notification not later than the next business day after the date of departure of the pharmacist-in-charge.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303322
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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22 TAC §291.5

The Texas State Board of Pharmacy proposes amendments to §291.5, concerning Closing a Pharmacy. The amendments, if adopted, provide that a pharmacy may temporarily close for the loss of a pharmacist-in-charge if the pharmacy timely notifies the board in writing of the temporary closure.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to clear and consistent regulatory processes. There is no anticipated adverse economic impact on large, small, or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments both limit and expand an existing regulation by allowing certain conduct while requiring written notification of the conduct;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.5. Closing a Pharmacy.

(a) Prior to closing. At least 14 days prior to the closing of a pharmacy that dispenses prescription drug orders the pharmacist-in-charge shall:

(1) post a closing notice sign in a conspicuous place in the front of the prescription department and at all public entrance doors to the pharmacy. Such closing notice sign shall contain the following information:

(A) the date of closing; and

(B) the name, address, and telephone number of the pharmacy acquiring the prescription drug orders, including refill information and patient medication records of the pharmacy.

(2) notify DEA of any controlled substances being transferred to another registrant as specified in 21 CFR 1301.52(d).

(b) Closing day. On the date of closing, the pharmacist-in-charge shall comply with the following:

(1) take an inventory as specified in §291.17 of this title (relating to Inventory Requirements);

(2) remove all prescription drugs from the pharmacy by one or a combination of the following methods:

(A) return prescription drugs to manufacturer or supplier (for credit/disposal);

(B) transfer (sell or give away) prescription drugs to a person who is legally entitled to possess drugs, such as a hospital, or another pharmacy; and

(C) destroy the prescription drugs following procedures specified in §303.2 of this title (relating to Disposal of Stock Prescription Drugs); and

(3) if the pharmacy dispenses prescription drug orders:

(A) transfer the prescription drug order files, including refill information, and patient medication records to a licensed pharmacy; and

(B) remove all signs or notify the landlord or owner of the property that it is unlawful to use the word "pharmacy" either in English or any other language, or any other word or combination of words of the same or similar meaning, or any graphic representation that would mislead or tend to mislead the public that a pharmacy is located at the address.

(c) After closing.

(1) Within ten days after the closing of the pharmacy, the pharmacist-in-charge shall forward to the board a written notice of the closing which includes the following information:

(A) the actual date of closing;

(B) the license issued to the pharmacy;

(C) a statement attesting:

(i) that an inventory as specified in §291.17 of this title; and

(ii) the manner by which the dangerous drugs and controlled substances possessed by the pharmacy were transferred or disposed; and

(D) if the pharmacy dispenses prescription drug orders, the name and address of the pharmacy to which the prescription drug orders, including refill information, and patient medication records were transferred.

(2) If the pharmacy is registered to possess controlled substances, send notification to the appropriate DEA divisional office explaining that the pharmacy has closed and include the following items:

(A) DEA registration certificate; and

(B) all unused DEA order forms (222) with the word VOID written on the face of each order form.

(3) Once the pharmacy has notified the board that the pharmacy is closed, the license may not be renewed. The pharmacy may apply for a new license as specified in §291.1 of this title (relating to Pharmacy License Application).

(d) Emergency or temporary closing.

(1) If pharmacy is closed suddenly due to fire, destruction, natural disaster, death, property seizure, eviction, bankruptcy, or other emergency circumstances and the pharmacist-in-charge cannot provide notification 14 days prior to the closing, the pharmacist-in-charge shall comply with the provisions of subsection (a) of this section as far in advance of the closing as allowed by the circumstances.

(2) A pharmacy may temporarily close for lack of a pharmacist-in-charge for no more than 30 days. If a pharmacy temporarily closes for lack of a pharmacist-in-charge, the pharmacy shall:

(A) only allow access to the prescription department if a pharmacist is present;

(B) send notification to the board as specified in §291.3(k) of this title (relating to Required Notifications); and

(C) either:

(i) reopen within 48 hours under the supervision of a new pharmacist-in-charge who has been reported to the board as specified in §291.3(e)(2) of this title; or

(ii) comply with the provisions of subsection (a) of this section as far in advance of the closing as allowed by the circumstances.

(e) Joint responsibility. If the pharmacist-in-charge is not available to comply with the requirements of this section, the owner shall be responsible for compliance with the provisions 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.

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Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8026

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22 TAC §291.6

The Texas State Board of Pharmacy proposes amendments to §291.6, concerning Pharmacy License Fees. The amendments, if adopted, increase pharmacy license fees based on expected expenses, specify the application fee for an initial or renewed certificate to provide remote pharmacy services, and remove the fee for issuance of a duplicate renewal certificate.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amended rule as follows:

Revenue Increase

FY2024 = $225,056.00

FY2025 = $228,221.00

FY2026 = $230,670.75

FY2027 = $231,181.74

FY2028 = $235,755.51

There are no anticipated fiscal implications for local government.

Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to assure that the Texas State Board of Pharmacy is adequately funded to carry out its mission and to fairly allocate fee burdens in proportion to the services provided by the Board. The economic cost to large, small, or micro-businesses (pharmacies) required to comply with the amended rule will be an increase of $67 for an initial license and an increase of $67 for the renewal of a license. A pharmacy that provides remote pharmacy services will also incur the following economic cost, as applicable: $100 for an initial or renewed certificate to provide remote pharmacy services using automated pharmacy systems; $50 for an initial or renewed certificate to provide remote pharmacy services using emergency medication kits; $150 for an initial or renewed certificate to provide remote pharmacy services using telepharmacy systems; and $100 for an initial or renewed certificate to provide remote pharmacy services using automated dispensing and delivery systems. The economic cost to an individual will be the same as the economic

cost to a business, if the individual chooses to pay the license fee for the business. An economic impact statement and regulatory flexibility analysis is not required because the proposed amendments will have a de minimis economic effect on Texas small businesses or rural communities.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do require an increase in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do expand an existing regulation by establishing a new fee;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.6. Pharmacy License Fees.

(a) Initial License Fee. The fee for an initial license shall be $583 [~~$516~~] for the initial registration period.

(b) Biennial License Renewal. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacy licenses provided under the Act §561.002.

(c) Renewal Fee. The fee for biennial renewal of a pharmacy license shall be $580 [~~$513~~] for the renewal period.

(d) Fee for Change of Location/Name/Rank. The application fee for a change of name, location, or rank shall be $100. [~~Duplicate or Amended Certificates. The fee for issuance of a duplicate pharmacy license renewal certificate shall be $20. The fee for issuance of an amended pharmacy license renewal certificate shall be $100.~~]

(e) Remote Pharmacy Services Fee. The application fee for an initial or renewed certificate to provide remote pharmacy services under §291.121 of this title (relating to Remote Pharmacy Services) shall be:

(1) for a certificate to provide remote pharmacy services using automated pharmacy systems under §291.121(a) of this title: $100;

(2) for a certificate to provide remote pharmacy services using emergency medication kits under §291.121(b) of this title: $50;

(3) for a certificate to provide remote pharmacy services using telepharmacy systems under §291.121(c) of this title: $150; and

(4) for a certificate to provide remote pharmacy services using automated dispensing and delivery systems under §291.121(d) of this title: $100.

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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Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
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22 TAC §291.8

The Texas State Board of Pharmacy proposes amendments to §291.8, concerning Return of Prescription Drugs. The amendments, if adopted, update the name of a state agency.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.8. Return of Prescription Drugs.

(a) General prohibition on return of prescription drugs. A pharmacist may not accept an unused prescription or drug, in whole or in part, for the purpose of resale or re-dispensing to any person, after the prescription or drug has been originally dispensed or sold, except as provided in subsection (b) of this section or Subchapter M, Chapter 431, Health and Safety Code, or Chapter 442, Health and Safety Code.

(b) Return of prescription drugs from health care facilities.

(1) Purpose. The purpose of this subsection is to outline procedures for the return of unused drugs from a health care facility or a penal institution to a dispensing pharmacy as specified in the §562.1085 of the Occupations Code. Nothing in this section shall require a consultant pharmacist, health care facility, penal institution, or pharmacy to participate in the return of unused drugs.

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

(A) Consultant pharmacist--A pharmacist who practices in or serves as a consultant for a health care facility in this state.

(B) Health care facility--A facility regulated under Chapter 242, Health and Safety Code.

(C) Licensed health care professional--A person licensed by the Texas Medical Board, Texas Board of Nursing[~~Nurse Examiners~~], or the Texas State Board of Pharmacy.

(D) Penal institution--A place designated by law for confinement of persons arrested for, charged with, or convicted of an offense. A penal institution includes a city, county, or state jail or prison.

(3) Responsibilities. A licensed health care professional in a penal institution or a consultant pharmacist may return to a pharmacy certain unused drugs, other than a controlled substance as defined by Chapter 481, Health and Safety Code, purchased from the pharmacy.

(A) The unused drugs must:

(i) be approved by the federal Food and Drug Administration and be:

(I) sealed in unopened tamper-evident packaging and either individually packaged or packaged in unit-dose packaging;

(II) oral or parenteral medication in sealed single-dose containers approved by the federal Food and Drug Administration;

(III) topical or inhalant drugs in sealed unit-of-use containers approved by the federal Food and Drug Administration; or

(IV) parenteral medications in sealed multiple-dose containers approved by the federal Food and Drug Administration from which doses have not been withdrawn.

(ii) not be the subject of a mandatory recall by a state or federal agency or a voluntary recall by a drug seller or manufacturer; and

(iii) have not been in the physical possession of the person for whom it was prescribed.

(B) A healthcare facility or penal institution may not return any drug product that:

(i) has been compounded;

(ii) appears on inspection to be adulterated;

(iii) requires refrigeration; or

(iv) has less than 120 days until the expiration date or end of the shelf life.

(C) The consultant pharmacist or licensed health care professional in a penal institution shall be responsible for assuring an inventory of the drugs to be returned to a pharmacy is completed. The following information shall be included on this inventory:

(i) name and address of the facility or institution;

(ii) name and pharmacist license number of the consultant pharmacist or name and license number of the licensed health care professional;

(iii) date of return;

(iv) date the prescription was dispensed;

(v) unique identification number assigned to the prescription by the pharmacy;

(vi) name of dispensing pharmacy;

(vii) name, strength, and quantity of drug;

(viii) signature of consultant pharmacist or licensed healthcare professional responsible for the administration of drugs in a penal institution.

(D) The health care facility/penal institution shall send a copy of the inventory specified in subparagraph (C) of this paragraph to:

(i) the pharmacy with the drugs returned; and

(ii) the Health and Human Services Commission.

(4) Dispensing/Receiving pharmacy responsibilities. If a pharmacy accepts the return of unused drugs from a health care facility/penal institution, the following is applicable.

(A) A pharmacist employed by the pharmacy shall examine the drugs to ensure the integrity of the drug product.

(B) The pharmacy shall reimburse or credit the entity that paid for the drug including the state Medicaid program for an unused drug returned to the pharmacy. The pharmacy shall maintain a record of the credit or reimbursement containing the following information:

(i) name and address of the facility or institution which returned the drugs;

(ii) date and amount of the credit or reimbursement was issued;

(iii) name of the person or entity to whom the credit or reimbursement was issued;

(iv) date the prescription was dispensed;

(v) unique identification number assigned to the prescription by the pharmacy;

(vi) name, strength, and quantity of drug;

(vii) signature of the pharmacist responsible for issuing the credit.

(C) After the pharmacy has issued credit or reimbursement, the pharmacy may restock and re-dispense the unused drugs returned under this section.

(5) Limitation on Liability.

(A) A pharmacy that returns unused drugs and a manufacturer that accepts the unused drugs under §562.1085, Occupations Code, and the employees of the pharmacy or manufacturer are not liable for harm caused by the accepting, dispensing, or administering of drugs returned in strict compliance with §562.1085, Occupations Code, unless the harm is caused by:

(i) wilful or wanton acts of negligence;

(ii) conscious indifference or reckless disregard for the safety of others; or

(iii) intentional conduct.

(B) This section does not limit, or in any way affect or diminish, the liability of a drug seller or manufacturer under Chapter 82, Civil Practice and Remedies Code.

(C) This section does not apply if harm results from the failure to fully and completely comply with the requirements of §562.1085, Occupations Code.

(D) This section does not apply to a pharmacy or manufacturer that fails to comply with the insurance provisions of Chapter 84, Civil Practice and Remedies 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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Julie Spier, R.Ph.
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Texas State Board of Pharmacy
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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards. The amendments, if adopted, specify prepackaging and labeling requirements for a participating provider to dispense donated prescription drugs under Chapter 442, Health and Safety Code, in accordance with House Bill 4332.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation in order to be consistent with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures as specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply

for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(3) A Class A pharmacy which changes location and/or name shall notify the board as specified in §291.3 of this title.

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures as specified in §291.3 of this title.

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures as specified in §291.5 of this title (relating to Closing a Pharmacy).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of Subchapter C of this chapter (relating to Nuclear Pharmacy (Class B)), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(10) A Class A pharmacy shall not compound sterile preparations.

(11) A Class A pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(12) Class A pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Central Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall be:

(I) easily accessible to both patient and pharmacists and not allow patient access to prescription drugs; and

(II) designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs. The temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, service animals accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(G) If the pharmacy has flammable materials, the pharmacy shall have a designated area for the storage of flammable materials. Such area shall meet the requirements set by local and state fire laws.

(2) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key, combination or other mechanical or electronic means to prohibit unauthorized access when a pharmacist is not on-site except as provided in subparagraphs (C) and (D) of this paragraph and paragraph (3) of this subsection. The following is applicable:

(i) If the prescription department is closed at any time when the rest of the facility is open, the prescription department must be physically or electronically secured. The security may be accomplished by means such as floor to ceiling walls; walls, partitions, or barriers at least 9 feet 6 inches high; electronically monitored motion detectors; pull down sliders; or other systems or technologies that will secure the pharmacy from unauthorized entrance when the pharmacy is closed. Pharmacies licensed prior to June 1, 2009, shall be exempt from this provision unless the pharmacy changes location. Change of location shall include the relocation of the pharmacy within the licensed address. A pharmacy licensed prior to June 1, 2009 that files a change of ownership but does not change location shall be exempt from the provisions.

(ii) The pharmacy's key, combination, or other mechanical or electronic means of locking the pharmacy may not be duplicated without the authorization of the pharmacist-in-charge or owner.

(iii) At a minimum, the pharmacy must have a basic alarm system with off-site monitoring and perimeter and motion sensors. The pharmacy may have additional security by video surveillance camera systems.

(C) Prior to authorizing individuals to enter the prescription department, the pharmacist-in-charge or owner may designate persons who may enter the prescription department to perform functions, other than dispensing functions or prescription processing, documented by the pharmacist-in-charge including access to the prescription department by other pharmacists, pharmacy personnel and other individuals. The pharmacy must maintain written documentation of authorized individuals other than individuals employed by the pharmacy who accessed the prescription department when a pharmacist is not on-site.

(D) Only persons designated either by name or by title including such titles as "relief" or "floater" pharmacist, in writing by the pharmacist-in-charge may unlock the prescription department except in emergency situations. An additional key to or instructions on accessing the prescription department may be maintained in a secure location outside the prescription department for use during an emergency or as designated by the pharmacist-in-charge.

(E) Written policies and procedures for the pharmacy's security shall be developed and implemented by the pharmacist-in-charge and/or the owner of the pharmacy. Such policies and procedures may include quarterly audits of controlled substances commonly abused or diverted; perpetual inventories for the comparison of the receipt, dispensing, and distribution of controlled substances; monthly reports from the pharmacy's wholesaler(s) of controlled substances purchased by the pharmacy; opening and closing procedures; product storage and placement; and central management oversight.

(3) Temporary absence of pharmacist.

(A) On-site supervision by pharmacist.

(i) If a pharmacy is staffed by only one pharmacist, the pharmacist may leave the prescription department for short periods of time without closing the prescription department and removing pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and is immediately available;

(III) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department during his or her absence; and

(IV) a notice is posted which includes the following information:

(-a-) the pharmacist is on a break and the time the pharmacist will return; and

(-b-) pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist's absence, but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (e.g., counting tablets/capsules, measuring liquids, or placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container;

(VI) prepackaging and labeling prepackaged drugs;

(VII) receiving oral prescription drug orders for dangerous drugs and reducing these orders to writing, either manually or electronically;

(VIII) transferring or receiving a transfer of original prescription information for dangerous drugs on behalf of a patient; and

(IX) contacting a prescriber for information regarding an existing prescription for a dangerous drug.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(II) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(B) Pharmacist is off-site.

(i) The prescription department must be secured with procedures for entry during the time that a pharmacy is not under the continuous on-site supervision of a pharmacist and the pharmacy is not open for pharmacy services.

(ii) Pharmacy technicians and pharmacy technician trainees may not perform any duties of a pharmacy technician or pharmacy technician trainee during the time that the pharmacist is off-site.

(iii) A pharmacy may use an automated dispensing and delivery system as specified in §291.121(d) of this title for pick-up of a previously verified prescription by a patient or patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to a patient or patient's agent during short periods of time when a pharmacist is off-site, provided the following conditions are met:

(I) short periods of time may not exceed two consecutive hours in a 24 hour period;

(II) a notice is posted which includes the following information:

(-a-) the pharmacist is off-site and not present in the pharmacy;

(-b-) no new prescriptions may be prepared at the pharmacy but previously verified prescriptions may be delivered to the patient or the patient's agent; and

(-c-) the date/time when the pharmacist will return;

(III) the pharmacy must maintain documentation of the absences of the pharmacist(s); and

(IV) the prescription department is locked and secured to prohibit unauthorized entry.

(v) During the time a pharmacist is absent from the prescription department and is off-site, a record of prescriptions delivered must be maintained and contain the following information:

(I) date and time of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(vi) Any prescription delivered to a patient when a pharmacist is not on-site at the pharmacy must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self-monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication shall be:

(i) provided to new and existing patients of a pharmacy with each new prescription drug order. A new prescription drug order is one that has not been dispensed by the pharmacy to the patient in the same dosage and strength within the last year;

(ii) provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) communicated orally unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication;

(iv) documented by recording the initials or identification code of the pharmacist providing the counseling in the prescription dispensing record as follows:

(I) on the original hard-copy prescription, provided the counseling pharmacist clearly records his or her initials on the prescription for the purpose of identifying who provided the counseling;

(II) in the pharmacy's data processing system;

(III) in an electronic logbook; or

(IV) in a hard-copy log; and

(v) reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information:

(I) Written information must be in plain language designed for the patient and printed in an easily readable font size comparable to but no smaller than ten-point Times Roman. This information may be provided to the patient in an electronic format, such as by e-mail, if the patient or patient's agent requests the information in an electronic format and the pharmacy documents the request.

(II) When a compounded preparation is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(IV) The written information accompanying the prescription or the prescription label shall contain the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel and/or the pharmacy's computer system may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable:

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(3) of this section.

(ii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable:

(i) The information as specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and, if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to ensure that the drugs are delivered to the appropriate patient.

(G) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences as specified in subparagraph (C) of this paragraph.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic database from outside the pharmacy by:

(I) an individual Texas licensed pharmacist employee of the pharmacy provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records; or

(II) a pharmacist employed by a Class E pharmacy provided the pharmacies have entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations.

(iv) Prior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained as specified in subparagraph (C) of this paragraph.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(C) Documentation of consultation. When a pharmacist consults a prescriber as described in subparagraph (A) of this paragraph, the pharmacist shall document on the prescription or in the pharmacy's data processing system associated with the prescription such occurrences and shall include the following information:

(i) date the prescriber was consulted;

(ii) name of the person communicating the prescriber's instructions;

(iii) any applicable information pertaining to the consultation; and

(iv) initials or identification code of the pharmacist performing the consultation clearly recorded for the purpose of identifying the pharmacist who performed the consultation.

(3) Substitution of generically equivalent drugs or interchangeable biological products. A pharmacist may dispense a generically equivalent drug or interchangeable biological product and shall comply with the provisions of §309.3 of this title (relating to Substitution Requirements).

(4) Substitution of dosage form.

(A) As specified in §562.012 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution; and

(ii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product; and

(III) does not alter desired clinical outcomes.

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery of, the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(C) The provisions of this paragraph do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of this state if the practitioner issuing the prescription has agreed to use of a formulary that includes a listing of therapeutic interchanges that the practitioner has agreed to allow. The pharmacy must maintain a copy of the formulary including a list of the practitioners that have agreed to the formulary and the signatures of these practitioners.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be re-used. However, if a patient or patient's agent has difficulty reading or understanding a prescription label, a prescription container may be reused provided:

(i) the container is designed to provide audio-recorded information about the proper use of the prescription medication;

(ii) the container is reused for the same patient;

(iii) the container is cleaned; and

(iv) a new safety closure is used each time the prescription container is reused.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) if the prescription was signed by a pharmacist, the name of the pharmacist who signed the prescription for a dangerous drug under delegated authority of a physician as specified in Subtitle B, Chapter 157, Occupations Code;

(vii) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman. The name of the patient's partner or family member is not required to be on the label of a drug prescribed for a partner for a sexually transmitted disease or for a patient's family members if the patient has an illness determined by the Centers for Disease Control and Prevention, the World Health Organization, or the Governor's office to be pandemic;

(viii) instructions for use that are printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(ix) quantity dispensed;

(x) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(xi) if the prescription is for a Schedule II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xii) if the pharmacist has selected a generically equivalent drug or interchangeable biological product pursuant to the provisions of the Act, Chapter 562, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xiii) the name and strength of the actual drug or biological product dispensed that is printed in an easily readable size comparable to but no smaller than ten-point Times Roman, unless otherwise directed by the prescribing practitioner;

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic drug or interchangeable biological product name and name of the manufacturer or distributor of such generic drug or interchangeable biological product. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug preparations having no brand name, the principal active ingredients shall be indicated on the label).

(II) Except as provided in clause (xii) of this subparagraph, the brand name of the prescribed drug or biological product shall not appear on the prescription container label unless it is the drug product actually dispensed.

(xiv) if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xv) either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(B) If the prescription label required in subparagraph (A) of this paragraph is printed in a type size smaller than ten-point Times Roman, the pharmacy shall provide the patient written information containing the information as specified in subparagraph (A) of this paragraph in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(C) The label is not required to include the initials or identification code of the dispensing pharmacist as specified in subparagraph (A) of this paragraph if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(D) The dispensing container is not required to bear the label as specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 90-day supply is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient; and

(-e-) name of the prescribing practitioner or, if applicable, the name of the pharmacist who signed the prescription drug order;

(II) if the drug is dispensed in a container other than the manufacturer's original container, specifies the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(8) Returning Undelivered Medication to Stock.

(A) A pharmacist may not accept an unused prescription or drug, in whole or in part, for the purpose of resale or re-dispensing to any person after the prescription or drug has been originally dispensed or sold, except as provided in §291.8 of this title (relating to Return of Prescription Drugs) or Subchapter M, Chapter 431, Health and Safety Code, or Chapter 442, Health and Safety Code. Prescriptions that have not been picked up by or delivered to the patient or patient's agent may be returned to the pharmacy's stock for dispensing.

(B) A pharmacist shall evaluate the quality and safety of the prescriptions to be returned to stock.

(C) Prescriptions returned to stock for dispensing shall not be mixed within the manufacturer's container.

(D) Prescriptions returned to stock for dispensing should be used as soon as possible and stored in the dispensing container. The expiration date of the medication shall be the lesser of one year from the dispensing date on the prescription label or the manufacturer's expiration date if dispensed in the manufacturer's original container.

(E) At the time of dispensing, the prescription medication shall be placed in a new prescription container and not dispensed in the previously labeled container unless the label can be completely removed. However, if the medication is in the manufacturer's original container, the pharmacy label must be removed so that no confidential patient information is released.

(9) Redistribution of Donated Prepackaged Prescription Drugs.

(A) A participating provider may dispense to a recipient donated prescription drugs that are prepackaged and labeled in accordance with §442.0515, Health and Safety Code, and this paragraph.

(B) Drugs may be prepackaged in quantities suitable for distribution to a recipient only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(C) The label of a prepackaged prescription drug a participating provider dispenses to a recipient shall indicate:

(i) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(ii) facility's lot number;

(iii) facility's beyond use date; and

(iv) quantity of the drug, if the quantity is greater than one.

(D) Records of prepackaging shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) facility's lot number;

(iii) manufacturer or distributor;

(iv) manufacturer's lot number;

(v) manufacturer's expiration date;

(vi) quantity per prepackaged unit;

(vii) number of prepackaged units;

(viii) date packaged;

(ix) name, initials, or electronic signature of the prepacker; and

(x) signature, or electronic signature of the responsible pharmacist.

(E) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(d) Equipment and supplies. Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(1) data processing system including a printer or comparable equipment;

(2) refrigerator;

(3) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(4) adequate supply of prescription, poison, and other applicable labels;

(5) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(6) metric-apothecary weight and measure conversion charts.

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(2) at least one current or updated reference from each of the following categories:

(A) a patient prescription drug information reference text or leaflets which are designed for the patient and must be available to the patient;

(B) at least one current or updated general drug information reference which is required to contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken; and

(C) if the pharmacy dispenses veterinary prescriptions, a general reference text on veterinary drugs; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined in the USP/NF and §291.15 of this title (relating to Storage of Drugs).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) facility's beyond use date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) manufacturer's expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the name, address, and telephone number of the pharmacy;

(ix) the initials or an identification code of the dispensing pharmacist;

(x) the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a

product contained in the med-pak if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication;

(xi) either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement; and

(xii) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label as specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 90-day supply is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) name and strength of each drug product dispensed;

(-c-) name of the patient; and

(-d-) name of the prescribing practitioner of each drug product, or the pharmacist who signed the prescription drug order;

(II) the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pak if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) for each drug product sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(3) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(4) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(5) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each container, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(6) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(7) The patient med-pak label is not required to include the initials or identification code of the dispensing pharmacist as specified in paragraph (2)(A) of this subsection if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(i) Automated devices and systems in a pharmacy.

(1) Automated counting devices. If a pharmacy uses automated counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk drugs only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist;

(C) the label of an automated counting device container containing a bulk drug shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk drugs into an automated counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated counting device; and

(vii) name, initials, or electronic signature of the responsible pharmacist; and

(E) the automated counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her name, initials, or electronic signature to the record as specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Automated pharmacy dispensing systems may be stocked or loaded by a pharmacist or by a pharmacy technician or pharmacy technician trainee under the supervision of a pharmacist.

(C) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a quality assurance program of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every twelve months and whenever any upgrade or change is made to the system and documents each such activity.

(D) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall:

(I) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(II) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(III) require that a pharmacist checks, verifies, and documents that the correct medication and strength of bulk drugs, prepackaged containers, or manufacturer's unit of use packages were properly stocked, filled, and loaded in the automated pharmacy dispensing system prior to initiating the fill process; alternatively, an electronic verification system may be used for verification of manufacturer's unit of use packages or prepacked medication previously verified by a pharmacist;

(IV) provide for an accountability record to be maintained that documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(V) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VI) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy that uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(E) Recovery Plan. A pharmacy that uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime; and

(iii) procedures for the maintenance and testing of the written plan for recovery.

(F) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(c)(2)(D) of this title (relating to Personnel), a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(i) This final check shall be considered accomplished if:

(I) a check of the final product is conducted by a pharmacist after the automated pharmacy dispensing system has completed the prescription and prior to delivery to the patient; or

(II) the following checks are conducted:

(-a-) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked as specified in subparagraph (D)(i)(III) of this paragraph;

(-b-) if the automated pharmacy dispensing system contains manufacturer's unit of use packages or prepackaged medication previously verified by a pharmacist, an electronic verification system has confirmed that the medications have been accurately stocked as specified in subparagraph (D)(i)(III) of this paragraph;

(-c-) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system; and

(-d-) an electronic verification process is used to verify the proper prescription label has been affixed to the correct medication container, prepackaged medication or manufacturer unit of use package for the correct patient.

(ii) If the final check is accomplished as specified in clause (i)(II) of this subparagraph, the following additional requirements must be met:

(I) the dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated pharmacy dispensing system until a completed, labeled prescription ready for delivery to the patient is produced;

(II) the pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in subparagraph (C) of this paragraph;

(III) the automated pharmacy dispensing system documents and maintains:

(-a-) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in clause (i)(II) of this subparagraph; and

(-b-) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs any other portion of the dispensing process; and

(IV) the pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every twelve months as specified in subparagraph (C) of this paragraph.

(3) Automated checking device.

(A) For the purpose of §291.32(c)(2)(D) of this title, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed:

(i) the drug used to fill the order is checked through the use of an automated checking device which verifies that the drug is labeled and packaged accurately; and

(ii) a pharmacist checks the accuracy of each original or new prescription drug order and is responsible for the final check of the order through the automated checking device.

(B) If the final check is accomplished as specified in subparagraph (A) of this paragraph, the following additional requirements must be met:

(i) the pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient;

(ii) the pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs any other portion of the dispensing process;

(iii) the pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly; and

(iv) the pharmacy establishes procedures to ensure that errors identified by the automated checking device may not be overridden by a pharmacy technician and must be reviewed and corrected by a pharmacist.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303330
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74

The Texas State Board of Pharmacy proposes amendments to §291.74, concerning Operational Standards. The amendments, if adopted re-insert rule text that was inadvertently removed and make grammatical corrections.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clear, consistent, and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.74. Operational Standards.

(a) Licensing requirements.

(1) A Class C pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class C pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(3) A Class C pharmacy which changes location and/or name shall notify the board of the change as specified in §291.3 of this title.

(4) A Class C pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change following the procedures in §291.3 of this title.

(5) A Class C pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(6) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(7) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(8) A Class C pharmacy, licensed under the Act, §560.051(a)(3), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1) (Community Pharmacy (Class A)) or the Act, §560.051(a)(2) (Nuclear Pharmacy (Class B)), is not required to secure a license for the such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Records), contained in Community Pharmacy (Class A), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class C pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-sterile Preparations).

(10) Class C pharmacy personnel shall not compound sterile preparations unless the pharmacy has applied for and obtained a Class C-S pharmacy.

(11) A Class C pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(12) A Class C pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Central Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(13) A Class C pharmacy with an ongoing clinical pharmacy program that proposes to allow a pharmacy technician to verify the accuracy of work performed by another pharmacy technician relating to the filling of floor stock and unit dose distribution systems for a patient admitted to the hospital if the patient's orders have previously been reviewed and approved by a pharmacist shall make application to the board and submit any information specified on the application.

(14) A rural hospital that wishes to allow a pharmacy technician to perform the duties specified in §291.73(e)(2)(D) of this title (relating to Personnel), shall make application to the board and submit any information specified on the application.

(A) A rural hospital may not allow a pharmacy technician to perform the duties specified in §291.73(e)(2)(D) of this title until the board has reviewed and approved the application and issued an amended license to the pharmacy.

(B) Every two years, in conjunction with the application for renewal of the pharmacy license, the pharmacist-in-charge shall update the application for pharmacy technicians to perform the duties specified in §291.73(e)(2)(D) of this title and shall attest as required on the application.

(b) Environment.

(1) General requirements.

(A) The institutional pharmacy shall have adequate space necessary for the storage, compounding, labeling, dispensing, and sterile preparation of drugs prepared in the pharmacy, and additional space, depending on the size and scope of pharmaceutical services.

(B) The institutional pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(C) A sink with hot and cold running water exclusive of restroom facilities shall be available to all pharmacy personnel and shall be maintained in a sanitary condition at all times.

(D) The institutional pharmacy shall be properly lighted and ventilated.

(E) The temperature of the institutional pharmacy shall be maintained within a range compatible with the proper storage of

drugs. The temperature of the refrigerator and/or freezer shall be maintained within a range compatible with the proper storage of drugs.

(F) If the institutional pharmacy has flammable materials, the pharmacy shall have a designated area for the storage of flammable materials. Such area shall meet the requirements set by local and state fire laws.

(G) The institutional pharmacy shall store antiseptics, other drugs for external use, and disinfectants separately from internal and injectable medications.

(2) Security requirements.

(A) The institutional pharmacy shall be enclosed and capable of being locked by key, combination or other mechanical or electronic means, so as to prohibit access by unauthorized individuals. Only individuals authorized by the pharmacist-in-charge shall enter the pharmacy.

(B) Each pharmacist on duty shall be responsible for the security of the institutional pharmacy, including provisions for adequate safeguards against theft or diversion of dangerous drugs, controlled substances, and records for such drugs.

(C) The institutional pharmacy shall have locked storage for Schedule II controlled substances and other drugs requiring additional security.

(c) Equipment and supplies. Institutional pharmacies distributing medication orders shall have the following equipment:

(1) data processing system including a printer or comparable equipment; and

(2) refrigerator and/or freezer and a system or device (e.g., thermometer) to monitor the temperature to ensure that proper storage requirements are met.

(d) Library. A reference library shall be maintained that includes the following in hard-copy or electronic format and that pharmacy personnel shall be capable of accessing at all times:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and regulations; and

(D) Federal Controlled Substances Act and regulations (or official publication describing the requirements of the Federal Controlled Substances Act and regulations);

(2) at least one current or updated reference from each of the following categories:

(A) drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(B) a general information reference text;

(3) a current or updated reference on injectable drug products;

(4) basic antidote information and the telephone number of the nearest regional poison control center;

(5) metric-apothecary weight and measure conversion charts.

(e) Absence of a pharmacist.

(1) Medication orders.

(A) In facilities with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable:

(i) Prescription drugs and devices only in sufficient quantities for immediate therapeutic needs may be removed from the institutional pharmacy;

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices;

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity taken;

(V) time and date; and

(VI) signature (first initial and last name or full signature) or electronic signature of person making withdrawal;

(iv) The original or direct copy of the medication order may substitute for such record, providing the medication order meets all the requirements of clause (iii) of this subparagraph; and

(v) The pharmacist shall verify the withdrawal of drugs from the pharmacy and perform a drug regimen review as specified in subsection (g)(1)(B) of this section as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(B) In facilities with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable:

(i) Prescription drugs and devices only in sufficient quantities for therapeutic needs may be removed from the institutional pharmacy;

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices;

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices; the record shall meet the same requirements as specified in subparagraph (A)(iii) and (iv) of this paragraph;

(iv) The pharmacist shall verify the withdrawal of drugs from the pharmacy after a reasonable interval, but in no event may such interval exceed seven days; and

(v) The pharmacist shall perform a drug regimen review as specified in subsection (g)(1)(B) of this section as follows:

(I) If the facility has an average daily inpatient census of ten or less, the pharmacist shall perform the drug review after a reasonable interval, but in no event may such interval exceed seven (7) days; or

(II) If the facility has an average inpatient daily census above ten, the pharmacist shall perform the drug review after a reasonable interval, but in no event may such interval exceed 96 hours.

(vi) The average daily inpatient census shall be calculated by hospitals annually immediately following the submission of the hospital's Medicare Cost Report and the number used for purposes of subparagraph (B)(v)(I) and (II) of this paragraph shall be the average of the inpatient daily census in the report and the previous two reports for a three year period.

(2) Floor stock. In facilities using a floor stock method of drug distribution, the following is applicable:

(A) Prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container.

(B) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(C) A record shall be made at the time of withdrawal by the authorized person removing the drug or device; the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature (first initial and last name or full signature) or electronic signature of person making the withdrawal.

(D) The pharmacist shall verify the withdrawal of drugs from the pharmacy after a reasonable interval, but in no event may such interval exceed seven days.

(3) Rural hospitals. In rural hospitals when a pharmacy technician performs the duties listed in §291.73(e)(2)(D) of this title, the following is applicable:

(A) the pharmacy technician shall make a record of all drugs distributed from the pharmacy. The record shall be maintained in the pharmacy for two years and contain the following information:

(i) name of patient or location where floor stock is distributed;

(ii) name of device or drug, strength, and dosage form;

(iii) dose prescribed or ordered;

(iv) quantity distributed;

(v) time and date of the distribution; and

(vi) signature (first initial and last name or full signature) or electronic signature of nurse or practitioner that verified the actions of the pharmacy technician.

(B) The original or direct copy of the medication order may substitute for the record specified in subparagraph (A) of this paragraph, provided the medication order meets all the requirements of subparagraph (A) of this paragraph.

(C) The pharmacist shall:

(i) verify and document the verification of all distributions made from the pharmacy in the absence of a pharmacist as soon as practical, but in no event more than seven (7) days from the time of such distribution;

(ii) perform a drug regimen review for all medication orders as specified in subsection (g)(1)(B) of this section and document such verification including any discrepancies noted by the pharmacist as follows:

(I) If the facility has an average daily inpatient census of ten or less, the pharmacist shall perform the drug review as soon as practical, but in no event more than seven (7) days from the time of such distribution; or

(II) If the facility has an average daily inpatient census above ten, the pharmacist shall perform the drug review after a reasonable interval, but in no event may such interval exceed 96 hours;

(iii) review any discrepancy noted by the pharmacist with the pharmacy technician(s) and make any change in procedures or processes necessary to prevent future problems; and

(iv) report any adverse events that have a potential for harm to a patient to the appropriate committee of the hospital that reviews adverse events.

(D) The average daily inpatient census shall be calculated by hospitals annually immediately following the submission of the hospital's Medicare Cost Report and the number used for purposes of subparagraph (C)(ii)(I) and (II) of this paragraph shall be the average of the inpatient daily census in the report and the previous two reports for a three year period.

(f) Drugs.

(1) Procurement, preparation and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(B) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(C) Institutional pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(D) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(E) Any drug bearing an expiration date may not be distributed beyond the expiration date of the drug.

(F) Outdated and other unusable drugs shall be removed from stock and shall be quarantined together until such drugs are disposed of properly.

(2) Formulary.

(A) A formulary shall be developed by the facility committee performing the pharmacy and therapeutics function for the facility. For the purpose of this section, a formulary is a compilation of pharmaceuticals that reflects the current clinical judgment of a facility's medical staff.

(B) The pharmacist-in-charge or pharmacist designated by the pharmacist-in-charge shall be a full voting member of the committee performing the pharmacy and therapeutics function for the facility, when such committee is performing the pharmacy and therapeutics function.

(C) A practitioner may grant approval for pharmacists at the facility to interchange, in accordance with the facility's formulary, for the prescribed drugs on the practitioner's medication orders provided:

(i) the pharmacy and therapeutics committee has developed a formulary;

(ii) the formulary has been approved by the medical staff committee of the facility;

(iii) there is a reasonable method for the practitioner to override any interchange; and

(iv) the practitioner authorizes pharmacists in the facility to interchange on his/her medication orders in accordance with the facility's formulary through his/her written agreement to abide by the policies and procedures of the medical staff and facility.

(3) Prepackaging of drugs.

(A) Distribution within a facility.

(i) Drugs may be prepackaged in quantities suitable for internal distribution by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(ii) The label of a prepackaged unit shall indicate:

(I) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(II) facility's unique lot number;

(III) expiration date based on currently available literature; and

(IV) quantity of the drug, if the quantity is greater than one.

(iii) Records of prepackaging shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) facility's unique lot number;

(III) manufacturer or distributor;

(IV) manufacturer's lot number;

(V) expiration date;

(VI) quantity per prepackaged unit;

(VII) number of prepackaged units;

(VIII) date packaged;

(IX) name, initials, or electronic signature of the prepacker; and

(X) name, initials, or electronic signature of the responsible pharmacist.

(iv) Stock packages, prepackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(B) Distribution to other Class C (Institutional) pharmacies under common ownership.

(i) Drugs may be prepackaged in quantities suitable for distribution to other Class C (Institutional) pharmacies under common ownership by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(ii) The label of a prepackaged unit shall indicate:

(I) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(II) facility's unique lot number;

(III) expiration date based on currently available literature;

(IV) quantity of the drug, if the quantity is greater than one; and

(V) name of the facility responsible for prepackaging the drug.

(iii) Records of prepackaging shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) facility's unique lot number;

(III) manufacturer or distributor;

(IV) manufacturer's lot number;

(V) expiration date;

(VI) quantity per prepackaged unit;

(VII) number of prepackaged units;

(VIII) date packaged;

(IX) name, initials, or electronic signature of the prepacker;

(X) name, initials, or electronic signature of the responsible pharmacist; and

(XI) name of the facility receiving the prepackaged drug.

(iv) Stock packages, prepackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(v) The pharmacy shall have written procedure for the recall of any drug prepackaged for another Class C pharmacy [~~Pharmacy~~] under common ownership. The recall procedures shall require:

(I) notification to the pharmacy to which the prepackaged drug was distributed;

(II) quarantine of the product if there is a suspicion of harm to a patient;

(III) a mandatory recall if there is confirmed or probable harm to a patient; and

(IV) notification to the board if a mandatory recall is instituted.

(4) Sterile preparations prepared in a location other than the pharmacy. A distinctive supplementary label shall be affixed to the container of any admixture. The label shall bear at a minimum:

(A) patient's name and location, if not immediately administered;

(B) name and amount of drug(s) added;

(C) name of the basic solution;

(D) name or identifying code of person who prepared admixture; and

(E) expiration date of solution.

(5) Distribution.

(A) Medication orders.

(i) Drugs may be given to patients in facilities only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner in compliance with paragraph (2)(C) of this subsection.

(ii) Drugs may be distributed only from the original or a direct copy of the practitioner's medication order.

(iii) Pharmacy technicians and pharmacy technician trainees may not receive oral medication orders.

(iv) Institutional pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(B) Procedures.

(i) Written policies and procedures for a drug distribution system (best suited for the particular institutional pharmacy) shall be developed and implemented by the pharmacist-in-charge, with the advice of the committee performing the pharmacy and therapeutics function for the facility.

(ii) The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(I) pharmaceutical care services;

(II) handling, storage and disposal of cytotoxic drugs and waste;

(III) disposal of unusable drugs and supplies;

(IV) security;

(V) equipment;

(VI) sanitation;

(VII) reference materials;

(VIII) drug selection and procurement;

(IX) drug storage;

(X) controlled substances;

(XI) investigational drugs, including the obtaining of protocols from the principal investigator;

(XII) prepackaging and manufacturing;

(XIII) stop orders;

(XIV) reporting of medication errors, adverse drug reactions/events, and drug product defects;

(XV) physician orders;

(XVI) floor stocks;

(XVII) drugs brought into the facility;

(XVIII) furlough medications;

(XIX) self-administration;

(XX) emergency drug supply;

(XXI) formulary;

(XXII) monthly inspections of nursing stations and other areas where drugs are stored, distributed, administered or dispensed;

(XXIII) control of drug samples;

(XXIV) outdated and other unusable drugs;

(XXV) routine distribution of patient medication;

(XXVI) preparation and distribution of sterile preparations;

(XXVII) handling of medication orders when a pharmacist is not on duty;

(XXVIII) use of automated compounding or counting devices;

(XXIX) use of data processing and direct imaging systems;

(XXX) drug administration to include infusion devices and drug delivery systems;

(XXXI) drug labeling;

(XXXII) recordkeeping;

(XXXIII) quality assurance/quality control;

(XXXIV) duties and education and training of professional and nonprofessional staff;

(XXXV) procedures for a pharmacy technician to verify the accuracy of work performed by another pharmacy technician, if applicable;

(XXXVI) operation of the pharmacy when a pharmacist in not on-site; and

(XXXVII) emergency preparedness plan, to include continuity of patient therapy and public safety.

(6) Discharge Prescriptions. Discharge prescriptions must be dispensed and labeled in accordance with §291.33 of this title (relating to Operational Standards) except that certain medications packaged in unit-of-use containers, such as metered-dose inhalers, insulin pens, topical creams or ointments, or ophthalmic or otic preparation that are administered to the patient during the time the patient was a patient in the hospital, may be provided to the patient upon discharge provided the pharmacy receives a discharge order and the product bears a label containing the following information:

(A) name of the patient;

(B) name and strength of the medication;

(C) name of the prescribing or attending practitioner;

(D) directions for use;

(E) duration of therapy (if applicable); and

(F) name and telephone number of the pharmacy.

(g) Pharmaceutical care services.

(1) The pharmacist-in-charge shall assure that at least the following pharmaceutical care services are provided to patients of the facility:

(A) Drug utilization review. A systematic ongoing process of drug utilization review shall be developed in conjunction

with the medical staff to increase the probability of desired patient outcomes and decrease the probability of undesired outcomes from drug therapy.

(B) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall evaluate medication orders and patient medication records for:

(I) known allergies;

(II) rational therapy--contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions;

(X) proper utilization, including overutilization or underutilization; and

(XI) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(ii) The drug regimen review shall be conducted on a prospective basis when a pharmacist is on duty, except for an emergency order, and on a retrospective basis as specified in subsection (e)(1) or (e)(3) of this section when a pharmacist is not on duty.

(iii) Any questions regarding the order must be resolved with the prescriber and a written notation of these discussions made and maintained.

(iv) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(C) Education. The pharmacist-in-charge in cooperation with appropriate multi-disciplinary staff of the facility shall develop policies that assure that:

(i) the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use; and

(ii) health care providers are provided with patient specific drug information.

(D) Patient monitoring. The pharmacist-in-charge in cooperation with appropriate multi-disciplinary staff of the facility shall develop policies to ensure that the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider.

(2) Other pharmaceutical care services which may be provided by pharmacists in the facility include, but are not limited to, the following:

(A) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(B) administering immunizations and vaccinations under written protocol of a physician;

(C) managing patient compliance programs;

(D) providing preventative health care services; and

(E) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(h) Emergency rooms.

(1) During the times a pharmacist is on duty in the facility any prescription drugs supplied to an outpatient, including emergency department patients, may only be dispensed by a pharmacist.

(2) When a pharmacist is not on duty in the facility, the following is applicable for supplying prescription drugs to be taken home by the patient for self-administration from the emergency room. If the patient has been admitted to the emergency room and assessed by a practitioner at the hospital, the following procedures shall be observed in supplying prescription drugs from the emergency room.

(A) Dangerous drugs and/or controlled substances may only be supplied in accordance with the system of control and accountability for dangerous drugs and/or controlled substances administered or supplied from the emergency room; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(B) Only dangerous drugs and/or controlled substances listed on the emergency room drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the facility's emergency department committee (or like group or person responsible for policy in that department) and shall consist of dangerous drugs and/or controlled substances of the nature and type to meet the immediate needs of emergency room patients.

(C) Dangerous drugs and/or controlled substances may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the institutional pharmacy.

(D) At the time of delivery of the dangerous drugs and/or controlled substances, the practitioner or licensed nurse under the supervision of a practitioner shall appropriately complete the label with at least the following information:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the dangerous drug or controlled substance; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug or controlled substance;

(vii) quantity supplied; and

(viii) unique identification number.

(E) The practitioner, or a licensed nurse under the supervision of the practitioner, shall give the appropriately labeled, prepackaged drug to the patient and explain the correct use of the drug.

(F) A perpetual record of dangerous drugs and/or controlled substances supplied from the emergency room shall be maintained in the emergency room. Such record shall include the following:

(i) date supplied;

(ii) practitioner's name;

(iii) patient's name;

(iv) brand name and strength of the dangerous drug or controlled substance; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug or controlled substance;

(v) quantity supplied; and

(vi) unique identification number.

(G) The pharmacist-in-charge, or staff pharmacist designated by the pharmacist-in-charge, shall verify the correctness of this record at least once every seven days.

(i) Radiology departments.

(1) During the times a pharmacist is on duty, any prescription drugs dispensed to an outpatient, including radiology department patients, may only be dispensed by a pharmacist.

(2) When a pharmacist is not on duty, the following procedures shall be observed in supplying prescription drugs from the radiology department.

(A) Prescription drugs may only be supplied to patients who have been scheduled for an x-ray examination at the facility.

(B) Prescription drugs may only be supplied in accordance with the system of control and accountability for prescription drugs administered or supplied from the radiology department and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only prescription drugs listed on the radiology drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the facility's radiology committee (or like group or persons responsible for policy in that department) and shall consist of drugs for the preparation of a patient for a radiological procedure.

(D) Prescription drugs may only be supplied in prepackaged quantities in suitable containers and prelabeled by the institutional pharmacy with the following information:

(i) name and address of the facility;

(ii) directions for use;

(iii) name and strength of the prescription drug--if generic name, the name of the manufacturer or distributor of the prescription drug;

(iv) quantity;

(v) facility's lot number and expiration date; and

(vi) appropriate ancillary label(s).

(E) At the time of delivery of the prescription drug, the practitioner or practitioner's agent shall complete the label with the following information:

(i) date supplied;

(ii) name of physician;

(iii) name of patient; and

(iv) unique identification number.

(F) The practitioner or practitioner's agent shall give the appropriately labeled, prepackaged prescription drug to the patient.

(G) A perpetual record of prescription drugs supplied from the radiology department shall be maintained in the radiology department. Such records shall include the following:

(i) date supplied;

(ii) practitioner's name;

(iii) patient's name;

(iv) brand name and strength of the prescription drug; or if no brand name, then the generic name, strength, dosage form, and the name of the manufacturer or distributor of the prescription drug;

(v) quantity supplied; and

(vi) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall verify the correctness of this record at least once every seven days.

(j) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with unlabeled drugs only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated medication supply systems.

(A) Authority to use automated medication supply systems. A pharmacy may use an automated medication supply system to fill medication orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated medication supply system has been tested by the pharmacy and found to dispense accurately. The

pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated medication supply system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated medication supply system to fill medication orders shall operate according to a written program for quality assurance of the automated medication supply system which:

(i) requires continuous monitoring of the automated medication supply system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated medication supply system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated medication supply system is used to store or distribute medications for administration pursuant to medication orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated medication supply system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review and approval of each original or new medication order prior to withdrawal from the automated medication supply system:

(-a-) before the order is filled when a pharmacist is on duty except for an emergency order;

(-b-) retrospectively within 72 hours in a facility with a full-time pharmacist when a pharmacist is not on duty at the time the order is made; or

(-c-) retrospectively within 7 days in a facility with a part-time or consultant pharmacist when a pharmacist is not on duty at the time the order is made;

(III) provide for access to the automated medication supply system for stocking and retrieval of medications which is limited to licensed healthcare professionals, pharmacy technicians, or pharmacy technician trainees acting under the supervision of a pharmacist;

(IV) provide that a pharmacist is responsible for the accuracy of the restocking of the system. The actual restocking may be performed by a pharmacy technician or pharmacy technician trainee;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated medication supply system;

(VI) require a prospective or retrospective drug regimen review is conducted as specified in subsection (g) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated medication supply system.

(ii) A pharmacy which uses an automated medication supply system to fill medication orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Automated medication supply systems used for storage and recordkeeping of medications located outside of the pharmacy department (e.g., Pyxis). A pharmacy technician or pharmacy technician trainee may restock an automated medication supply system located outside of the pharmacy department with prescription drugs provided:

(i) prior to distribution of the prescription drugs a pharmacist verifies that the prescription drugs pulled to stock the automated supply system match the list of prescription drugs generated by the automated medication supply system except as specified in §291.73(e)(2)(C)(ii) of this title; or

(ii) all of the following occur:

(I) the prescription drugs to restock the system are labeled and verified with a machine readable product identifier, such as a barcode;

(II) either:

(-a-) the drugs are in tamper evident product packaging, packaged by an FDA registered repackager or manufacturer, that is shipped to the pharmacy; or

(-b-) if any manipulation of the product occurs in the pharmacy prior to restocking, such as repackaging or extemporaneous compounding, the product must be checked by a pharmacist; and

(III) quality assurance audits are conducted according to established policies and procedures to ensure accuracy of the process.

(E) Recovery Plan. A pharmacy which uses an automated medication supply system to store or distribute medications for administration pursuant to medication orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated medication supply system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated medication supply system is experiencing downtime;

(ii) procedures for response when an automated medication supply system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board and other appropriate agencies whenever an automated medication supply system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Verification of medication orders prepared by the pharmacy department through the use of an automated medication supply system. A pharmacist must check drugs prepared pursuant to medication orders to ensure that the drug is prepared for distribution accurately as prescribed. This paragraph does not apply to automated medication supply systems used for storage and recordkeeping of medications located outside of the pharmacy department.

(A) This check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed preparation of the medication order and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated medication supply system contains unlabeled stock drugs, a pharmacist verifies that those drugs have been accurately stocked; and

(II) a pharmacist checks the accuracy of the data entry of each original or new medication order entered into the automated medication supply system before the order is filled.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The medication order preparation process must be fully automated from the time the pharmacist releases the medication order to the automated system until a completed medication order, ready for delivery to the patient, is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated medication supply system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated medication supply system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician or pharmacy technician trainee who performs any other portion of the medication order preparation process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated medication supply system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after a drug is prepared for distribution but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) The final check of a drug prepared pursuant to a medication order shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new medication order.

(ii) the medication order is prepared, labeled, and made ready for delivery to the patient in compliance with Class C (Institutional) pharmacy [~~Pharmacy~~] rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the medication order has been prepared safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs any other portion of the medication order preparation process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303331
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.121

The Texas State Board of Pharmacy proposes amendments to §291.121, concerning Remote Pharmacy Services. The amendments, if adopted, clarify how the board provides a license to engage in remote pharmacy services.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and efficient regulatory processes. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or

state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.121. Remote Pharmacy Services.

(a) Remote pharmacy services using automated pharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an automated pharmacy system as outlined in §562.109 of the Texas Pharmacy Act.

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

(A) Automated pharmacy system--A mechanical system that dispenses prescription drugs and maintains related transaction information.

(B) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container, or quantities of unit dosed drugs, into another cartridge or container for dispensing by a pharmacist using an automated pharmacy system.

(C) Provider pharmacy--The community pharmacy (Class A) or the institutional pharmacy (Class C) providing remote pharmacy services.

(D) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, in remote sites.

(E) Remote site--A facility not located at the same location as a Class A or Class C pharmacy, at which remote pharmacy services are provided using an automated pharmacy dispensing system.

(F) Unit dose--An amount of a drug packaged in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using an automated pharmacy system to a jail or prison operated by or for the State of Texas, a jail or prison operated by local government or a healthcare facility regulated under Chapter 142, 241, 242, 247, 252, 464, 534, or 577, Health and Safety Code, provided drugs are administered by a licensed healthcare professional working in the jail, prison, or healthcare facility.

(B) A provider pharmacy may provide remote pharmacy services at more than one remote site.

(C) Before providing remote pharmacy services, the automated pharmacy system at the remote site must be tested by the provider pharmacy and found to dispense accurately. The provider pharmacy shall make the results of such testing available to the board upon request.

(D) A provider pharmacy which is licensed as an institutional (Class C) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title (relating to Definitions, Personnel, Operational Standards, and Records, respectively) and this section.

(E) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the automated pharmacy system located at the remote site including supervision of the automated pharmacy system and compliance with this section.

(F) A pharmacist from the provider pharmacy shall be accessible at all times to respond to patients' or other health professionals' questions and needs pertaining to drugs dispensed through the use of the automated pharmacy system. Such access may be through a 24 hour pager service or telephone which is answered 24 hours a day.

(4) Operational standards.

(A) Application for permission to provide pharmacy services using an automated pharmacy system.

(i) A Class A or Class C Pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using an automated pharmacy system and pay the application fee specified in §291.6(e)(1) of this title (relating to Pharmacy License Fees).

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be issued [~~sent~~] a certificate which must be displayed at the remote site.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of:

(I) a remote site where an automated pharmacy system is operated by the pharmacy; or

(II) a remote pharmacy service at a remote site.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site if controlled substances are maintained within an automated pharmacy system at the facility.

(iii) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title (relating to Notifications).

(C) Environment/Security.

(i) A provider pharmacy shall only store drugs at a remote site within an automated pharmacy system which is locked by key, combination or other mechanical or electronic means so as to prohibit access by unauthorized personnel.

(ii) An automated pharmacy system shall be under the continuous supervision of a provider pharmacy pharmacist. To qualify as continuous supervision, the pharmacist is not required to be physically present at the site of the automated pharmacy system if the system is supervised electronically by a pharmacist.

(iii) Automated pharmacy systems shall have adequate security and procedures to:

(I) comply with federal and state laws and regulations; and

(II) maintain patient confidentiality.

(iv) Access to the automated pharmacy system shall be limited to pharmacists or personnel who:

(I) are designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the automated pharmacy system.

(v) Drugs shall be stored in compliance with the provisions of §291.15 of this title (relating to Storage of Drugs) and §291.33(f)(2) of this title including the requirements for temperature and handling of outdated drugs.

(D) Prescription dispensing and delivery.

(i) Drugs shall only be dispensed at a remote site through an automated pharmacy system after receipt of an original prescription drug order by a pharmacist at the provider pharmacy in a manner authorized by §291.34(b) of this title.

(ii) A pharmacist at the provider pharmacy shall control all operations of the automated pharmacy system and approve the release of the initial dose of a prescription drug order. Subsequent doses from an approved prescription drug order may be removed from the automated medication system after this initial approval. Any change made in the prescription drug order shall require a new approval by a pharmacist to release the drug.

(iii) A pharmacist at the provider pharmacy shall conduct a drug regimen review as specified in §291.33(c) of this title prior to releasing a prescription drug order to the automated pharmacy system.

(iv) Drugs dispensed by the provider pharmacy through an automated pharmacy system shall comply with the labeling or labeling alternatives specified in §291.33(c) of this title.

(v) An automated pharmacy system used to meet the emergency medication needs for residents of a remote site must comply with the requirements for emergency medication kits in subsection (b) of this section.

(E) Drugs.

(i) Drugs for use in an automated pharmacy system shall be packaged in the original manufacturer's container or be prepackaged in the provider pharmacy and labeled in compliance with the board's prepackaging requirements for the class of pharmacy.

(ii) Drugs dispensed from the automated pharmacy system may be returned to the pharmacy for reuse provided the drugs are in sealed, tamper evident packaging which has not been opened.

(F) Stocking an automated pharmacy system.

(i) Stocking of drugs in an automated pharmacy system shall be completed by a pharmacist, pharmacy technician, or pharmacy technician trainee under the direct supervision of a pharmacist, except as provided in clause (ii) of this subparagraph.

(ii) If the automated pharmacy system uses removable cartridges or containers to hold drugs, the prepackaging of the cartridges or containers shall occur at the provider pharmacy unless provided by an FDA approved repackager. The prepackaged cartridges or containers may be sent to the remote site to be loaded into the machine by personnel designated by the pharmacist-in-charge provided:

(I) a pharmacist verifies the cartridge or container has been properly filled and labeled;

(II) the individual cartridges or containers are transported to the remote site in a secure, tamper-evident container; and

(III) the automated pharmacy system uses barcoding, microchip, or other technologies to ensure that the containers are accurately loaded in the automated pharmacy system.

(iii) All drugs to be stocked in the automated pharmacy system shall be delivered to the remote site by the provider pharmacy.

(G) Quality assurance program. A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall operate according to a written program for quality assurance of the automated pharmacy system which:

(i) requires continuous supervision of the automated pharmacy system; and

(ii) establishes mechanisms and procedures to routinely test the accuracy of the automated pharmacy system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(H) Policies and procedures of operation.

(i) A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the name and address of the pharmacist-in-charge and personnel designated by the pharmacist-in-charge to have access to the drugs stored in the automated pharmacy system;

(II) duties which may only be performed by a pharmacist;

(III) a copy of the portion of the written contract or agreement between the pharmacy and the facility which outlines the services to be provided and the responsibilities and accountabilities of each party relating to the operation of the automated pharmacy system in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(IV) date of last review/revision of the policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;

(-b-) operation of the automated pharmacy system;

(-c-) preventative maintenance of the automated pharmacy system;

(-d-) sanitation;

(-e-) storage of drugs;

(-f-) dispensing;

(-g-) supervision;

(-h-) drug procurement;

(-i-) receiving of drugs;

(-j-) delivery of drugs; and

(-k-) recordkeeping.

(ii) A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an automated pharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of the automated pharmacy system to dispense prescription drugs. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated pharmacy system is experiencing downtime;

(II) procedures for response when an automated pharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall maintain original prescription drug orders for drugs dispensed from an automated pharmacy system in compliance with §291.34(b) of this title.

(iii) if prescription drug records are maintained in a data processing system, the system shall have a workable (electronic) data retention system which can produce a separate audit trail of drug usage by the provider pharmacy and each remote site for the preceding two years as specified in §291.34(e) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Records of dispensing. Dispensing records for a prescription drug order shall be maintained by the provider pharmacy in the manner required by §291.34(d) or (e) of this title.

(D) Transaction information.

(i) The automated pharmacy system shall electronically record all transactions involving drugs stored in, removed, or dispensed from the system.

(ii) Records of dispensing from an automated pharmacy system for a patient shall be maintained by the providing pharmacy and include the:

(I) identity of the system accessed;

(II) identification of the individual accessing the system;

(III) date of transaction;

(IV) name, strength, dosage form, and quantity of drug accessed; and

(V) name of the patient for whom the drug was accessed.

(iii) Records of stocking or removal from an automated pharmacy system shall be maintained by the pharmacy and include the:

(I) date;

(II) name, strength, dosage form, and quantity of drug stocked or removed;

(III) name, initials, or identification code of the person stocking or removing drugs from the system; and

(IV) name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled.

(E) Patient medication records. Patient medication records shall be created and maintained by the provider pharmacy in the manner required by §291.34(c) of this title.

(F) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs sent to and returned from a remote site separate from the records of the provider pharmacy and from any other remote site's records; and

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title (relating to Inventory Requirements) that are received and dispensed or distributed from each remote site.

(ii) As specified in §291.17 of this title, a provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs of the provider pharmacy.

(b) Remote pharmacy services using emergency medication kits.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an emergency medication kit as outlined in §562.108 of the Texas Pharmacy Act.

(2) Definitions. The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings defined in the Act or §291.31 of this title.

(A) Automated pharmacy system--A mechanical system that dispenses prescription drugs and maintains related transaction information.

(B) Emergency medication kits--Controlled substances and dangerous drugs maintained by a provider pharmacy to meet the emergency medication needs of a resident:

(i) at an institution licensed under Chapter 242 or 252, Health and Safety Code; or

(ii) at an institution licensed under Chapter 242, Health and Safety Code and that is a veterans home as defined by the §164.002, Natural Resources Code, if the provider pharmacy is a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy.

(C) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container, or quantities of unit dosed drugs, into another cartridge or container for dispensing by a pharmacist using an emergency medication kit.

(D) Provider pharmacy--The community pharmacy (Class A), the institutional pharmacy (Class C), the non-resident pharmacy (Class E) located not more than 20 miles from an institution licensed under Chapter 242 or 252, Health and Safety Code, or the United States Department of Veterans Affairs pharmacy or another federally operated pharmacy providing remote pharmacy services.

(E) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, in remote sites.

(F) Remote site--A facility not located at the same location as a Class A, Class C, Class E pharmacy or a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy, at which remote pharmacy services are provided using an emergency medication kit.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using an emergency medication kit to an institution regulated under Chapter 242, or 252, Health and Safety Code.

(B) A provider pharmacy may provide remote pharmacy services at more than one remote site.

(C) A provider pharmacy shall not place an emergency medication kit in a remote site which already has a kit from another provider pharmacy except as provided by paragraph (4)(B)(iii) of this subsection.

(D) A provider pharmacy which is licensed as an institutional (Class C) or a non-resident (Class E) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(E) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the emergency medication kit located at the remote site including supervision of the emergency medication kit and compliance with this section.

(4) Operational standards.

(A) Application for permission to provide pharmacy services using an emergency medication kit.

(i) A Class A, Class C, or Class E pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using an emergency medication kit and pay the application fee specified in §291.6(e)(2) of this title.

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be issued [~~sent~~] a certificate which must be displayed at the remote site.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of:

(I) a remote site where an emergency medication kit is operated by the pharmacy; or

(II) a remote pharmacy service at a remote site.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site if controlled substances are maintained within an emergency medication kit at the facility.

(iii) If more than one provider pharmacy provides an emergency kit to a remote site, the provider pharmacies must enter into a written agreement as to the emergency medications supplied by each pharmacy. The written agreement shall include reasons why an additional pharmacy is required to meet the emergency medication needs of the residents of the institution.

(iv) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title.

(C) Environment/Security.

(i) Emergency medication kits shall have adequate security and procedures to:

(I) prohibit unauthorized access;

(II) comply with federal and state laws and regulations; and

(III) maintain patient confidentiality.

(ii) Access to the emergency medication kit shall be limited to pharmacists and licensed healthcare personnel employed by the facility.

(iii) Drugs shall be stored in compliance with the provisions of §291.15 and §291.33(f)(2) of this title including the requirements for temperature and handling outdated drugs.

(D) Prescription dispensing and delivery.

(i) Drugs in the emergency medication kit shall be accessed for administration to meet the emergency medication needs of a resident of the remote site pursuant to an order from a practitioner. The prescription drug order for the drugs used from the emergency medication kit shall be forwarded to the provider pharmacy in a manner authorized by §291.34(b) of this title.

(ii) The remote site shall notify the provider pharmacy of each entry into an emergency medication kit. Such notification shall meet the requirements of paragraph (5)(D)(ii) of this subsection.

(E) Drugs.

(i) The contents of an emergency medication kit:

(I) may consist of dangerous drugs and controlled substances; and

(II) shall be determined by the consultant pharmacist, pharmacist-in-charge of the provider pharmacy, medical director, and the director of nurses and limited to those drugs necessary to meet the resident's emergency medication needs. For the purpose of this subsection, this shall mean a situation in which a drug cannot be supplied by a pharmacy within a reasonable time period.

(ii) When deciding on the drugs to be placed in the emergency medication kit, the consultant pharmacist, pharmacist-in-charge of the provider pharmacy, medical director, and the director of nurses must determine, select, and record a prudent number of drugs for potential emergency incidents based on:

(I) clinical criteria applicable to each facility's demographics;

(II) the facility's census; and

(III) the facility's healthcare environment.

(iii) A current list of the drugs stored in each remote site's emergency medication kit shall be maintained by the provider pharmacy and a copy kept with the emergency medication kit.

(iv) An automated pharmacy system may be used as an emergency medication kit provided the system limits emergency access to only those drugs approved for the emergency medication kit.

(v) Drugs for use in an emergency medication kit shall be packaged in the original manufacturer's container or prepackaged in the provider pharmacy and labeled in compliance with the board's prepackaging requirements for the class of pharmacy.

(F) Stocking emergency medication kits.

(i) Stocking of drugs in an emergency medication kit shall be completed at the provider pharmacy or remote site by a pharmacist, pharmacy technician, or pharmacy technician trainee under the direct supervision of a pharmacist, except as provided in clause (ii) of this subparagraph.

(ii) If the emergency medication kit is an automated pharmacy system which uses bar-coding, microchip, or other technologies to ensure that the containers or unit dose drugs are accurately loaded, the prepackaging of the containers or unit dose drugs shall occur at the provider pharmacy unless provided by an FDA approved repackager. The prepackaged containers or unit dose drugs may be sent to the remote site to be loaded into the machine by personnel designated by the pharmacist-in-charge provided:

(I) a pharmacist verifies the container or unit dose drug has been properly filled and labeled;

(II) the individual containers or unit dose drugs are transported to the remote site in a secure, tamper-evident container; and

(III) the automated pharmacy system uses bar-coding, microchip, or other technologies to ensure that the containers or unit dose drugs are accurately loaded in the automated pharmacy system.

(iii) All drugs to be stocked in the emergency medication kit shall be delivered to the remote site by the provider pharmacy.

(G) Policies and procedures of operation.

(i) A provider pharmacy that provides pharmacy services through an emergency medication kit at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) duties which may only be performed by a pharmacist;

(II) a copy of the written contract or agreement between the pharmacy and the facility which outlines the services to be provided and the responsibilities and accountabilities of each party in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(III) date of last review/revision of the policy and procedure manual; and

(IV) policies and procedures for:

(-a-) security;

(-b-) operation of the emergency medication kit;

(-c-) preventative maintenance of the automated pharmacy system if the emergency medication kit is an automated pharmacy system;

(-d-) sanitation;

(-e-) storage of drugs;

(-f-) dispensing;

(-g-) supervision;

(-h-) drug procurement;

(-i-) receiving of drugs;

(-j-) delivery of drugs; and

(-k-) recordkeeping.

(ii) A pharmacy that provides pharmacy services through an emergency medication kit at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an emergency medication kit which is an automated pharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of the automated pharmacy system to provide emergency medications. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated pharmacy system is experiencing downtime;

(II) procedures for response when an automated pharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall maintain original prescription drug orders for drugs dispensed from an emergency medication kit in compliance with §291.34(b) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Records of dispensing. Dispensing records for a prescription drug order shall be maintained by the provider pharmacy in the manner required by §291.34(d) or (e) of this title.

(D) Transaction information.

(i) A prescription drug order shall be maintained by the provider pharmacy as the record of removal of a drug from an emergency medication kit for administration to a patient.

(ii) The remote site shall notify the provider pharmacy electronically or in writing of each entry into an emergency medication kit. Such notification may be included on the prescription drug order or a separate document and shall include the name, strength, and quantity of the drug removed, the time of removal, and the name of the person removing the drug.

(iii) A separate record of stocking, removal, or dispensing for administration from an emergency medication kit shall be maintained by the pharmacy and include the:

(I) date;

(II) name, strength, dosage form, and quantity of drug stocked, removed, or dispensed for administration;

(III) name, initials, or identification code of the person stocking, removing, or dispensing for administration, drugs from the system;

(IV) name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled; and

(V) unique prescription number assigned to the prescription drug order when the drug is administered to the patient.

(E) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs sent to and returned from a remote site separate from the records of the provider pharmacy and from any other remote site's records; and

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title, that are received and dispensed or distributed from each remote site.

(ii) As specified in §291.17 of this title, a provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs of the provider pharmacy.

(c) Remote pharmacy services using telepharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a healthcare facility that is not at the same location as a Class A or Class C pharmacy through a telepharmacy system as outlined in §562.110 of the Texas Pharmacy Act.

(2) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings defined in the Act or §291.31 of this title.

(A) Provider pharmacy--

(i) a Class A pharmacy that provides pharmacy services through a telepharmacy system at a remote dispensing site or at a healthcare facility that is regulated by this state or the United States; or

(ii) a Class C pharmacy that provides pharmacy services though a telepharmacy system at a healthcare facility that is regulated by this state or the United States.

(B) Remote dispensing site--a location licensed as a telepharmacy that is authorized by a provider pharmacy through a telepharmacy system to store and dispense prescription drugs and devices, including dangerous drugs and controlled substances.

(C) Remote healthcare site--a healthcare facility regulated by this state or the United States that is a:

(i) rural health clinic regulated under 42 U.S.C. Section 1395x(aa);

(ii) health center as defined by 42 U.S.C. Section 254b;

(iii) healthcare facility located in a medically underserved area as determined by the United States Department of Health and Human Services;

(iv) healthcare facility located in a health professional shortage area as determined by the United States Department of Health and Human Services; or

(v) a federally qualified health center as defined by 42 U.S.C. Section 1396d(I)(2)(B).

(D) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, drug regimen review, and patient counseling, at a remote site.

(E) Remote site--a remote healthcare site or a remote dispensing site.

(F) Still image capture--A specific image captured electronically from a video or other image capture device.

(G) Store and forward--A video or still image record which is saved electronically for future review.

(H) Telepharmacy system--A system that monitors the dispensing of prescription drugs and provides for related drug use review and patient counseling services by an electronic method which shall include the use of the following types of technology:

(i) audio and video;

(ii) still image capture; and

(iii) store and forward.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using a telepharmacy system at a:

(i) remote healthcare site; or

(ii) remote dispensing site.

(B) A provider pharmacy may not provide remote pharmacy services at a remote healthcare site if a Class A or Class C pharmacy that dispenses prescription drug orders to out-patients is located in the same community, unless the remote healthcare site is a federally qualified health center as defined by 42 U.S.C. Section 1396d(I)(2)(B). For the purposes of this subsection a community is defined as:

(i) the census tract in which the remote site is located, if the remote site is located in a Metropolitan Statistical Area (MSA) as defined by the United States Census Bureau in the most recent U.S. Census; or

(ii) within 10 miles of the remote site, if the remote site is not located in an MSA.

(C) A provider pharmacy may not provide remote pharmacy services at a remote dispensing site if a Class A pharmacy is located within 22 miles by road of the remote dispensing site.

(D) If a Class A or Class C pharmacy is established in a community in which a remote healthcare site has been located, the remote healthcare site may continue to operate.

(E) If a Class A pharmacy is established within 22 miles by road of a remote dispensing site that is currently operating, the remote dispensing site may continue to operate at that location.

(F) Before providing remote pharmacy services, the telepharmacy system at the remote site must be tested by the provider pharmacy and found to operate properly. The provider pharmacy shall make the results of such testing available to the board upon request.

(G) A provider pharmacy which is licensed as a Class C pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(H) A provider pharmacy can only provide pharmacy services at no more than two remote dispensing sites.

(4) Personnel.

(A) The pharmacist-in-charge of the provider pharmacy is responsible for all operations at the remote site including supervision of the telepharmacy system and compliance with this section.

(B) The provider pharmacy shall have sufficient pharmacists on duty such that each pharmacist may supervise no more than two remote sites that are simultaneously open to provide services.

(C) The following duties shall be performed only by a pharmacist at the provider pharmacy:

(i) receiving an oral prescription drug order for a controlled substance;

(ii) interpreting the prescription drug order;

(iii) verifying the accuracy of prescription data entry;

(iv) selecting the drug product to be stored and dispensed at the remote site;

(v) interpreting the patient's medication record and conducting a drug regimen review;

(vi) authorizing the telepharmacy system to print a prescription label at the remote site;

(vii) performing the final check of the dispensed prescription to ensure that the prescription drug order has been dispensed accurately as prescribed; and

(viii) counseling the patient.

(D) A pharmacy technician at the remote site may receive an oral prescription drug order for a dangerous drug.

(5) Operational standards.

(A) Application to provide remote pharmacy services using a telepharmacy system.

(i) A Class A or Class C pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using a telepharmacy system and pay the application fee specified in §291.6(e)(3) of this title.

(ii) Such application shall be resubmitted every two years in conjunction with the renewal of the provider pharmacy's license.

(iii) On approval of the application, the provider pharmacy will be issued [~~sent~~] a license for the remote site, which must be displayed at the remote site.

(iv) If the average number of prescriptions dispensed each day at a remote dispensing site is open for business is more than 125 prescriptions, as calculated each calendar year, the remote dispensing site shall apply for a Class A pharmacy license as specified in §291.1 of this title (relating to Pharmacy License Application).

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of a remote site where a telepharmacy system is operated by the pharmacy.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site, if controlled substances are maintained.

(iii) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title.

(C) Environment/Security.

(i) A remote site shall be under the continuous supervision of a provider pharmacy pharmacist at all times the site is open to provide pharmacy services. To qualify as continuous supervision, the pharmacist is not required to be physically present at the remote site and shall supervise electronically through the use of the following types of technology:

(I) audio and video;

(II) still image capture; and

(III) store and forward.

(ii) Drugs shall be stored in compliance with the provisions of §291.15 and §291.33(f)(2) of this title including the requirements for temperature and handling of outdated drugs.

(iii) Drugs for use in the telepharmacy system at a remote healthcare site shall be stored in an area that is:

(I) separate from any other drugs used by the healthcare facility; and

(II) locked by key, combination or other mechanical or electronic means, so as to prohibit access by unauthorized personnel.

(iv) Drugs for use in the telepharmacy system at a remote dispensing site shall be stored in an area that is locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized personnel.

(v) Access to the area where drugs are stored at the remote site and operation of the telepharmacy system shall be limited to:

(I) pharmacists employed by the provider pharmacy;

(II) licensed healthcare providers, if the remote site is a remote healthcare site; and

(III) pharmacy technicians;

(vi) Individuals authorized to access the remote site and operate the telepharmacy system shall:

(I) be designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the telepharmacy pharmacy system.

(vii) Remote sites shall have adequate security and procedures to:

(I) comply with federal and state laws and regulations; and

(II) maintain patient confidentiality.

(D) Prescription dispensing and delivery.

(i) A pharmacist at the provider pharmacy shall conduct a drug regimen review as specified in §291.33(c) of this title prior to delivery of the dispensed prescription to the patient or patient's agent.

(ii) The dispensed prescription shall be labeled at the remote site with the information specified in §291.33(c) of this title.

(iii) A pharmacist at the provider pharmacy shall perform the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed. This final check shall be accomplished through a visual check using electronic methods.

(iv) A pharmacist at the provider pharmacy shall counsel the patient or patient's agent as specified in §291.33(c) of this title. This counseling may be performed using electronic methods. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(v) If the remote site has direct access to the provider pharmacy's data processing system, only a pharmacist or pharmacy technician may enter prescription information into the data processing system.

(vi) Drugs which require reconstitution through the addition of a specified amount of water may be dispensed by the remote site only if a pharmacy technician, pharmacy technician trainee, or licensed healthcare provider reconstitutes the product.

(vii) A telepharmacy system located at a remote dispensing site may not dispense a schedule II controlled substance.

(viii) Drugs dispensed at the remote site through a telepharmacy system shall only be delivered to the patient or patient's agent at the remote site.

(E) Quality assurance program. A pharmacy that provides remote pharmacy services through a telepharmacy system at a remote site shall operate according to a written program for quality assurance of the telepharmacy system which:

(i) requires continuous supervision of the telepharmacy system at all times the site is open to provide remote pharmacy services; and

(ii) establishes mechanisms and procedures to routinely test the operation of the telepharmacy system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(F) Policies and procedures.

(i) A pharmacy that provides pharmacy services through a telepharmacy system at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the name and address of the pharmacist-in-charge and personnel designated by the pharmacist-in-charge to have:

(-a-) access to the area where drugs are stored at the remote site; and

(-b-) operate the telepharmacy system;

(II) duties which may only be performed by a pharmacist;

(III) if the remote site is located at a remote healthcare site, a copy of the written contact or agreement between the provider pharmacy and the healthcare facility which outlines the services to be provided and the responsibilities and accountabilities of each party in fulfilling the terms of the contract or agreement in compliance with federal and state laws and regulations;

(IV) date of last review/revision of policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;
(-b-) operation of the telepharmacy system;
(-c-) sanitation;
(-d-) storage of drugs;
(-e-) dispensing;
(-f-) supervision;
(-g-) drug and/or device procurement;
(-h-) receiving of drugs and/or devices;
(-i-) delivery of drugs and/or devices; and

(-j-) recordkeeping.

(ii) A pharmacy that provides remote pharmacy services through a telepharmacy system at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services through a telepharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of a pharmacist to electronically supervise the telepharmacy system and the dispensing of prescription drugs at the remote site. The written plan for recovery shall include:

(I) a statement that prescription drugs shall not be dispensed at the remote site, if a pharmacist is not able to electronically supervise the telepharmacy system and the dispensing of prescription drugs;

(II) procedures for response when a telepharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(6) Additional operational standards for remote dispensing sites.

(A) A pharmacist employed by a provider pharmacy shall make at least monthly on-site visits to a remote site. The remote site shall maintain documentation of the visit.

(B) A pharmacist employed by a provider pharmacy shall be physically present at a remote dispensing site when the pharmacist is providing services requiring the physical presence of the pharmacist, including immunizations.

(C) A remote dispensing site shall be staffed by an on-site pharmacy technician who is under the continuous supervision of a pharmacist employed by the provider pharmacy.

(D) All pharmacy technicians at a remote dispensing site shall be counted for the purpose of establishing the pharmacist-pharmacy technician ratio of the provider pharmacy which, notwithstanding Section 568.006 of the Act, may not exceed three pharmacy technicians for each pharmacist providing supervision.

(E) A pharmacy technician working at a remote dispensing site must:

(i) have worked at least one year at a retail pharmacy during the three years preceding the date the pharmacy technician begins working at the remote dispensing site; and

(ii) have completed a training program on the proper use of a telepharmacy system.

(F) A pharmacy technician at a remote dispensing site may not perform sterile or nonsterile compounding. However, a pharmacy technician may prepare commercially available medications for dispensing, including the reconstitution of orally administered powder antibiotics.

(7) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) accessible by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The remote site shall maintain original prescription drug orders for medications dispensed from a remote site using a telepharmacy system in the manner required by §291.34(b) of this title and the provider pharmacy shall have electronic access to all prescription records.

(iii) If prescription drug records are maintained in a data processing system, the system shall have a workable (electronic) data retention system which can produce a separate audit trail of drug usage by the provider pharmacy and by each remote site for the preceding two years as specified in §291.34(e) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Patient medication records. Patient medication records shall be created and maintained at the remote site or provider pharmacy in the manner required by §291.34(c) of this title. If such records are maintained at the remote site, the provider pharmacy shall have electronic access to those records.

(D) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs ordered and dispensed by a remote site separate from the records of the provider pharmacy and from any other remote site's records;

(II) keep a perpetual inventory of all controlled substances that are received and dispensed or distributed from each remote site. The perpetual inventory shall be reconciled, by a pharmacist employed by the provider pharmacy, at least monthly.

(ii) As specified in §291.17 of this title, a provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs at the provider pharmacy.

(III) A copy of the inventory of the remote site shall be maintained at the remote site.

(d) Remote pharmacy services using automated dispensing and delivery systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an automated dispensing and delivery system.

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

(A) Automated dispensing and delivery system--A mechanical system that dispenses and delivers prescription drugs to patients at a remote delivery site and maintains related transaction information.

(B) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device or controlled substance from one person to another, whether or not for a consideration.

(C) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(D) Provider pharmacy--The community pharmacy (Class A) or the institutional pharmacy (Class C) providing remote pharmacy services.

(E) Remote delivery site--A location at which remote pharmacy services are provided using an automated dispensing and delivery system.

(F) Remote pharmacy service--The provision of pharmacy services, including the dispensing and delivery of prescription drugs, in remote delivery sites.

(3) General requirements for a provider pharmacy to provide remote pharmacy services using an automated dispensing and delivery system to dispense and deliver a prescription that is verified by the provider pharmacy to a patient or patient's agent.

(A) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the automated dispensing and delivery system located at the remote delivery site including supervision of the automated dispensing and delivery system and compliance with this section.

(B) The patient or patient's agent shall receive counseling via a direct link to audio or video communication by a Texas licensed pharmacist who has access to the complete patient medication record (patient profile) maintained by the provider pharmacy prior to the release of any new prescription released from the system.

(C) A pharmacist shall be accessible at all times to respond to patients' or other health professionals' questions and needs pertaining to drugs delivered through the use of the automated dispensing and delivery system. Such access may be through a 24 hour pager service or telephone which is answered 24 hours a day.

(D) The patient or patient's agent shall be given the option whether to use the system.

(E) An electronic notice shall be provided to the patient or patient's agent at the remote delivery site with the following information:

(i) the name and address of the pharmacy that verified the prescription; and

(ii) a statement that a pharmacist is available 24 hours a day, 7 days a week through the use of telephonic communication.

(F) Drugs stored in the automated dispensing and distribution system shall be stored at proper temperatures, as defined in the USP/NF and §291.15 of this title.

(G) A provider pharmacy may only provide remote pharmacy services using an automated dispensing and delivery system to patients at a board-approved remote delivery site.

(H) A provider pharmacy may provide remote pharmacy services at more than one remote delivery site.

(I) Before providing remote pharmacy services, the automated dispensing and delivery system at the remote delivery site must be tested by the provider pharmacy and found to dispense and deliver accurately. The provider pharmacy shall make the results of such testing available to the board upon request.

(J) A provider pharmacy which is licensed as an institutional (Class C) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(4) Operational standards.

(A) Application to provide remote pharmacy services using an automated dispensing and delivery system.

(i) A community (Class A) or institutional (Class C) pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using an automated dispensing and delivery system and pay the application fee specified in §291.6(e)(4) of this title.

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be issued [~~sent~~] a certificate which must be displayed at the provider pharmacy.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service.

(ii) A provider pharmacy shall comply with appropriate controlled substance registrations for each remote delivery site if dispensed controlled substances are maintained within an automated dispensing and delivery system at the facility.

(iii) A provider pharmacy shall file an application for change of location and/or name of a remote delivery site as specified in §291.3 of this title.

(C) Environment/Security.

(i) A provider pharmacy shall only store prescription drugs at a remote delivery site within an automated dispensing and delivery system which is locked by key, combination or other mechanical or electronic means so as to prohibit access by unauthorized personnel.

(ii) Access to the automated dispensing and delivery system shall be limited to pharmacists and pharmacy technicians or pharmacy technician trainees under the direct supervision of a pharmacist who:

(I) are designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the automated dispensing and delivery system.

(iii) Drugs shall be stored in compliance with the provisions of §291.15 of this title and §291.33(c)(8) of this title, including the requirements for temperature and the return of undelivered medication to stock.

(iv) the automated dispensing and delivery system must have an adequate security system, including security camera(s), to prevent unauthorized access and to maintain patient confidentiality.

(D) Stocking an automated dispensing and delivery system. Stocking of prescription drugs in an automated dispensing and delivery system shall be completed under the supervision of a pharmacist.

(E) Quality assurance program. A pharmacy that provides pharmacy services through an automated dispensing and delivery system at a remote delivery site shall operate according to a written program for quality assurance of the automated dispensing and delivery system which:

(i) requires continuous supervision of the automated dispensing and delivery system; and

(ii) establishes mechanisms and procedures to routinely test the accuracy of the automated dispensing and delivery system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(F) Policies and procedures of operation.

(i) A pharmacy that provides pharmacy services through an automated dispensing and delivery system at a remote delivery site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the names and addresses of the pharmacist-in-charge and all personnel designated by the pharmacist-in-charge to have access to the prescription drugs stored in the automated dispensing and delivery system;

(II) duties which may only be performed by a pharmacist;

(III) a copy of the portion of the written contract or lease agreement between the pharmacy and the remote delivery site location which outlines the services to be provided and the responsibilities and accountabilities of each party relating to the operation of the automated dispensing and delivery system in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(IV) date of last review/revision of the policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;

(-b-) operation of the automated dispensing and delivery system;

(-c-) preventative maintenance of the automated dispensing and delivery system;

(-d-) sanitation;

(-e-) storage of prescription drugs;

(-f-) supervision;

(-g-) delivery of prescription drugs; and

(-h-) recordkeeping.

(ii) A pharmacy that provides pharmacy services through an automated dispensing and delivery system at a remote delivery site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an automated dispensing and delivery system shall maintain a written plan for recovery from an event which interrupts the ability of the automated dispensing and delivery system to dispense and deliver prescription drugs. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated dispensing and delivery system is experiencing downtime;

(II) procedures for response when an automated dispensing and delivery system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall have a workable (electronic) data retention system which can produce a separate audit trail of drug delivery and retrieval transactions at each remote delivery site for the preceding two years.

(B) Transaction information.

(i) The automated dispensing and delivery system shall electronically record all transactions involving drugs stored in, removed, or delivered from the system.

(ii) Records of delivery from an automated dispensing and delivery system for a patient shall be maintained by the provider pharmacy and include the:

(I) identity of the system accessed;

(II) identification of the individual accessing the system;

(III) date of transaction;

(IV) prescription number, drug name, strength, dosage form;

(V) number of prescriptions retrieved;

(VI) name of the patient for whom the prescription was retrieved;

(VII) name of prescribing practitioner; and

(VIII) name of pharmacist responsible for consultation with the patient, if required, and documentation that the consultation was performed.

(iii) Records of stocking or removal from an automated dispensing and delivery system shall be maintained by the pharmacy and include the:

(I) count of bulk prescription drugs stored or removed;

(II) number of dispensed prescription packages removed;

(III) name, initials, or identification code of the person stocking or removing prescription drugs from the system; and

(IV) name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled.

(C) The pharmacy shall make the automated dispensing and delivery system and any records of the system, including testing records, available for inspection by the board.

(D) The automated dispensing and delivery system records a digital image of the individual accessing the system to pick-up a prescription and such record is maintained by the pharmacy for two years.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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22 TAC §291.129

The Texas State Board of Pharmacy proposes amendments to §291.129, concerning Satellite Pharmacy. The amendments, if adopted, clarify how the board provides a satellite pharmacy license.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and efficient regulatory processes. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.129. Satellite Pharmacy.

(a) Purpose. The purpose of this section is to create a new class of pharmacy for the provision of pharmacy services by a Class A or Class C pharmacy in a location that is not at the same location as the Class A or Class C pharmacy through a satellite pharmacy and to provide standards for the operation of this class of pharmacy established under §560.053 of the Texas Pharmacy Act.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings as defined in the Act or in §291.31 of this title (relating to Definitions).

(1) Provider pharmacy--The Class A or Class C pharmacy providing satellite pharmacy services.

(2) Satellite pharmacy--A facility not located at the same location as a Class A or Class C pharmacy at which satellite pharmacy services are provided.

(3) Satellite pharmacy services--The provision of pharmacy services, including the storage and delivery of prescription drugs, in an alternate location.

(c) General requirements.

(1) A Class A or Class C provider pharmacy may establish a satellite pharmacy in a location that is not at the same location as the Class A or Class C pharmacy.

(2) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the satellite pharmacy including supervision of satellite pharmacy personnel and compliance with this section.

(3) A satellite pharmacy may not store bulk drugs and may only store prescription medications that have been previously verified and dispensed by the provider pharmacy.

(4) A Class C pharmacy that is a provider pharmacy dispensing outpatient prescriptions for a satellite pharmacy shall comply with the provisions of §§291.31 - 291.34 of this title (relating to Def-

initions, Personnel, Operational Standards, and Records for Class A (Community) pharmacies) and this section.

(5) The provider pharmacy and the satellite pharmacy must have:

(A) the same owner; and

(B) share a common electronic file or have appropriate technology to allow access to sufficient information necessary or required to process a non-dispensing function.

(d) Personnel.

(1) All individuals working at the satellite pharmacy shall be employees of the provider pharmacy and must report their employment to the board as such.

(2) A satellite pharmacy shall have sufficient pharmacists on duty to operate the satellite pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(3) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and pharmacy technician trainees and for designating and delegating duties, other than those listed in paragraph (7) of this subsection, to pharmacy technicians and pharmacy technician trainees. Each pharmacist:

(A) shall verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees; and

(B) shall be responsible for any delegated act performed by pharmacy technicians and pharmacy technician trainees under his or her supervision.

(4) A pharmacist shall be physically present to directly supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system. Each prescription entered into the data processing system shall be verified at the time of data entry.

(5) All pharmacists, while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(6) A pharmacist shall ensure that the drug is dispensed and delivered safely and accurately as prescribed. A pharmacist shall ensure the safety and accuracy of the portion of the process the pharmacist is performing.

(7) Duties in a satellite pharmacy that may only be performed by a pharmacist are as follows:

(A) receiving oral prescription drug orders for controlled substances and reducing these orders to writing, either manually or electronically;

(B) interpreting or clarifying prescription drug orders;

(C) communicating to the patient or patient's agent information about the prescription drug or device, which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, as specified in §291.33(c) of this title;

(D) communicating to the patient or the patient's agent on his or her request for information concerning any prescription drugs dispensed to the patient by the pharmacy;

(E) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(F) interpreting patient medication records and performing drug regimen reviews; and

(G) performing a specific act of drug therapy management for a patient when delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act.

(8) Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in paragraph (7) of this subsection. However, a pharmacist may delegate to pharmacy technicians and pharmacy technician trainees any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(A) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees; and

(B) pharmacy technicians and pharmacy technician trainees are under the direct supervision of, and responsible to, a pharmacist.

(9) Pharmacy technicians and pharmacy technician trainees in a satellite pharmacy may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs as follows:

(A) initiating and receiving refill authorization requests;

(B) entering prescription data into a data processing system; and

(C) reconstituting medications.

(10) In addition to the duties listed above in paragraph (9) of this subsection, pharmacy technicians may perform the following nonjudgmental technical duties associated with the preparation and distribution of prescription drugs:

(A) receiving oral prescription drug orders for dangerous drugs and reducing these orders to writing, either manually or electronically; and

(B) transferring or receiving a transfer of original prescription information for a dangerous drug on behalf of a patient.

(11) All satellite pharmacy personnel shall wear identification tags or badges that bear the person's name and identifies him or her as a pharmacist, pharmacist intern, pharmacy technician, or pharmacy technician trainee.

(e) Operational requirements.

(1) Application for permission to provide satellite pharmacy services.

(A) A Class A or Class C pharmacy shall make an application to the board to provide satellite pharmacy services. The application shall include the following:

(i) the name, address, and license number of the provider pharmacy;

(ii) the name and address of the facility where the satellite pharmacy will be located;

(iii) the anticipated date of opening and hours of operation; and

(iv) a copy of the lease agreement or, if the location of the satellite pharmacy is owned by the applicant, a notarized statement certifying such location ownership.

(B) A renewal application shall be resubmitted every two years in conjunction with the application for renewal of the

provider pharmacy's license. The renewal application shall contain the documentation required in subparagraph (A) of this paragraph.

(C) Upon approval of the application, the provider pharmacy will be issued[~~sent~~] a certificate which must be displayed at the satellite pharmacy.

(2) Notification requirements.

(A) A provider pharmacy shall notify the board in writing within ten days of a change of location, discontinuance of service, or closure of a satellite pharmacy that is operated by the pharmacy.

(B) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each satellite pharmacy if controlled substances are maintained at the satellite pharmacy.

(3) Environment.

(A) The satellite pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A satellite pharmacy shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall:

(I) be easily accessible to both the patient and pharmacists and not allow patient access to prescription drugs; and

(II) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(C) The satellite pharmacy shall be properly lighted and ventilated.

(D) The temperature of the satellite pharmacy shall be maintained within a range compatible with the proper storage of drugs in compliance with the provisions of §291.15 of this title (relating to Storage of Drugs). The temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(E) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(4) Security.

(A) A satellite pharmacy shall be under the continuous, physically present supervision of a pharmacist at all times the satellite pharmacy is open to provide pharmacy services.

(B) The satellite pharmacy shall be enclosed by walls, partitions or other means of floor-to-ceiling enclosure. In addition to the security requirements outlined in §291.33(b)(2) of this title, satellite pharmacies shall have adequate security and procedures to:

(i) prohibit unauthorized access;

(ii) comply with federal and state regulations; and

(iii) maintain patient confidentiality.

(C) Access to the satellite pharmacy shall be limited to pharmacists, pharmacy technicians, and pharmacy technician trainees employed by the provider pharmacy and who are designated in writing by the pharmacist-in-charge.

(D) The provider pharmacy shall have procedures that specify that prescriptions may only be delivered to the satellite pharmacy by the provider pharmacy and shall:

(i) be delivered in a sealed container with a list of the prescriptions delivered;

(ii) be signed for on receipt by the pharmacist at the satellite pharmacy; and

(iii) be checked by personnel designated by the pharmacist-in-charge to verify that the prescriptions sent by the provider pharmacy were actually received. The designated person who checks the order shall document the verification by signing and dating the list of prescriptions delivered.

(5) Prescription dispensing and delivery. A satellite pharmacy shall comply with the requirements outlined in §291.33(c) of this title with regard to prescription dispensing and delivery.

(6) Equipment and supplies. A satellite pharmacy shall have the following equipment and supplies:

(A) typewriter or comparable equipment;

(B) refrigerator, if storing drugs requiring refrigeration; and

(C) metric-apothecary weight and measure conversion charts.

(7) Library. A reference library shall be maintained by the satellite pharmacy that includes the following in hard-copy or electronic format:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules; and

(iv) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(B) at least one current or updated reference from each of the following categories:

(i) patient information:

(I) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(II) a reference text or information leaflets which provide patient information;

(ii) drug interactions: a reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the satellite pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(iii) a general information reference text, such as:

(I) Facts and Comparisons with current supplements;

(II) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(III) Clinical Pharmacology;

(IV) American Hospital Formulary Service with current supplements; or

(V) Remington's Pharmaceutical Sciences; and

(C) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Records.

(1) Maintenance of records.

(A) Every record required to be kept under §291.34 of this title and under this section shall be:

(i) kept by the provider pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the board. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(C) Prescription drug orders shall be maintained by the provider pharmacy in the manner required by §291.34(d) or (e) of this title.

(2) Prescriptions.

(A) Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(B) The provider pharmacy must maintain appropriate records to identify the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performed any processing at the satellite pharmacy.

(C) A provider pharmacy shall keep a record of all prescriptions sent and returned between the pharmacies separate from the records of the provider pharmacy and from any other satellite pharmacy's records.

(D) A satellite pharmacy shall keep a record of all prescriptions received and returned between the pharmacies.

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 295. PHARMACISTS

22 TAC §295.5

The Texas State Board of Pharmacy proposes amendments to §295.5, concerning Pharmacist License or Renewal Fees. The amendments, if adopted, increase pharmacist license fees based on expected expenses.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amended rule as follows:

Revenue Increase

FY2024 = $532,000.00

FY2025 = $545,300.00

FY2026 = $558,387.20

FY2027 = $571,230.11

FY2028 = $583,797.17

There are no anticipated fiscal implications for local government.

Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to assure that the Texas State Board of Pharmacy is adequately funded to carry out its mission. The economic cost to large, small or micro-businesses (pharmacies) will be the same as the economic cost to an individual, if the pharmacy chooses to pay the fee for the individual. The economic cost to individuals who are required to comply with the amended rule will be an increase of $43 for an initial license and an increase of $43 for the renewal of a license. An economic impact statement and regulatory flexibility analysis is not required because the proposed amendments will have a de minimis economic effect on Texas small businesses or rural communities.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do require an increase in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§295.5. Pharmacist License or Renewal Fees.

(a) Biennial Registration. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacist licenses provided under the Pharmacy Act, §559.002.

(b) Initial License Fee.

(1) The fee for the initial license shall be $381 [~~$338~~] for a two-year registration.

(2) New pharmacist licenses shall be assigned an expiration date and initial fee shall be prorated based on the assigned expiration date.

(c) Renewal Fee. The fee for biennial renewal of a pharmacist license shall be $378 [~~$335~~] for a two-year registration.

(d) Exemption from fee. The license of a pharmacist who has been licensed by the Texas State Board of Pharmacy for at least 50 years or who is at least 72 years old shall be renewed without payment of a fee provided such pharmacist is not actively practicing pharmacy. The renewal certificate of such pharmacist issued by the board shall reflect an inactive status. A person whose license is renewed pursuant to this subsection may not engage in the active practice of pharmacy without first paying the renewal fee as set out in subsection (c) 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 September 8, 2023.

TRD-202303326
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

22 TAC §295.8

The Texas State Board of Pharmacy proposes amendments to §295.8, concerning Continuing Education Requirements. The amendments, if adopted, remove continuing education requirements that have expired.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clearer and more concise agency regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulations;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board inter-

prets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§295.8. Continuing Education Requirements.

(a) Authority and purpose.

(1) Authority. In accordance with §559.053 of the Texas Pharmacy Act, (Chapters 551 - 569, Occupations Code), all pharmacists must complete and report 30 contact hours (3.0 CEUs) of approved continuing education obtained during the previous license period in order to renew their license to practice pharmacy.

(2) Purpose. The board recognizes that the fundamental purpose of continuing education is to maintain and enhance the professional competency of pharmacists licensed to practice in Texas, for the protection of the health and welfare of the citizens of Texas.

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

(1) ACPE--Accreditation Council for Pharmacy Education.

(2) Act--The Texas Pharmacy Act, Chapters 551 - 569, Occupations Code.

(3) Approved programs--Live programs, home study, and other mediated instruction delivered by an approved provider or a program specified by the board and listed as an approved program in subsection (e) of this section.

(4) Approved provider--An individual, institution, organization, association, corporation, or agency that is approved by the board.

(5) Board--The Texas State Board of Pharmacy.

(6) Certificate of completion--A certificate or other official document presented to a participant upon the successful completion of an approved continuing education program.

(7) Contact hour--A unit of measure of educational credit which is equivalent to approximately 60 minutes of participation in an organized learning experience.

(8) Continuing education unit (CEU)--A unit of measure of education credit which is equivalent to 10 contact hours (i.e., one CEU = 10 contact hours).

(9) CPE Monitor--A collaborative service from the National Association of Boards of Pharmacy and ACPE that provides an electronic system for pharmacists to track their completed CPE credits.

(10) Credit hour--A unit of measurement for continuing education equal to 15 contact hours.

(11) Enduring Materials (Home Study)--Activities that are printed, recorded, or computer assisted instructional materials that do not provide for direct interaction between faculty and participants.

(12) Initial license period--The time period between the date of issuance of a pharmacist's license and the next expiration date following the initial 30 day expiration date. This time period ranges from eighteen to thirty months depending upon the birth month of the licensee.

(13) License period--The time period between consecutive expiration dates of a license.

(14) Live programs--Activities that provide for direct interaction between faculty and participants and may include lectures, symposia, live teleconferences, workshops, etc.

(15) Standardized pharmacy examination--The North American Pharmacy Licensing Examination (NAPLEX).

(c) Methods for obtaining continuing education. A pharmacist may satisfy the continuing education requirements by either:

(1) successfully completing the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section;

(2) successfully completing during the preceding license period, one credit hour for each year of their license period, which is a part of the professional degree program in a college of pharmacy the professional degree program of which has been accredited by ACPE; or

(3) taking and passing the standardized pharmacy examination (NAPLEX) during the preceding license period as a Texas licensed pharmacist, which shall be equivalent to the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section.

(d) Reporting Requirements.

(1) Renewal of a pharmacist license. To renew a license to practice pharmacy, a pharmacist must report on the renewal application completion of at least thirty contact hours (3.0 CEUs) of continuing education. The following is applicable to the reporting of continuing education contact hours:

(A) at least one contact hour (0.1 CEU) specified in paragraph (1) of this subsection shall be related to Texas pharmacy laws or rules;

~~[(B) for renewals received after August 31, 2021 and before September 1, 2023, at least one contact hour (0.1 CEU) annually, for a total of two contact hours (0.2 CEU) specified in paragraph (1) of this subsection, shall be related to best practices, alternative treatment options, and multi-modal approaches to pain management as specified in §481.0764 of the Texas Health and Safety Code;]~~

(B) [~~(C)~~] not later than the first anniversary of becoming licensed to practice pharmacy, a pharmacist must have completed at least two contact hours (0.2 CEU) specified in paragraph (1) of this subsection related to approved procedures of prescribing and monitoring controlled substances as specified in §481.07635 of the Texas Health and Safety Code;

~~[(D) for renewals received after August 31, 2021 and before September 1, 2023, at least one contact hour (0.1 CEU) specified in paragraph (1) of this subsection shall be related to mental health awareness;]~~

(C) [~~(E)~~] any continuing education requirements which are imposed upon a pharmacist as a part of a board order or agreed board order shall be in addition to the requirements of this section; and

(D) [~~(F)~~] a pharmacist must have completed the human trafficking prevention course required in §116.002 of the Texas Occupations Code.

(2) Failure to report completion of required continuing education. The following is applicable if a pharmacist fails to report completion of the required continuing education:

(A) the license of a pharmacist who fails to report completion of the required number of continuing education contact hours shall not be renewed and the pharmacist shall not be issued a renewal

certificate for the license period until such time as the pharmacist successfully completes the required continuing education and reports the completion to the board; and

(B) a pharmacist who practices pharmacy without a current renewal certificate is subject to all penalties of practicing pharmacy without a license, including the delinquent fees specified in the Act, §559.003.

(3) Extension of time for reporting. A pharmacist who has had a physical disability, illness, or other extenuating circumstances which prohibits the pharmacist from obtaining continuing education credit during the preceding license period may be granted an extension of time to complete the continuing education requirement. The following is applicable for this extension:

(A) the pharmacist shall submit a petition to the board with his/her license renewal application which contains:

(i) the name, address, and license number of the pharmacist;

(ii) a statement of the reason for the request for extension;

(iii) if the reason for the request for extension is health related, a statement from the attending physician(s) treating the pharmacist which includes the nature of the physical disability or illness and the dates the pharmacist was incapacitated; and

(iv) if the reason for the request for the extension is for other extenuating circumstances, a detailed explanation of the extenuating circumstances, and if because of military deployment, documentation of the dates of the deployment;

(B) after review and approval of the petition, a pharmacist may be granted an extension of time to comply with the continuing education requirement which shall not exceed one license renewal period;

(C) an extension of time to complete continuing education credit does not relieve a pharmacist from the continuing education requirement during the current license period; and

(D) if a petition for extension to the reporting period for continuing education is denied, the pharmacist shall:

(i) have 60 days to complete and report completion of the required continuing education requirements; and

(ii) be subject to the requirements of paragraph (2) of this subsection relating to failure to report completion of the required continuing education if the required continuing education is not completed and reported within the required 60-day time period.

(4) Exemptions from reporting requirements.

(A) All pharmacists licensed in Texas shall be exempt from the continuing education requirements in paragraph (1) of this subsection during their initial license period, with the exception of the requirements in paragraph (1)(B), (C), and (F) of this subsection which must be completed during the time periods specified in the subparagraphs.

(B) Pharmacists who are not actively practicing pharmacy shall be granted an exemption to the reporting requirements for continuing education, provided the pharmacists submit a completed renewal application for each license period which states that they are not practicing pharmacy. Upon submission of the completed renewal application, the pharmacist shall be issued a renewal certificate which states that pharmacist is inactive. Pharmacists who wish to return to the practice of pharmacy after being exempted from the continuing education requirements as specified in this subparagraph must:

(i) notify the board of their intent to actively practice pharmacy;

(ii) pay the fee as specified in §295.9 of this title (relating to Inactive License); and

(iii) provide copies of completion certificates from approved continuing education programs as specified in subsection (e) of this section for 30 contact hours (3.0 CEUs). Approved continuing education earned within two years prior to the licensee applying for the return to active status may be applied toward the continuing education requirement for reactivation of the license but may not be counted toward subsequent renewal of the license.

(e) Approved Programs.

(1) Any program presented by an ACPE approved provider subject to the following conditions:

(A) pharmacists may receive credit for the completion of the same ACPE course only once during a license period;

(B) pharmacists who present approved ACPE continuing education programs may receive credit for the time expended during the actual presentation of the program. Pharmacists may receive credit for the same presentation only once during a license period; and

(C) proof of completion of an ACPE course shall contain the following information:

(i) name of the participant;

(ii) title and completion date of the program;

(iii) name of the approved provider sponsoring or cosponsoring the program;

(iv) number of contact hours and/or CEUs awarded;

(v) the assigned ACPE universal program number and a "P" designation indicating that the CE is targeted to pharmacists; and

(vi) either:

(I) a dated certifying signature of the approved provider and the official ACPE logo; or

(II) the CPE Monitor logo.

(2) Courses which are part of a professional degree program or an advanced pharmacy degree program offered by a college of pharmacy which has a professional degree program accredited by ACPE.

(A) Pharmacists may receive credit for the completion of the same course only once during a license period. A course is equivalent to one credit hour for each year of the renewal period.

(B) Pharmacists who teach these courses may receive credit towards their continuing education, but such credit may be received only once for teaching the same course during a license period.

(3) Basic cardiopulmonary resuscitation (CPR) courses which lead to CPR certification by the American Red Cross or the American Heart Association or its equivalent shall be recognized as approved programs. Pharmacists may receive credit for one contact hour (0.1 CEU) towards their continuing education requirement for completion of a CPR course only once during a license period. Proof of completion of a CPR course shall be the certificate issued by

the American Red Cross or the American Heart Association or its equivalent.

(4) Advanced cardiovascular life support courses (ACLS) or pediatric advanced life support (PALS) courses which lead to initial ACLS or PALS certification by the American Heart Association or its equivalent shall be recognized as approved programs. Pharmacists may receive credit for twelve contact hours (1.2 CEUs) towards their continuing education requirement for completion of an ACLS or PALS course only once during a license period. Proof of completion of an ACLS or PALS course shall be the certificate issued by the American Heart Association or its equivalent.

(5) Advanced cardiovascular life support courses (ACLS) or pediatric advanced life support (PALS) courses which lead to ACLS or PALS recertification by the American Heart Association or its equivalent shall be recognized as approved programs. Pharmacists may receive credit for four contact hours (0.4 CEUs) towards their continuing education requirement for completion of an ACLS or PALS recertification course only once during a license period. Proof of completion of an ACLS or PALS recertification course shall be the certificate issued by the American Heart Association or its equivalent.

(6) Attendance at Texas State Board of Pharmacy Board Meetings shall be recognized for continuing education credit as follows:

(A) pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for attending a full, public board business meeting in its entirety;

(B) a maximum of six contact hours (0.6 CEUs) are allowed for attendance at a board meeting during a license period; and

(C) proof of attendance for a complete board meeting shall be a certificate issued by the Texas State Board of Pharmacy.

(7) Participation in a Texas State Board of Pharmacy appointed Task Force shall be recognized for continuing education credit as follows:

(A) pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for participating in a Texas State Board of Pharmacy appointed Task Force; and

(B) proof of participation for a Task Force shall be a certificate issued by the Texas State Board of Pharmacy.

(8) Attendance at programs presented by the Texas State Board of Pharmacy or courses offered by the Texas State Board of Pharmacy as follows:

(A) pharmacists shall receive credit for the number of hours for the program or course as stated by the Texas State Board of Pharmacy; and

(B) proof of attendance at a program presented by the Texas State Board of Pharmacy or completion of a course offered by the Texas State Board of Pharmacy shall be a certificate issued by the Texas State Board of Pharmacy.

(9) Pharmacists shall receive credit toward their continuing education requirements for programs or courses approved by other state boards of pharmacy as follows:

(A) pharmacists shall receive credit for the number of hours for the program or course as specified by the other state board of pharmacy; and

(B) proof of attendance at a program or course approved by another state board of pharmacy shall be a certificate or other documentation that indicates:

(i) name of the participant;

(ii) title and completion date of the program;

(iii) name of the approved provider sponsoring or cosponsoring the program;

(iv) number of contact hours and/or CEUs awarded;

(v) a dated certifying signature of the provider; and

(vi) documentation that the program is approved by the other state board of pharmacy.

(10) Completion of an Institute for Safe Medication Practices' (ISMP) Medication Safety Self Assessment for hospital pharmacies or for community/ambulatory pharmacies shall be recognized for continuing education credit as follows:

(A) pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for completion of an ISMP Medication Safety Self Assessment; and

(B) proof of completion of an ISMP Medication Safety Self Assessment shall be:

(i) a continuing education certificate provided by an ACPE approved provider for completion of an assessment; or

(ii) a document from ISMP showing completion of an assessment.

(11) Pharmacists shall receive credit for three contact hours (0.3 CEUs) toward their continuing education requirements for taking and successfully passing an initial Board of Pharmaceutical Specialties certification examination administered by the Board of Pharmaceutical Specialties. Proof of successfully passing the examination shall be a certificate issued by the Board of Pharmaceutical Specialties.

(12) Programs approved by the American Medical Association (AMA) as Category 1 Continuing Medical Education (CME) and accredited by the Accreditation Council for Continuing Medical Education subject to the following conditions:

(A) pharmacists may receive credit for the completion of the same CME course only once during a license period;

(B) pharmacists who present approved CME programs may receive credit for the time expended during the actual presentation of the program. Pharmacists may receive credit for the same presentation only once during a license period; and

(C) proof of completion of a CME course shall contain the following information:

(i) name of the participant;

(ii) title and completion date of the program;

(iii) name of the approved provider sponsoring or cosponsoring the program;

(iv) number of contact hours and/or CEUs awarded; and

(v) a dated certifying signature of the approved provider.

(f) Retention of continuing education records and audit of records by the board.

(1) Retention of records. Pharmacists are required to maintain certificates of completion of approved continuing education for three years from the date of reporting the contact hours on a license renewal application. Such records may be maintained in hard copy or electronic format.

(2) Audit of records by the board. The board shall audit the records of pharmacists for verification of reported continuing education credit. The following is applicable for such audits:

(A) upon written request, a pharmacist shall provide to the board documentation of proof for all continuing education contact hours reported during a specified license period(s). Failure to provide all requested records during the specified time period constitutes prima facie evidence of failure to keep and maintain records and shall subject the pharmacist to disciplinary action by the board;

(B) credit for continuing education contact hours shall only be allowed for approved programs for which the pharmacist submits documentation of proof reflecting that the hours were completed during the specified license period(s). Any other reported hours shall be disallowed. A pharmacist who has received credit for continuing education contact hours disallowed during an audit shall be subject to disciplinary action; and

(C) a pharmacist who submits false or fraudulent records to the board shall be subject to disciplinary action by the board.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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President
Texas State Board of Pharmacy
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22 TAC §295.9

The Texas State Board of Pharmacy proposes amendments to §295.9, concerning Inactive License. The amendments, if adopted, remove a continuing education requirement for which the statutory authority has expired from the conditions for reactivation of an inactive license and make a grammatical correction.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clearer and more concise agency regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation by removing an expired statutory requirement;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§295.9. Inactive License.

(a) Placing a license on inactive status. A person who is licensed by the board to practice pharmacy but who is not eligible to renew the license for failure to comply with the continuing education requirements of the Act, Chapter 559, Subchapter A, and who is not engaged in the practice of pharmacy in this state, may place the license on inactive status at the time of license renewal or during a license period as follows:

(1) To place a license on inactive status at the time of renewal, the licensee shall:

(A) complete and submit before the expiration date a pharmacist license renewal application provided by the board;

(B) state on the renewal application that the license is to be placed on inactive status and that the licensee shall not practice pharmacy in Texas while the license is inactive; and

(C) pay the fee for renewal of the license as specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees).

(2) To place a license on inactive status at a time other than the time of license renewal, the licensee shall:

(A) return the current renewal certificate to the board;

(B) submit a signed statement stating that the licensee shall not practice pharmacy in Texas while the license is inactive, and the date the license is to be placed on inactive status; and

(C) pay the fee for issuance of an amended license as specified in §295.5(e) of this title (relating to Pharmacist License or Renewal Fees).

(b) Prohibition against practicing pharmacy in Texas with an inactive license. A holder of a license that is on inactive status shall not practice pharmacy in this state. The practice of pharmacy by a holder of a license that is on inactive status constitutes the practice of pharmacy without a license.

(c) Reactivation of an inactive license.

(1) A holder of a license that is on inactive status may return the license to active status by:

(A) applying for active status on a form prescribed by the board;

(B) providing copies of completion certificates from approved continuing education programs as specified in §295.8(e) of this title (relating to Continuing Education Requirements) for 30 hours including at least one contact hour (0.1 CEU) [~~shall be~~] related to Texas pharmacy laws or rules [~~and, for applications received before September 1, 2023, at least one contact hour (0.1 CEU) shall be related to best practices, alternative treatment options, and multi-modal approaches to pain management as specified in §481.0764 of the Texas Health and Safety Code~~]. Approved continuing education earned within two years prior to the licensee applying for the return to active status may be applied toward the continuing education requirement for reactivation of the license but may not be counted toward subsequent renewal of the license; and

(C) paying the fee specified in paragraph (2) of this subsection.

(2) If the application for reactivation of the license is made at the time of license renewal, the applicant shall pay the license renewal fee specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees). If the application for reactivation of the license is made at a time other than the time of license renewal, the applicant shall pay the fee for issuance of an amended license to practice pharmacy as specified in §295.5(e) of this title (relating to Pharmacist License or Renewal Fees).

(3) In an emergency caused by a natural or manmade disaster or any other exceptional situation that causes an extraordinary demand for pharmacist services, the executive director of the board, in his/her discretion, may allow a pharmacist whose license has been inactive for no more than two years to reactivate their license prior to obtaining the required continuing education specified in paragraph (1)(B) of this subsection, provided the pharmacist completes the continuing education requirement within six months of reactivation of the license. If the required continuing education is not provided within six months, the license shall return to an inactive status.

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 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.10

The Texas State Board of Pharmacy proposes amendments to §297.10, concerning Registration for Military Service Members, Military Veterans, and Military Spouses. The amendments, if adopted, establish procedures for a military service member who is currently registered in good standing by a jurisdiction with registration requirements that are substantially similar to Texas's requirements to obtain an interim pharmacy technician registration, in accordance with Senate Bill 422 and make grammatical corrections.

Julie Spier, R.Ph., President, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Spier has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the registration requirements and procedures for military service members to request an interim pharmacy technician registration and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Spier has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation by exempting military service members from certain registration requirements in order to comply with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control

and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§297.10. Registration for Military Service Members, Military Veterans, and Military Spouses.

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

(1) Active duty--Current full-time military service in the armed forces of the United States or active duty military service as a member of the Texas military forces, or similar military service of another state.

(2) Armed forces of the United States--The army, navy, air force, space force, coast guard, or marine corps of the United States or a reserve unit of one of those branches of the armed forces.

(3) Military service member--A person who is on active duty.

(4) Military spouse--A person who is married to a military service member.

(5) Military veteran--A person who has served on active duty and who was discharged or released from active duty.

(b) Alternative registration procedure. For the purpose of §55.004, Occupations Code, an applicant for a pharmacy technician registration who is a military service member, military veteran, or military spouse may complete the following alternative procedures for registering as a pharmacy technician.

(1) An applicant who holds a current registration as a pharmacy technician issued by another state but does not have a current pharmacy technician certification certificate shall meet the requirements for registration as a pharmacy technician trainee as specified in §297.3 of this chapter (relating to Registration Requirements).

(2) An applicant who held a pharmacy technician registration in Texas that expired within the five years preceding the application date who meets the following requirements may be granted a pharmacy technician registration. The applicant:

(A) shall complete the Texas application for registration that includes the following:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application;

(B) shall provide documentation to include:

(i) military identification indicating that the applicant is a military service member, military veteran, or military dependent, if a military spouse; and

(ii) marriage certificate, if the applicant is a military spouse; applicant's spouse is on active duty status;

(C) be exempt from the application fees paid to the board set forth in §297.4(a) and (b)(2) of this chapter (relating to Fees);

(D) shall meet all necessary requirements in order for the board to access the criminal history records information, including submitting fingerprint information and such criminal history check does not reveal any charge or conviction for a crime that §281.64 of this title (relating to Sanctions for Criminal Offenses) indicates a sanction of denial, revocation, or suspension; and

(E) is not required to have a current pharmacy technician certification certificate.

(c) Expedited registration procedure. For the purpose of §55.005, Occupations Code, an applicant for a pharmacy technician registration who is a military service member, military veteran or military spouse and who holds a current registration as a pharmacy technician issued by another state or who held a pharmacy technician registration in Texas that expired within the five years preceding the application date may complete the following expedited procedures for registering as a pharmacy technician.

(1) The applicant shall:

(A) have a high school or equivalent diploma (e.g., GED), or be working to achieve a high school or equivalent diploma. For the purpose of this clause, an applicant for registration may be working to achieve a high school or equivalent diploma for no more than two years;

(B) have taken and passed a pharmacy technician certification examination approved by the board and have a current certification certificate;

(C) complete the Texas application for registration that includes the following information:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application;

(D) meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and paying the required fees; and

(E) shall be exempt from the registration fee as specified in §297.4(b)(2) of this chapter.

(2) Once an applicant has successfully completed all requirements of registration, and the board has determined there are no grounds to refuse registration, the applicant will be notified of registration as a registered pharmacy technician and of his or her pharmacy technician registration number.

(3) All applicants for renewal of an expedited pharmacy technician registration issued to a military service member, military veteran, or military spouse shall comply with the renewal procedures as specified in §297.3 of this chapter.

(d) License renewal. As specified in §55.003, Occupations Code, a military service member who holds a pharmacy technician registration is entitled to two years of additional time to complete any requirements related to the renewal of the military service member's registration. [~~as follows:~~]

(1) A military service member who fails to renew their pharmacy technician registration in a timely manner because the individual was serving as a military service member shall submit to the board:

(A) name, address, and registration number of the pharmacy technician;

(B) military identification indicating that the individual is a military service member; and

(C) a statement requesting up to two years of additional time to complete the renewal.

(2) A military service member specified in paragraph (1) of this subsection shall be exempt from fees specified in §297.3(d)(3) of this chapter.

(3) A military service member specified in paragraph (1) of this subsection is entitled to two additional years of time to complete the continuing education requirements specified in §297.8 of this title (relating to Continuing Education Requirements).

(e) Interim registration for military service member or military spouse. In accordance with §55.0041, Occupations Code, a military service member or military spouse who is currently registered in good standing by a jurisdiction with registration requirements that are substantially equivalent to the registration requirements in this state may be issued an interim pharmacy technician registration. The military service member or military spouse:

(1) shall provide documentation to include:

(A) a notification of intent to practice form including any additional information requested;

(B) proof of the military service member or military spouse's residency in this state, including a copy of the permanent change of station order for the military service member to whom the military spouse is married;

(C) a copy of the military service member or military spouse's military identification card; and

(D) verification from the jurisdiction in which the military service member or military spouse holds an active pharmacy technician registration that the military service member or military spouse's registration is in good standing;

(2) may not engage in pharmacy technician duties in this state until issued an interim pharmacy technician registration;

(3) may hold an interim pharmacy technician registration only for the period during which the military service member or military service member to whom the military spouse is married is stationed at a military installation in this state, but not to exceed three years from the date of issuance of the interim registration; and

(4) may not renew the interim pharmacy technician registration.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303332
Julie Spier, R.Ph.
President
Texas State Board of Pharmacy
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-8026

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

SUBCHAPTER B. LICENSING REQUIREMENTS

22 TAC §463.9

The Texas Behavioral Health Executive Council proposes amendments to §463.9, relating to Licensed Specialist in School Psychology.

Overview and Explanation of the Proposed Rule. The proposed rule amendments allow applicants who were licensed in other states to provide school psychological services or applicants with graduate degrees in related disciplines to psychology to be eligible to apply for licensure as an LSSP so long as the applicant also meets the coursework, examinations, and internship requirements.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity, consistency, and efficiency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the

residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Psychologists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§463.9. Licensed Specialist in School Psychology.

(a) License Requirements. An applicant for licensure as a specialist in school psychology must:

(1) hold an appropriate graduate degree;

(2) provide proof of specific graduate level coursework;

(3) provide proof of an acceptable internship;

(4) provide proof of passage of all examinations required by the Council; and

(5) meet the requirements imposed under §501.2525(a)(3) - (9) of the Occupations Code.

(b) Applicants who hold active certification as a Nationally Certified School Psychologist (NCSP) are considered to have met all requirements for licensure under this rule except for passage of the Jurisprudence Examination. Applicants relying upon this subsection must provide the Council with their NCSP certification number.

(c) Applicants who graduated from a training program accredited or approved by the National Association of School Psychologists or accredited in School Psychology by the American Psychological Association are considered to have met all training and internship requirements for licensure under this rule. Applicants relying upon this subsection must submit an official transcript indicating the degree and date the degree was awarded or conferred.

(d) Appropriate Graduate Degrees.

(1) Applicants who do not hold active NCSP certification, or who did not graduate from a training program accredited or approved by the National Association of School Psychologists or accredited in School Psychology by the American Psychological Association, must have completed a graduate degree in psychology from a regionally accredited institution of higher education. For purposes of this rule, a graduate degree in psychology means the name of the candidate's major or program of study is titled psychology.

(2) Applicants applying under this subsection must have completed, either as part of their graduate degree program or after conferral of their graduate degree, at least 60 graduate level semester credit hours from a regionally accredited institution of higher education. A maximum of 12 internship hours may be counted toward this requirement.

(3) An applicant who holds a graduate degree that does not qualify under subsection (d)(1) but meets the requirements of subsection (d)(2) is considered to have an appropriate graduate degree if: [~~the applicant holds a certificate of completion from a graduate-level training program designed to train individuals from related disciplines in the practice of school psychology.~~]

(A) the applicant holds a certificate of completion from a graduate-level training course designed to train individuals from related disciplines in the practice of school psychology;

(B) the applicant holds a graduate degree in a discipline related to psychology from a regionally accredited institution of higher education;

(C) the applicant is licensed, certified, or registered in good standing to practice school psychology in another jurisdiction; or

(D) the applicant was licensed, certified, or registered to practice school psychology in another jurisdiction within the previous ten years before application for licensure and was not subject to any administrative or disciplinary actions during that same time period.

(e) Applicants applying under subsection (d) of this section must submit evidence of graduate level coursework as follows:

(1) Psychological Foundations, including:

(A) biological bases of behavior;

(B) human learning;

(C) social bases of behavior;

(D) multi-cultural bases of behavior;

(E) child or adolescent development;

(F) psychopathology or exceptionalities;

(2) Research and Statistics;

(3) Educational Foundations, including any of the following:

(A) instructional design;

(B) organization and operation of schools;

(C) classroom management; or

(D) educational administration;

(4) School-based Assessment, including:

(A) psychoeducational assessment;

(B) socio-emotional, including behavioral and cultural, assessment;

(5) School-based Interventions, including:

(A) counseling;

(B) behavior management;

(C) consultation;

(6) Professional, Legal and Ethical Issues; and

(7) A School-based Practicum.

(f) Applicants applying under subsection (d) of this section must have completed an internship with a minimum of 1200 hours and that meets the following criteria:

(1) At least 600 of the internship hours must have been completed in a public school.

(2) The internship must be provided through a formal course of supervised study from a regionally accredited institution of higher education in which the applicant was enrolled; or the internship must have been obtained in accordance with Council §463.11(d)(1) and (d)(2)(C) of this title.

(3) Any portion of an internship completed within a public school must be supervised by a Licensed Specialist in School Psychology, and any portion of an internship not completed within a public school must be supervised by a Licensed Psychologist.

(4) No experience which is obtained from a supervisor who is related within the second degree of affinity or consanguinity to the supervisee may be utilized.

(5) Unless authorized by the Council, supervised experience received from a supervisor practicing with a restricted license may not be utilized to satisfy the requirements of this rule.

(6) Internship hours must be obtained in not more than two placements. A school district, consortium, and educational co-op are each considered one placement.

(7) Internship hours must be obtained in not less than one or more than two academic years.

(8) An individual completing an internship under this rule must be designated as an intern.

(9) Interns must receive no less than two hours of supervision per week, with no more than half being group supervision. The amount of weekly supervision may be reduced, on a proportional basis, for interns working less than full-time.

(10) The internship must include direct intern application of assessment, intervention, behavior management, and consultation, for children representing a range of ages, populations and needs.

(g) Provision of psychological services in the public schools by unlicensed individuals.

(1) An unlicensed individual may provide psychological services under supervision in the public schools if:

(A) the individual is enrolled in an internship, practicum or other site based training in a psychology program in a regionally accredited institution of higher education; or

(B) the individual has completed an internship that meets the requirements of this rule, and has submitted an application for licensure as a Licensed Specialist in School Psychology to the Council that has not been denied or returned.

(2) An unlicensed individual may not provide psychological services in a private school setting unless the activities or services provided are exempt under §501.004 of the Psychologists' Licensing Act.

(3) An unlicensed individual may not engage in the practice of psychology under paragraph (1)(B) of this subsection for more than forty-five days following receipt of the application by the Council.

(4) The authority to practice referenced in paragraph (1)(B) of this subsection is limited to the first or initial application filed by an individual under this rule, but is not applicable to any subsequent applications filed under this rule.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303312

Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §781.404

The Texas Behavioral Health Executive Council proposes amendments to §781.404, relating to Recognition as a Council-approved Supervisor and the Supervision Process.

Overview and Explanation of the Proposed Rule. The proposed amendments are intended to clarify the allowable fee arrangements between supervisor and supervisee.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Texas State Board of Social Worker Examiners previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§781.404. Recognition as a Council-approved Supervisor and the Supervision Process.

(a) Types of supervision include:

(1) administrative or work-related supervision of an employee, contractor or volunteer that is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(2) clinical supervision of a Licensed Master Social Worker in a setting in which the LMSW is providing clinical services; the supervision may be provided by a Licensed Professional Counselor, Licensed Psychologist, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker or Psychiatrist. This supervision is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(3) clinical supervision of a Licensed Master Social Worker, who is providing clinical services and is under a supervision plan to fulfill supervision requirements for achieving the LCSW; a Licensed Clinical Social Worker who is a Council-approved supervisor delivers this supervision;

(4) non-clinical supervision of a Licensed Master Social Worker or Licensed Baccalaureate Social Worker who is providing non-clinical social work service toward qualifications for independent non-clinical practice recognition; this supervision is delivered by a Council-approved supervisor; or

(5) Council-ordered supervision of a licensee by a Council-approved supervisor pursuant to a disciplinary order or as a condition of new or continued licensure.

(b) A person who wishes to be a Council-approved supervisor must file an application and pay the applicable fee.

(1) A Council-approved supervisor must be actively licensed in good standing by the Council as an LBSW, an LMSW, an LCSW, or be recognized as an Advanced Practitioner (LMSW-AP), or hold the equivalent social work license in another jurisdiction. The person applying for Council-approved status must have practiced at his/her category of licensure for two years. The Council-approved supervisor shall supervise only those supervisees who provide services that fall within the supervisor's own competency.

(2) The Council-approved supervisor is responsible for the social work services provided within the supervisory plan.

(3) The Council-approved supervisor must have completed a 40-hour supervisor's training program acceptable to the Council.

(A) At a minimum, the 40-hour supervisor's training program must meet each of the following requirements:

(i) the course must be taught by a licensed social worker holding both the appropriate license classification, and supervisor status issued by the Council;

(ii) all related coursework and assignments must be completed over a time period not to exceed 90 days; and

(iii) the 40-hour supervision training must include at least:

(I) three (3) hours for defining and conceptualizing supervision and models of supervision;

(II) three (3) hours for supervisory relationship and social worker development;

(III) twelve (12) hours for supervision methods and techniques, covering roles, focus (process, conceptualization, and personalization), group supervision, multi-cultural supervision (race, ethnic, and gender issues), and evaluation methods;

(IV) twelve (12) hours for supervision and standards of practice, codes of ethics, and legal and professional issues; and

(V) three (3) hours for executive and administrative tasks, covering supervision plan, supervision contract, time for supervision, record keeping, and reporting.

(B) Subparagraph (A) of this paragraph is effective September 1, 2023.

(4) The Council-approved supervisor must submit required documentation and fees to the Council.

(5) When a licensee is designated Council-approved supervisor, he or she may perform the following supervisory functions.

(A) An LCSW may supervise clinical experience toward the LCSW license, non-clinical experience toward the Independent Practice Recognition (non-clinical), and Council-ordered probated suspension;

(B) An LMSW-AP may supervise non-clinical experience toward the non-clinical Independent Practice Recognition; and Council-ordered probated suspension for non-clinical practitioners;

(C) An LMSW with the Independent Practice Recognition (non-clinical) who is a Council-approved supervisor may supervise an LBSW's or LMSW's non-clinical experience toward the non-clinical Independent Practice Recognition; and an LBSW or LMSW (non-clinical) under Council-ordered probated suspension;

(D) An LBSW with the non-clinical Independent Practice Recognition who is a Council-approved supervisor may supervise an LBSW's non-clinical experience toward the non-clinical Independent Practice Recognition; and an LBSW under Council-ordered probated suspension.

(6) The approved supervisor must renew the approved supervisor status in conjunction with the biennial license renewal. The approved supervisor may surrender supervisory status by documenting the choice on the appropriate Council renewal form and subtracting the supervisory renewal fee from the renewal payment. If a licensee who has surrendered supervisory status desires to regain supervisory status, the licensee must reapply and meet the current requirements for approved supervisor status.

(7) A supervisor must maintain the qualifications described in this section while he or she is providing supervision.

(8) A Council-approved supervisor who wishes to provide any form of supervision or Council-ordered supervision must comply with the following:

(A) The supervisor is obligated to keep legible, accurate, complete, signed supervision notes and must be able to produce such documentation for the Council if requested. The notes shall document the content, duration, and date of each supervision session.

(B) A social worker may contract for supervision with written approval of the employing agency. A copy of the approval must accompany the supervisory plan submitted to the Council.

(C) A Council-approved supervisor who is compensated for supervisory duties may not charge or collect a fee or anything of value from the supervisee [~~his or her employee or contract employee~~] for the supervision services provided to the supervisee. [~~employee or contract employee.~~]

(D) Before entering into a supervisory plan, the supervisor shall be aware of all conditions of exchange with the clients served by her or his supervisee. The supervisor shall not provide supervision if the supervisee is practicing outside the authorized scope of the license. If the supervisor believes that a social worker is practicing outside the scope of the license, the supervisor shall make a report to the Council.

(E) A supervisor shall not be employed by or under the employment supervision of the person who he or she is supervising.

(F) A supervisor shall not be a family member of the person being supervised.

(G) A supervisee must have a clearly defined job description and responsibilities.

(H) A supervisee who provides client services for payment or reimbursement shall submit billing to the client or third-party payers which clearly indicates the services provided and who provided the services, and specifying the supervisee's licensure category and the fact that the licensee is under supervision.

(I) If either the supervisor or supervisee has an expired license or a license that is revoked or suspended during supervision, supervision hours accumulated during that time will be accepted only if the licensee appeals to and receives approval from the Council.

(J) A licensee must be a current Council-approved supervisor in order to provide professional development supervision toward licensure or specialty recognition, or to provide Council-ordered supervision to a licensee. Providing supervision without having met all requirements for current, valid Council-approved supervisor status may be grounds for disciplinary action against the supervisor.

(K) The supervisor shall ensure that the supervisee knows and adheres to Subchapter B, Rules of Practice, of this Chapter.

(L) The supervisor and supervisee shall avoid forming any relationship with each other that impairs the objective, professional judgment and prudent, ethical behavior of either.

(M) Should a supervisor become subject to a Council disciplinary order, that person is no longer a Council-approved supervisor and must so inform all supervisees, helping them to find alternate supervision. The person may reapply for Council-approved supervisor status by meeting the terms of the disciplinary order and having their license in good standing, in addition to submitting an application for Council-approved supervisor, and proof of completion of a 40-hour Council-approved supervisor training course, taken no earlier than the date of execution of the Council order.

(N) Providing supervision without Council-approved supervisor status is grounds for disciplinary action.

(O) A supervisor shall refund all supervisory fees the supervisee paid after the date the supervisor ceased to be Council-approved.

(P) A supervisor is responsible for developing a well-conceptualized supervision plan with the supervisee, and for updating that plan whenever there is a change in agency of employment, job function, goals for supervision, or method by which supervision is provided.

(9) A Council-approved supervisor who wishes to provide supervision towards licensure as an LCSW or towards specialty recognition in Independent Practice (IPR) or Advanced Practitioner (LMSW-AP), which is supervision for professional growth, must comply with the following:

(A) Supervision toward licensure or specialty recognition may occur in one-on-one sessions, in group sessions, or in a combination of one-on-one and group sessions. Session may transpire in the same geographic location, or via audio, web technology or other electronic supervision techniques that comply with HIPAA and Texas Health and Safety Code, Chapter 611, and/or other applicable state or federal statutes or rules.

(B) Supervision groups shall have no fewer than two members and no more than six.

(C) Supervision shall occur in proportion to the number of actual hours worked for the 3,000 hours of supervised experience. No more than 10 hours of supervision may be counted in any one month, or 30-day period, as appropriate, towards satisfying minimum requirements for licensure or specialty recognition.

(D) The Council considers supervision toward licensure or specialty recognition to be supervision which promotes professional growth. Therefore, all supervision formats must encourage clear, accurate communication between the supervisor and the supervisee, including case-based communication that meets standards for confidentiality. Though the Council favors supervision formats in which the supervisor and supervisee are in the same geographical place for a substantial part of the supervision time, the Council also recognizes that some current and future technology, such as using reliable, technologically-secure computer cameras and microphones, can allow personal face-to-face, though remote, interaction, and can support professional growth. Supervision formats must be clearly described in the supervision plan, explaining how the supervision strategies and methods of delivery meet the supervisee's professional growth needs and ensure that confidentiality is protected.

(E) Supervision toward licensure or specialty recognition must extend over a full 3000 hours over a period of not less than 24 full months for LCSW or Independent Practice Recognition (IPR). Even if the individual completes the minimum of 3000 hours of supervised experience and minimum of 100 hours of supervision prior to 24 months from the start date of supervision, supervision which meets the Council's minimum requirements shall extend to a minimum of 24 full months.

(F) The supervisor and the supervisee bear professional responsibility for the supervisee's professional activities.

(G) If the supervisor determines that the supervisee lacks the professional skills and competence to practice social work under a regular license, the supervisor shall develop and implement a written remediation plan for the supervisee.

(H) Supervised professional experience required for licensure must comply with §781.401 of this title and §781.402 of this title and all other applicable laws and rules.

(10) A Council-approved supervisor who wishes to provide supervision required as a result of a Council order must comply with this title, all other applicable laws and rules, and/or the following.

(A) A licensee who is required to be supervised as a condition of initial licensure, continued licensure, or disciplinary action must:

(i) submit one supervisory plan for each practice location to the Council for approval by the Council or its designee within 30 days of initiating supervision;

(ii) submit a current job description from the agency in which the social worker is employed with a verification of authenticity from the agency director or his or her designee on agency letterhead or submit a copy of the contract or appointment under which the licensee intends to work, along with a statement from the potential supervisor that the supervisor has reviewed the contract and is qualified to supervise the licensee in the setting;

(iii) ensure that the supervisor submits reports to the Council on a schedule determined by the Council. In each report, the supervisor must address the supervisee's performance, how closely the supervisee adheres to statutes and rules, any special circumstances that led to the imposition of supervision, and recommend whether the supervisee should continue licensure. If the supervisor does not recommend the supervisee for continued licensure, the supervisor must provide specific reasons for not recommending the supervisee. The Council may consider the supervisor's reservations as it evaluates the supervision verification the supervisee submits; and

(iv) notify the Council immediately if there is a disruption in the supervisory relationship or change in practice location and submit a new supervisory plan within 30 days of the break or change in practice location.

(B) The supervisor who agrees to provide Council-ordered supervision of a licensee who is under Council disciplinary action must understand the Council order and follow the supervision stipulations outlined in the order. The supervisor must address with the licensee those professional behaviors that led to Council discipline, and must help to remediate those concerns while assisting the licensee to develop strategies to avoid repeating illegal, substandard, or unethical behaviors.

(C) Council-ordered and mandated supervision timeframes are specified in the Council order.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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22 TAC §781.501

The Texas Behavioral Health Executive Council proposes amendments to §781.501, relating to Requirements for Continuing Education.

Overview and Explanation of the Proposed Rule. The proposed amendments correct a typographical error and allow field and practicum instructors to claim up to 10 hours of continuing education credit when providing instruction to social work students.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency;

it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Texas State Board of Social Worker Examiners previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§781.501. Requirements for Continuing Education.

(a) Minimum Continuing Education Hours Required:

(1) A licensee must complete 30 hours of continuing education during each renewal period that they hold a license. The 30 hours of continuing education must include 6 hours in ethics and 3 hours in cultural diversity or competency.

(2) A licensee may carry forward to the next renewal period, a maximum of 10 hours accrued during the current renewal period if those hours are not needed for renewal.

(b) Special Continuing Education Requirements.

(1) A licensee with supervisory status must complete 6 hours of continuing education in supervision.

(2) The special continuing education requirements set out in this subsection may be counted toward the minimum continuing education hours required under subsection (a) of this section.

(c) Acceptable ethics hours include, but are not limited to continuing education on:

(1) state or federal laws, including agency rules, relevant to the practice of social work;

(2) practice guidelines established by local, regional, state, national, or international professional organizations;

(3) training or education designed to demonstrate or affirm the ideals and responsibilities of the profession; and

(4) training or education intended to assist licensees in determining appropriate decision-making and behavior, improve consistency in or enhance the professional delivery of services, and provide a minimum acceptable level of practice.

(d) Acceptable cultural diversity or competency hours include, but are not limited to continuing education regarding age, disability, ethnicity, gender, gender identity, language, national origin, race, religion, culture, sexual orientation, and socio-economic status.

(e) Acceptable Continuing Education Activities.

(1) All continuing education hours must have been received during the renewal period unless allowed under subsection (a)(2) of this section, and be directly related to the practice of social work;

(2) The Council shall make the determination as to whether the activity claimed by the licensee is directly related to the practice of social work;

(3) Except for hours claimed under subsection (h) of this section, all continuing education hours obtained must be designated by the provider in a letter, email, certificate, or transcript that displays the licensee's name, topic covered, date(s) of training, and hours of credit earned; and

(4) Multiple instances or occurrences of a continuing education activity may not be claimed for the same renewal period.

(f) Licensees must obtain at least fifty percent of their continuing education hours from one or more of the following providers:

(1) an international, national, regional, state, or local association of medical, mental, or behavioral health professionals;

(2) public school districts, charter schools, or education service centers;

(3) city, county, state, or federal governmental entities;

(4) an institution of higher education accredited by a regional accrediting organization recognized by the Council for Higher

Education Accreditation, the Texas Higher Education Coordinating Board, or the United States Department of Education;

(5) religious or charitable organizations devoted to improving the mental or behavioral health of individuals;

(6) a licensee that is a Council-approved supervisor;

(7) a hospital or hospital system, including any clinic, division, or department within a hospital or hospital system; or

(8) any provider approved or endorsed by a provider listed herein.

(g) Licensees [~~Notwithstanding subsection (f) of this section, licensees~~] shall receive credit for continuing education activities according to the number of hours designated by the provider, or if no such designation, on a one-for-one basis with one credit hour for each hour spent in the continuing education activity.

(h) Notwithstanding subsection (f) of this section, licensees [~~Licensees~~] may claim continuing education credit for each of the following activities:

(1) Passage of the jurisprudence examination. Licensees who pass the jurisprudence examination may claim 1 hour of continuing education in ethics.

(2) Preparing and giving a presentation at a continuing education activity. The maximum number of hours that may be claimed for this activity is 5 hours.

(3) Authoring a book or peer reviewed article. The maximum number of hours that may be claimed for this activity is 5 hours.

(4) Teaching or attending a university or college level course. The maximum number of hours that may be claimed for this activity is 5 hours.

(5) Self-study. The maximum number of hours that may be claimed for this activity is 1 hour. Self-study is credit that is obtained from any type of activity that is performed by an individual licensee acting alone. Such activities include, but are not limited to, reading materials directly related to the practice of social work. Time spent individually viewing or listening to audio, video, digital, or print media as part of an organized continuing education activity, program or offering from a third-party is not subject to this self-study limitation and may count as acceptable continuing education under other parts of this rule.

(6) Successful completion of a training course on human trafficking prevention described by §116.002 of the Occupations Code. Licensees who complete this training may claim 1 hour of continuing education credit.

(7) Providing field or practicum instruction to social work students. A field or practicum instructor may claim one hour of continuing education credit for each hour of college or university credit that is awarded to the social work student receiving instruction. The maximum number of hours that may be claimed for this activity is 10 hours per renewal period, and hours claimed may not be counted toward the ethics or cultural diversity or competency requirements.

(i) The Council does not pre-evaluate or pre-approve continuing education providers or hours.

(j) Licensees shall maintain proof of continuing education compliance for a minimum of 3 years after the applicable renewal period.

(k) Subsection (f) of this rule is effective January 1, 2024.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
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For further information, please call: (512) 305-7706

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PART 35. TEXAS STATE BOARD OF EXAMINERS OF MARRIAGE AND FAMILY THERAPISTS

CHAPTER 801. LICENSURE AND REGULATION OF MARRIAGE AND FAMILY THERAPISTS

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §801.2

The Texas Behavioral Health Executive Council proposes amendments to §801.2, relating to Definitions.

Overview and Explanation of the Proposed Rule. The proposed amendment adds a definition for independent practice for the purpose of providing greater clarity in the rules.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the

Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.2. Definitions.

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

(1) Accredited institutions or programs--An institution of higher education accredited by a regionally accrediting agency recognized by the Council for Higher Education Accreditation, the Texas Higher Education Coordinating Board, or the United States Department of Education.

(2) Act--Texas Occupations Code, Chapter 502, the Licensed Marriage and Family Therapist Act.

(3) Board--The Texas State Board of Examiners of Marriage and Family Therapists.

(4) Client--An individual, family, couple, group, or organization who receives or has received services from a person identified as a marriage and family therapist who is either licensed by the council or unlicensed.

(5) Council--The Texas Behavioral Health Executive Council.

(6) Council Act--Texas Occupations Code, Chapter 507, concerning the Texas Behavioral Health Executive Council.

(7) Council rules--22 Texas Administrative Code, Chapters 801 and 881 to 885.

(8) Direct clinical services to couples or family-- professional services provided to couples or families in which a clinician delivers therapeutic services with two or more individuals simultaneously or two or more individuals from the same family system within the same therapeutic session. Individuals must share an ongoing relationship beyond that which occurs in the therapeutic experience itself. Examples of ongoing relationships include family systems, couple systems, enduring friendship/community support systems, and residential, treatment or situationally connected systems.

(9) Endorsement--The process whereby the council reviews licensing requirements that a license applicant completed while under the jurisdiction of an out-of-state marriage and family therapy

regulatory board. The council may accept, deny or grant partial credit for requirements completed in a different jurisdiction.

(10) Executive director--the executive director for the Texas Behavioral Health Executive Council.

(11) Family system--An open, on-going, goal-seeking, self-regulating, social system which shares features of all such systems. Certain features such as its unique structuring of gender, race, nationality and generation set it apart from other social systems. Each individual family system is shaped by its own particular structural features (size, complexity, composition, and life stage), the psychobiological characteristics of its individual members (age, race, nationality, gender, fertility, health and temperament) and its socio-cultural and historic position in its larger environment.

(12) Group supervision--Supervision that involves a minimum of three and no more than six marriage and family therapy supervisees or LMFT Associates in a clinical setting during the supervision hour.

(13) Independent Practice--The practice of providing marriage and family therapy services to a client without the supervision of an LMFT-S.

(14) [~~(13)~~] Individual supervision--Supervision of no more than two marriage and
family therapy supervisees or LMFT Associates in a clinical setting during the supervision hour.

(15) [~~(14)~~] Jurisprudence exam--An online learning experience based on the Act, the
Council Act, and council rules, and other state laws and rules relating to the practice of marriage and family therapy.

(16) [~~(15)~~] License--A marriage and family therapist license, a marriage and family
therapist associate license, a provisional marriage and family therapist license, or a provisional marriage and family therapist associate license.

(17) [~~(16)~~] Licensed marriage and family therapist (LMFT)--As defined in §502.002
of the Occupations Code, a person who offers marriage and family therapy for compensation.

(18) [~~(17)~~] Licensed marriage and family therapist associate (LMFT Associate)--As
defined in §502.002 of the Occupations Code, an individual who offers to provide marriage and family therapy for compensation under the supervision of a supervisor approved by the executive council. The appropriate council-approved terms to refer to an LMFT Associate are: "Licensed Marriage and Family Therapist Associate" or "LMFT Associate." Other terminology or abbreviations like "LMFT A" are not council-approved and may not be used.

(19) [~~(18)~~] Licensee--Any person licensed by the council.

(20) [~~(19)~~] Licensure examination--The national licensure examination administered by the Association of Marital and Family Therapy Regulatory Boards (AMFTRB) or the State of California marriage and family therapy licensure examination.

(21) [~~(20)~~] Marriage and family therapy--The rendering of professional therapeutic
services to clients, singly or in groups, and involves the professional application of family systems theories and techniques in the delivery of therapeutic services to those persons. The term includes the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction or processes.

(22) [~~(21)~~] Month--A calendar month.

(23) [~~(22)~~] Person--An individual, corporation, partnership, or other legal entity.

(24) [~~(23)~~] Recognized religious practitioner--A rabbi, clergyman, or person of similar status who is a member in good standing of and accountable to a legally recognized denomination or legally recognizable religious denomination or legally recognizable religious organization and other individuals participating with them in pastoral counseling if:

(A) the therapy activities are within the scope of the performance of regular or specialized ministerial duties and are performed under the auspices of sponsorship of an established and legally recognized church, denomination or sect, or an integrated auxiliary of a church as defined in 26 CFR §1.6033-2(h) (relating to Returns by exempt organizations (taxable years beginning after December 31, 1969) and returns by certain nonexempt organizations (taxable years beginning after December 31, 1980));

(B) the individual providing the service remains accountable to the established authority of that church, denomination, sect, or integrated auxiliary; and

(C) the person does not use the title of or hold himself or herself out as a licensed marriage and family therapist.

(25) [~~(24)~~] Supervision--

(A) Supervision for licensure--The guidance or management in the provision of clinical services by a marriage and family therapy supervisee or LMFT Associate, which must be conducted for at least one supervision hour each week, except for good cause shown.

(B) Supervision, Council-ordered--For the oversight and rehabilitation in the provision of clinical services by a licensee under a Council Order, defined by the Order and the Council-Ordered Supervision Plan, and must be conducted as specified in the Council Order and Supervision Plan (generally in face-to-face, one-on-one sessions).

(26) [~~(25)~~] Supervision hour--50 minutes.

(27) [~~(26)~~] Supervisor--An LMFT with supervisor status meeting the requirements
set out in §801.143 of this title (relating to Supervisor Requirements). The appropriate council-approved terminology to use in reference to a Supervisor is: "Supervisor," "Licensed Marriage and Family Therapist Supervisor," "LMFT-S" or "LMFT Supervisor." Other terminology or abbreviations may not be used.

(28) [~~(27)~~] Technology-assisted services--Providing therapy or supervision with
technologies and devices for electronic communication and information exchange between a licensee in one location and a client or supervisee in another location.

(29) [~~(28)~~] Therapist--A person who holds a license issued by the council.

(30) [~~(29)~~] Waiver--The suspension of educational, professional, or examination
requirements for an applicant who meets licensing requirements under special conditions.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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SUBCHAPTER B. RULES OF PRACTICE

22 TAC §801.48

The Texas Behavioral Health Executive Council proposes amendments to §801.48, relating to Record Keeping, Confidentiality, Release of Records, and Required Reporting.

Overview and Explanation of the Proposed Rule. This amendment is proposed for the purposes of clarity, to make it clear that any licensee in private practice must establish a plan of custody and control for a client's records.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been

proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.48. Record Keeping, Confidentiality, Release of Records, and Required Reporting.

(a) Communication between a licensee and client and the client's records, however created or stored, are confidential under the provisions of the Texas Health and Safety Code, Chapter 611 (relating to Mental Health Records), and other state or federal statutes or rules where such statutes or rules apply to a licensee's practice.

(b) A licensee may not disclose any communication, record, or identity of a client except as provided in Texas Health and Safety Code, Chapter 611 (relating to Mental Health Records), or other state or federal statutes or rules.

(c) A licensee must comply with Texas Health and Safety Code, Chapters 181 (relating to Medical Records Privacy) and 611 (relating to Mental Health Records), and other state or federal statutes or rules where such statutes or rules apply to a licensee's practice, concerning access to and release of mental health records and confidential information.

(d) A licensee must report or release information as required by the following statutes:

(1) Texas Family Code, Chapter 261 (relating to Investigation of Report of Child Abuse or Neglect);

(2) Texas Human Resources Code, Chapter 48 (relating to Investigations and Protective Services for Elderly Persons and Persons with Disabilities);

(3) Texas Health and Safety Code, Chapter 161, Subchapter L (relating to Abuse, Neglect, and Unprofessional or Unethical Conduct in Healthcare Facilities); and

(4) Texas Civil Practice and Remedies Code, §81.006 (relating to Duty to Report Sexual Exploitation by a Mental Health Services Provider).

(A) If a licensee has reasonable cause to suspect that a client has been the victim of a sexual exploitation, sexual contact, or therapeutic deception by another licensee or a mental health services provider during therapy or any other course of treatment, or if a client alleges sexual exploitation, sexual contact, or therapeutic deception by another licensee or mental health services provider (during therapy or any other course of treatment), the licensee must report alleged misconduct not later than the 30th day after the date the licensee became aware of the misconduct or the allegations to:

(i) the district attorney in the county in which the alleged sexual exploitation, sexual contact, or therapeutic deception occurred;

(ii) the council if the misconduct involves a licensee; and

(iii) any other state licensing agency which licenses the mental health services provider.

(B) Before making a report under this subsection, the reporter must inform the alleged victim of the reporter's duty to report and must determine if the alleged victim wants to remain anonymous.

(C) A report under this subsection is required to contain only the information needed to:

(i) identify the reporter;

(ii) identify the alleged victim, unless the alleged victim has requested anonymity;

(iii) express suspicion that sexual exploitation, sexual contact, or therapeutic deception occurred; and

(iv) provide the name of the alleged perpetrator.

(e) A licensee must keep accurate records of therapeutic services, including dates of services, types of services, progress or case notes and billing information for a minimum of seven years after termination of services or five years after a client reaches the age of majority, whichever is greater.

(f) Records created by a licensee during the scope of the licensee's employment by educational institutions; by federal, state, or local government agencies; or political subdivisions or programs are not required to comply with the requirements of subsection (e) of this section.

(g) A licensee must retain and dispose of client records in such a way that confidentiality is maintained.

(h) In private [~~independent~~] practice, the licensee must establish a plan for the custody and control of the licensee's client mental health records in the event of the licensee's death or incapacity, or the termination of the licensee's professional services.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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SUBCHAPTER C. APPLICATIONS AND LICENSING

22 TAC §801.142

The Texas Behavioral Health Executive Council proposes amendments to §801.142, relating to Supervised Clinical Experience Requirements and Conditions.

Overview and Explanation of the Proposed Rule. The proposed amendment increases the number of hours that may be counted towards licensure that are provided by technology-assisted services from 500 hours to 750 hours.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state

or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.142. Supervised Clinical Experience Requirements and Conditions.

An applicant for LMFT must complete supervised clinical experience acceptable to the council.

(1) The LMFT Associate must have completed a minimum of two years of work experience in marriage and family therapy, which includes a minimum of 3,000 hours of supervised clinical practice. The required 3,000 must include:

(A) at least 1,500 hours providing direct clinical services, of which:

(i) no more than 750 [~~500~~] hours may be provided via technology-assisted services (as approved by the supervisor); and

(ii) at least 500 hours must be providing direct clinical services to couples or families.

(B) of the 200 hours of council-approved supervision, as defined in §801.2 of this title (relating to Definitions), of which:

(i) at least 100 hours must be individual supervision; and

(ii) no more than 50 hours may be provided by telephonic services, but there is no limit for hours by live video.

(2) The remaining required hours, not covered by subsection (1) above, may come from related experiences, including workshops, public relations, writing case notes, consulting with referral sources, etc.

(3) An LMFT Associate, when providing services, must receive a minimum of one hour of supervision every week, except for good cause shown.

(4) Staff may count graduate internship hours exceeding the requirements set in §801.114(b)(8) of this title (relating to Academic Course Content) toward the minimum requirement of at least 3,000 hours of supervised clinical practice under the following conditions.

(A) No more than 500 excess graduate internship hours, of which no more than 250 hours may be direct clinical services to couples or families, completed under a Commission on Accreditation for Marriage and Family Therapy Education (COAMFTE) accredited graduate program may be counted toward the minimum requirement of at least 3,000 hours of supervised clinical practice.

(B) No more than 400 excess graduate internship hours, of which no more than 200 hours may be direct clinical services to couples or families, completed under a non-COAMFTE-accredited graduate program may be counted toward the minimum requirement of at least 3,000 hours of supervised clinical practice.

(C) No more than 100 excess graduate internship supervision hours may be counted toward the minimum requirement of at least 200 hours of council-approved supervision.

(5) An LMFT Associate may practice marriage and family therapy in any setting under supervision, such as a private practice, public or private agencies, hospitals, etc.

(6) During the post-graduate, supervised clinical experience, both the supervisor and the LMFT Associate may have disciplinary actions taken against their licenses for violations of the Act, the Council Act, or council rules.

(7) Within 30 days of the initiation of supervision, an LMFT Associate must submit to the council a Supervisory Agreement Form for each council approved supervisor.

(8) An LMFT Associate may have no more than two council-approved supervisors at a time, unless given prior approval by the council or its designee.

(9) Except as specified in paragraph (4) of this section, hours of supervision and supervised clinical experience accrued toward an out-of-state LMFT license may be accepted only by endorsement.

(A) The applicant must ensure supervision and supervised experience accrued in another jurisdiction is verified by the jurisdiction in which it occurred and that the other jurisdiction provides verification of supervision to the council.

(B) If an applicant has been licensed as an LMFT in another United States jurisdiction for the two years immediately preceding the date the application is received, the supervised clinical experience requirements are considered met. If licensed for any other two-year period, the application will be reviewed to determine whether clinical experience requirements have been met in accordance with council rules, 22 Texas Administrative Code, §882.1 (relating to Application Process).

(10) Applicants with a master's degree that qualifies under §§801.112 and 801.113 may count any supervision and experience (e.g., practicum, internship, externship) completed after conferral of the master's degree and as part of a doctoral program, toward the supervision and experience requirements set out in §801.142. A doctoral program must lead to a degree that qualifies under §§801.112 and 801.113 before the Council will award credit for supervision and experience under this provision.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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22 TAC §801.143

The Texas Behavioral Health Executive Council proposes amendments to §801.143, relating to Supervisor Requirements.

Overview and Explanation of the Proposed Rule. The proposed amendments remove the 12 supervisee limit on supervisors, allowing supervisors to determine the appropriate number of supervisees that they can provide adequate supervision. Additionally, the proposed amendments make it clear that a supervisor must establish a plan of custody and control for records of supervision for their LMFT Associates.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.143. Supervisor Requirements.

(a) To apply for supervisor status, an LMFT in good standing must submit an application and applicable fee as well as documentation of the following:

(1) completion of at least 3,000 hours of LMFT practice over a minimum of 3 years; and

(A) successful completion of a 3-semester-hour, graduate course in marriage and family therapy supervision from an accredited institution; or

(B) a 40-hour continuing education course in clinical supervision; or

(2) designation as an approved supervisor or supervisor candidate by the American Association for Marriage and Family Therapy (AAMFT).

(b) A supervisor may not be employed by the person he or she is supervising.

(c) A supervisor may not be related within the second degree by affinity (marriage) or within the third degree by consanguinity (blood or adoption) to the person whom he or she is supervising.

(d) Within 60 days of the initiation of supervision, a supervisor must process and maintain a complete supervision file on the LMFT Associate. The supervision file must include:

(1) a photocopy of the submitted Supervisory Agreement Form;

(2) proof of council approval of the Supervisory Agreement Form;

(3) a record of all locations at which the LMFT Associate will practice;

(4) a dated and signed record of each supervision conference with the LMFT Associate's total number of hours of supervised experience, direct client contact hours, and direct client contact hours with couples or families accumulated up to the date of the conference; [~~and~~]

(5) an established plan for the custody and control of the records of supervision for each LMFT Associate in the event of the supervisor's death or incapacity, or the termination of the supervisor's practice; and

(6) [~~(5)~~] a copy of any written plan for remediation of the LMFT Associate.

(e) Within 30 days of the termination of supervision, a supervisor must submit written notification to the council.

(f) Both the LMFT Associate and the council-approved supervisor are fully responsible for the marriage and family therapy activities of the LMFT Associate.

(1) The supervisor must ensure the LMFT Associate knows and adheres to all statutes and rules that govern the practice of marriage and family therapy.

(2) A supervisor must maintain objective, professional judgment; a dual relationship between the supervisor and the LMFT Associate is prohibited.

(3) A supervisor may only supervise the number of individuals for which the supervisor can provide adequate supervision. [~~not supervise more than 12 persons at one time.~~]

(4) If a supervisor determines the LMFT Associate may not have the therapeutic skills or competence to practice marriage and family therapy under an LMFT license, the supervisor must develop and implement a written plan for remediation of the LMFT Associate.

(5) A supervisor must timely submit accurate documentation of supervised experience.

(g) Supervisor status expires with the LMFT license.

(h) A supervisor who fails to meet all requirements for licensure renewal may not advertise or represent himself or herself as a supervisor in any manner.

(i) A supervisor whose license status is other than "current, active" is no longer an approved supervisor. Supervised clinical experience hours accumulated under that person's supervision after the date his or her license status changed from "current, active" or after removal of the supervisor designation will not count as acceptable hours unless approved by the council.

(j) A supervisor who becomes subject to a council disciplinary order is no longer an approved supervisor. The person must:

(1) inform each LMFT Associate of the council disciplinary order;

(2) refund all supervisory fees received after date the council disciplinary order was ratified to the LMFT Associate who paid the fees; and

(3) assist each LMFT Associate in finding alternate supervision.

(k) Supervision of an LMFT Associate without being currently approved as a supervisor is grounds for disciplinary action.

(l) The LMFT Associate may compensate the supervisor for time spent in supervision if the supervision is not part of the supervisor's responsibilities as a paid employee of an agency, institution, clinic, or other business entity.

(m) At a minimum, the 40-hour continuing education course in clinical supervision, referenced in subsection (a)(1)(B) of this rule, must meet each of the following requirements:

(1) the course must be taught by a graduate-level licensee holding supervisor status issued by the Council;

(2) all related coursework and assignments must be completed over a time period not to exceed 90 days; and

(3) the 40-hour supervision training must include at least:

(A) three (3) hours for defining and conceptualizing supervision and models of supervision;

(B) three (3) hours for supervisory relationship and marriage and family therapist development;

(C) twelve (12) hours for supervision methods and techniques, covering roles, focus (process, conceptualization, and personalization), group supervision, multi-cultural supervision (race, ethnic, and gender issues), and evaluation methods;

(D) twelve (12) hours for supervision and standards of practice, codes of ethics, and legal and professional issues; and

(E) three (3) hours for executive and administrative tasks, covering supervision plan, supervision contract, time for supervision, record keeping, and reporting.

(n) Subsection (m) of this rule is effective May 1, 2023.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303318
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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SUBCHAPTER D. SCHEDULE OF SANCTIONS

22 TAC §801.305

The Texas Behavioral Health Executive Council proposes the repeal of §801.305, relating to Schedule of Sanctions.

OVERVIEW AND EXPLANATION OF THE PROPOSED RULE. This rule is proposed to be repealed and replaced with a new schedule of sanctions that is proposed elsewhere in this issue of the *Texas Register.*

FISCAL NOTE. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule repeal is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or ad-

ministering the rule repeal. Additionally, Mr. Spinks has determined that enforcing or administering the rule repeal does not have foreseeable implications relating to the costs or revenues of state or local government.

PUBLIC BENEFIT. Mr. Spinks has determined for the first five-year period the proposed rule repeal is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule repeal will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule repeal is in effect, the public benefit anticipated as a result of enforcing the rule repeal will be to help the Executive Council protect the public.

PROBABLE ECONOMIC COSTS. Mr. Spinks has determined for the first five-year period the proposed rule repeal is in effect, there will be no additional economic costs to persons required to comply with this rule repeal.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT STATEMENT. Mr. Spinks has determined for the first five-year period the proposed rule repeal is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES AND RURAL COMMUNITIES. Mr. Spinks has determined that the proposed rule repeal will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

LOCAL EMPLOYMENT IMPACT STATEMENT. Mr. Spinks has determined that the proposed rule repeal will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

REQUIREMENT FOR RULES INCREASING COSTS TO REGULATED PERSONS. The proposed rule repeal does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule repeal is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

GOVERNMENT GROWTH IMPACT STATEMENT. For the first five-year period the proposed rule repeal is in effect, the Executive Council estimates that the proposed rule repeal will have no effect on government growth. The proposed rule repeal does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

TAKINGS IMPACT ASSESSMENT. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule repeal. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

REQUEST FOR PUBLIC COMMENTS. Comments on the proposed rule repeal may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

APPLICABLE LEGISLATION. This rule repeal is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

STATUTORY AUTHORITY. The rule repeal is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule repeal pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule repeal to the Executive Council. The rule repeal is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule repeal in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule repeal.

Lastly, the Executive Council proposes this rule repeal under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.305. Schedule of Sanctions.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303321
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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22 TAC §801.305

The Texas Behavioral Health Executive Council proposes new §801.305, relating to Schedule of Sanctions.

Overview and Explanation of the Proposed Rule. The proposed new rule is necessary to correct a *Texas Register* submission error regarding the graphic chart. The same chart that was proposed in the August 5, 2022, issue of the *Texas Register* is currently being re-proposed, because unfortunately the chart adopted in the November 18, 2022, issue of the *Texas Register* was the previous chart. As stated previously in the preamble to the August 5th proposal, this proposed schedule of sanctions chart will more closely resemble the format used by the other behavioral health boards, which adopted this format to make their schedule of sanctions charts easier to use. There are some substantive changes being made to the current schedule of sanctions chart in effect, but again, these changes are the same as those proposed in the August 5, 2022, edition of the *Texas Register;* there are no changes being proposed that have not been reviewed and proposed by the member board. This proposed schedule of sanctions chart will align with the changes made to §801.302, which reduced the amount of severity levels from five to four by combining the two previous suspension levels into one. Therefore, violations of §§801.44(t) and (v), 801.47, and 801.57(e) will no longer be split between two types of suspension levels. Additionally, the sanction for §801.47 is being split between subsections (a) and (b), which are a suspension and revocation respectively. Section 801.44(s) - (v) has been updated to correspond more accurately to the correct rule and sanction. Amendments have been made to §801.143(h) - (l) so corresponding amendments have been made to match those changes. Lastly, some typographical errors are being corrected.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019).

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this

State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.305. Schedule of Sanctions.

The following standard sanctions shall apply to violations of the Texas Occupations Code, Chapter 502 and 22 Texas Administrative Code, Part 35.

Figure: 22 TAC §801.305

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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PART 41. TEXAS BEHAVIORAL HEALTH EXECUTIVE COUNCIL

CHAPTER 882. APPLICATIONS AND LICENSING

SUBCHAPTER C. DUTIES AND RESPONSIBILITIES

22 TAC §882.32

The Texas Behavioral Health Executive Council proposes amendments to §882.32, relating to Duty to Update Name and Address.

Overview and Explanation of the Proposed Rule. The proposed amendments are required due to the statutory changes made by S.B. 510, 88th Leg., R.S. (2023). Beginning September 1, 2023, Section 507.161 of the Occupations Code will make all home addresses and telephone numbers of licensees confidential and not subject to disclosure under Chapter 552 of the Government Code. Additionally, Section 552.11765 of the Government Code will make a license application, the home address, home telephone number, electronic mail address, social security number, date of birth, driver's license number, state identification number, passport number, emergency contact information, or payment information of an applicant, licensee, or previous licensee confidential and not subject to disclosure under Chapter 552 of the Government Code.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to applicants, licensees, and the general public because the proposed rule will provide greater clarity, consistency, and efficiency in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the

Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

REQUEST FOR PUBLIC COMMENTS. Comments on the proposed rule may be submitted by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via https://www.bhec.texas.gov/proposed-rule-changes-and-the-rulemaking-process/index.html. The deadline for receipt of comments is 5:00 p.m., Central Time, on October 22, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

Applicable Legislation. This rule is proposed pursuant to the specific legal authority granted to the Executive Council by H.B. 1501, 86th Leg., R.S. (2019). Additionally, S.B. 510, 88th Leg., R.S. (2023) also grants the Executive Council legal authority to propose this rule.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Lastly, the Executive Council proposes this rule pursuant to the authority found in §507.161 of the Tex. Occ. Code and §552.11765 of the Tex. Gov't Code which makes all home addresses and telephone numbers of applicants and licensees confidential, as well as the licensee's application file maintained by the Executive Council.

No other code, articles or statutes are affected by this section.

§882.32. Duty to Update Name and Address.

(a) Applicants and licensees must update their name, main address, business address, email address, and phone number in the Council's online licensing system within 30 days of a change. The main address entered by an applicant or licensee must be capable of receiving mail addressed to the applicant or licensee from the agency. It is the responsibility of the individual to ensure the agency has the correct contact information for that individual.

(b) Official agency correspondence will be sent to an applicant's or licensee's main address, unless otherwise required by law. The street address portion of an applicant's or licensee's main address will not be displayed in results returned from the online licensee search function and will not[, ~~but will continue to~~] be publicly available via the Public Information Act. Applicants and licensees may also enter a business address in the agency's online licensing system which will be displayed, without redaction, in public search results.

(c) A name change request must be accompanied by a copy of a current driver's license, social security card, marriage license, divorce decree or court order reflecting the change of name.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 305-7706

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG
SUBCHAPTER K. TEXAS FOOD ESTABLISHMENTS

25 TAC §§229.172, 229.176 - 229.178

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes amendments to §229.172, concerning Accreditation of Certified Food Management Programs; §229.176, concerning Certification of Food Managers; §229.177, Certification of Food Managers in Areas Under the Department of State Health Services Permitting Jurisdiction; and §229.178, concerning Accreditation of Food Handler Education or Training Programs.

BACKGROUND AND PURPOSE

The purpose of the proposal is to comply with Senate Bill (S.B.) 812, 88th Legislature, Regular Session, 2023, which amends Texas Health and Safety Code §438.043 and §438.0431. S.B. 812 requires that allergen training be included in DSHS-accredited Certified Food Manager (CFM) and Food Handler (FH)

training. S.B. 812 also amends Texas Health and Safety Code §438.103 to add language to require that state-approved CFM examinations include questions testing food allergen awareness. The proposed amendments reflect the required addition of food allergen awareness to DSHS-accredited CFM and FH training programs and CFM examinations.

SECTION-BY-SECTION SUMMARY

The references to Texas Health and Safety Code statutes are revised to be consistent in the rules. The references to Texas Government Code and Texas Family Code are also revised to be consistent with the references.

The references to "Texas Online Authority" fee are changed to "Texas.gov" fee to reflect current usage.

The proposed amendments to §229.172(c)(2) and §229.176(c)(2) add language requiring that DSHS-accredited CFM examinations include questions testing food allergen awareness.

The proposed amendments to §229.172(j)(2), §229.176(g), and §229.176(i)(2) update the references to *CFP Standards*.

The proposed amendments to §229.177(c)(3) and §229.178(c)(1)(D) update the regulatory citations to the 2017 FDA Food Code.

The proposed amendment to §229.178(c)(1)(F) adds language requiring that food allergen awareness be included in DSHS-accredited FH training programs.

The proposed amendments include editorial changes and provide consistency of the rule language.

FISCAL NOTE

Donna Sheppard, 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

DSHS 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 DSHS 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 DSHS;

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

(6) the proposed rules will expand existing rules;

(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

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. Currently, there are approximately 120 training and examination accredited providers that must prepare, by law, to include the food allergen awareness component in their product.

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 and to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Dr. Timothy Stevenson, Associate Commissioner, Consumer Protection Division, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased employee awareness of the presence of food allergens in retail food establishments and the danger that those allergens present to consumers with food allergies. Employee awareness, in turn, will enhance both prevention of and response to allergenic incidents.

Donna Sheppard has also determined that for the first five years the rules are in effect, DSHS is unable to estimate the cost to accredited training and exam providers of adding a food allergen awareness component to DSHS-accredited CFM and FH training programs and CFM examinations.

REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

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 DSHS Consumer Protection Division, Food and Drug Section, Retail Food Safety Operations, Mail Code 1987, Texas Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, hand-delivered to 1100 West 49th Street, Austin, Texas 78756 or by email to foodestablishments@dshs.texas.gov.

To be considered, comments must be submitted no later than 21 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 faxing or emailing com-

ments, please indicate "Comments on Proposed Rule 23R052" in the subject line.

STATUTORY AUTHORITY

The proposed amendments are authorized by Texas Health and Safety Code §438.0431(b), which directs the Executive Commissioner of HHSC to adopt rules to implement legislation; and Texas Government Code §531.0055 and Texas Health and Safety Code §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules and policies necessary 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 proposed amendments implement Texas Government Code Chapter 531 and Texas Health and Safety Code Chapters 438 and 1001.

§229.172. Accreditation of Certified Food Management Programs.

(a) Purpose. This section is intended to provide the framework for accrediting manager level food safety training programs in accordance with the Texas Health and Safety Code, Chapter 438, Subchapter D, Food Service Programs. A uniform standard governing the accreditation of food safety programs enhances the recognition of reciprocity among regulatory agencies and reduces the expense of duplicate education incurred when food establishment managers work in multiple regulatory jurisdictions. Education of the food establishment manager provides more qualified personnel, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

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

(1) Accredited certified food manager training program--A certified food manager training and testing program approved by the department that meets the standards set forth in this section.

(2) Alternative training methods--Training other than classroom, including but not limited to distance learning, computerized training programs, and correspondence courses.

(3) ANSI-CFP Program Accreditation--Accreditation by the American National Standard Institute (ANSI) and the Conference for Food Protection (CFP), which accredit programs as outlined in the *CFP Standards for Accreditation of Food Protection Manager Certification Programs*.

(4) Certificate--The documentation issued by a department-approved ANSI-CFP Program examination licensee verifying that an individual has complied with the requirements of this section.

(5) Certification--The process whereby a certified food manager certificate is issued.

(6) Certified food manager--A person who has demonstrated that he or she has the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a certified food manager examination and becoming certified as described in this section.

(7) Certified food manager examination--A department-approved ANSI-CFP Program accredited on-site examination for food manager certification.

(8) Certified food manager program; certified food management program--A training program accredited by the department that provides food safety education for food establishment managers and administers a certified food manager examination for certification or recertification purposes.

(A) Certification program--A certified food manager program whose course work consists of a minimum of 14 hours of instruction on food safety topics which may include traditional or alternative methods of training, including distance education, and at least a one-hour certified food manager examination.

(B) Recertification program--A certified food manager program whose course work consists of a minimum of six hours of instruction on food safety topics, which may include traditional or alternative methods of training, including distance education, and a certified food manager examination.

(9) Continuing education--Documented professional education or activities that provide for the continued proficiency of a certified food management program instructor.

(10) Department--The Texas Department of State Health Services.

(11) Food--A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(12) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(13) Law--Applicable local, state and federal statutes, regulations and ordinances.

(14) Licensee--The individual, corporation or company that is licensed by the department to operate certified food management programs.

(15) On-site examination--An ANSI-CFP Program accredited paper and computer-based examination for food manager certification administered by a certified food manager program.

(16) Person--An association, corporation, partnership, individual, or other legal entity, government or governmental subdivision or agency.

(17) Qualified instructor--An individual whose educational background and work experience meet the requirements for approval as a qualified food management program instructor as described in this section.

(18) Reciprocity--Acceptance by state and local regulatory authorities of a department-approved certified food manager certificate.

(19) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(20) Single entity--A corporation that educates only its own employees.

(21) Sponsor--An individual designated in writing to the department, by the licensee, as the person responsible for administrative management of the certified food manager program.

(22) Two-Year Renewal Certificate--The certificate issued by the department from May 6, 2004 to April 24, 2008, verifying that a certified food manager has completed the application and submission of fees for renewal of a department-issued certificate.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating, training, supervising or directing food preparation activities, and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspections of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by training and food safety examination. To be certified, a food manager shall complete an accredited certified food management certification or recertification program and pass a certified food manager examination. A state-approved examination for issuance or renewal of a food manager certificate must test an applicant on the food allergen awareness information described by Texas Health and Safety Code §437.027(b).

(3) Certificate reciprocity. Department-approved food manager certificates shall be recognized statewide by regulatory authorities as the only valid proof of successful completion of a department-accredited certified food management program.

(4) Certificate availability. The original certified food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

(d) Certification program course curriculum. A certification program shall include a minimum of 14 hours of food safety training utilizing the training and time requirements in Texas Health and Safety Code, §438.043(a).

(e) Recertification program course curriculum. A recertification training program shall include a minimum of six hours of food safety training.

(f) Requirements for qualification of instructors. The instructors for all certified food management programs shall be department-qualified prior to teaching a class. The instructors for all certified food management programs shall meet the qualifications in these rules. Instructors meeting these qualifications shall be approved for the two-year permit term of the certified food management program licensee. The completed application form shall be submitted to the department through the accredited certified food management program licensee.

(1) New instructors. A completed application for new instructors shall be submitted by the program licensee to the department with the following documentation:

(A) the completed and signed application form;

(B) a copy of a valid food management certificate; and

(C) verification of education or experience in food safety documented by one of the following:

(i) an associate or higher college degree from an accredited institution in a major related to food safety or environmental health, evidenced by a copy of the candidate's diploma or transcript;

(ii) five years of food establishment work experience as a food manager verified in an attached resume; or

(iii) two years of regulatory food inspection experience verified in an attached resume.

(2) Nationally accredited program instructors. Nationally accredited program instructors who have met the minimum standards as set forth by this section shall be given reciprocity when instructing and administering an ANSI-CFP Program Accreditation examination.

(g) Responsibilities of qualified instructors.

(1) Compliance with certified food management program laws and rules. All qualified instructors are responsible for compliance with applicable certified food management program laws and rules.

(2) Training requirements. All qualified instructors are responsible for instructing the course content as specified in subsection (o)(3) of this section, and meeting the training time requirements as specified in subsection (n)(6) of this section.

(h) Requirements for the renewal of qualified instructors. In order to renew an instructor's qualification, the program licensee shall comply with the requirements of this subsection.

(1) Contact hours for continuing education. Certified food management programs shall submit a renewal application and documentation of five contact hours of continuing education for each instructor during the two-year certified food manager program license

period to maintain qualification as a certified food manager program instructor.

(2) Accepted continuing education topics. Continuing education topics may include areas in food safety or instruction enhancement.

(3) Verification of continuing education. The following may be used for continuing education:

(A) a certificate of completion for a course or seminar with the participant's name, course name, date and number of contact hours earned;

(B) a college transcript with course description; or

(C) other documentation of attendance as approved by the department.

(i) On-site examination. ANSI-CFP Program accredited food safety certification examinations shall be the only department-approved paper and computer-based certified food manager examinations.

(j) Certified food manager certificates.

(1) General certificate issuance. Certificates shall be issued by the department-approved examination provider. Candidates whose certificates are issued after successful passage of a department-approved examination shall be deemed to meet the requirements for food manager certification.

(2) Certificate period. A certified food manager certificate issued by a department-approved examination provider under this section shall comply with the *CFP Standards for Accreditation of Food Protection Manager Certification Programs,* §7.3, Effective Date of Certificate, as amended[~~, 2008, at http://www.foodprotect.org/managers-certification/~~].

(3) Recertification. Candidates may become recertified by taking a recertification class and passing a department-approved examination, or by passing an examination as described in §229.176(i)(3) of this title (relating to Certification of Food Managers).

(4) Certification through single entity corporations. Candidates from accredited single entity corporations may receive food manager certificates as described in this section, except that the food manager certificate shall:

(A) clearly indicate that the certificate is valid for food manager duties performed for the single entity only;

(B) be recognized by regulatory authorities for only that single entity; and

(C) not receive reciprocity or recertification.

(k) Department certificate.

(1) Two-year renewal certificate. Certified food manager certificates issued by the department from May 6, 2004 to April 24, 2008, shall be renewed every two years and may be renewed two times.

(2) Department certificate replacement. An individual requesting a certified food manager certificate replacement shall submit a completed written application to the department with the appropriate non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(l) Department certificate fees.

(1) Two-year renewal certificate fee. The fee for renewal of a two-year certificate issued shall be $10.

(2) Replacement certificate fee. A replacement certificate fee for the department examination shall be $15.

(3) Texas.gov [~~Texas Online Authority~~] fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by Texas.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through Texas.gov [~~Texas Online~~].

(m) Licensing of single entity certified food management programs. In addition to the licensing requirements as specified in subsection (n) of this section, a corporation wishing to use a single entity option, which offers course length and topic requirements as specified in Texas Health and Safety Code, §438.043(a), shall submit to the department:

(1) a copy of the course syllabus; and

(2) a copy of the course curriculum.

(n) Licensing of certified food management program licensee. The department shall issue a license of accreditation to each certified food management program licensee who has demonstrated compliance with this section. A license issued under these rules shall expire two years from the date of issuance. This license is not transferable on change of ownership, name, or site location.

(1) Application. A person wishing to apply for a certification or recertification certified food management program license shall submit a completed application to the department.

(2) Security agreement. The licensee shall submit a signed security agreement stating that individual examination items, examination item banks, certified food manager certification examinations, examination answer sheets, and candidate scores shall be secure at all times, and during administration that the examinations shall remain secure.

(3) Certified food management program license fee. The completed license application shall include the appropriate non-refundable fee as specified in subsection (p)(1) of this section.

(4) Sponsor. The licensee may designate a certified food manager program sponsor as the person responsible for the administrative management of the program.

(5) Qualified instructor. The licensee shall provide a list of all qualified food management program instructors who plan to teach an accredited certification or recertification course to the department. A completed instructor application, along with other necessary documentation shall be submitted for all non-qualified instructors.

(6) Course syllabus. The licensee shall provide a course syllabus to the department verifying the minimum of 14 hours of training for a certification program as specified in subsection (d) of this section and a minimum of six hours of training for a recertification program as specified in subsection (e) of this section. The training methods shall be designated on the application. A course curriculum shall be available for review to verify the course syllabus.

(7) Certification examination. Department-approved examinations [~~examination(s)~~] utilized by the certified food management programs shall be designated on the completed application.

(o) Responsibilities of a licensee.

(1) Compliance with certified food management program laws and rules. The licensee is responsible for compliance with applicable certified food management program laws and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (p) of this section.

(3) Certified food management program course content. All certified food management programs shall be taught utilizing the training and time requirements in Texas Health and Safety Code, §438.043(a).

(4) Change of sponsor. The licensee shall notify the department in writing of the name of the new program sponsor.

(5) Change of qualified instructor. The licensee shall ensure that only a department-qualified instructor serves as the instructor for the certified food management program. All new instructors shall complete the application for new instructors that shall be submitted by the licensee to the department with the applicable documentation. Licensees shall instruct all new instructors on the applicable laws and rules and administrative responsibilities.

(p) Required fees. All fees are payable to the Department of State Health Services and are non-refundable. Licensees shall submit fees with the appropriate form that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. The fees shall be:

(1) Certified food manager program license fee for initial, renewal, or change of ownership. The certified food manger program license fee shall be $600 for a two-year license for each certification or recertification program.

(2) Certified food manager program amended license fee. Program amendment fees shall be $300 for each certification or recertification program.

(3) Late fee. Certified food manager licensees submitting a completed renewal application to the department after the expiration date shall pay an additional $100 as a late fee.

(4) Texas.gov [~~Texas Online Authority~~] fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by Texas.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through Texas.gov [~~Texas Online~~].

(q) Certified food management program registry. The department shall maintain a program registry of all accredited certification and recertification programs. The registry shall be made available on the department website.

(r) Department audits. Audits of examination and classroom may be conducted to assess program compliance. Audits may be based on analysis of data compiled by the department. The licensee shall allow personnel authorized by the department access for the purposes of an audit.

(s) Denial, suspension and revocation of program accreditation. An accredited food manager program license may be denied, suspended or revoked for the following reasons:

(1) breach of the security agreement;

(2) delinquency in payment of fees as described in this section; or

(3) violation of the provisions of this section.

(t) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(u) Suspension of License Relating to Child Support and Child Custody.

(1) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession of or access to a child, the department shall immediately determine if a license has been issued to the obligator named and:

(A) record the suspension of the license in the department's records;

(B) report the suspension as appropriate; and

(C) demand surrender of the suspended license.

(2) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The board will provide notice as appropriate to the licensee or to others concerned with the license.

(3) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Texas Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(4) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsections (l) and (m) of this section are met.

§229.176. Certification of Food Managers.

(a) Purpose. This section is intended to provide the framework of certification requirements for food managers in accordance with Texas Health and Safety Code, Chapter 438, Subchapter G, Certification of Food Managers, supports demonstration of food safety knowledge, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

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

(1) ANSI-CFP Program Accreditation--Accreditation by the American National Standards Institute (ANSI) and the Conference for Food Protection (CFP), which accredit programs as outlined in the CFP: Standards for Accreditation of Food Protection Manager Certification Programs.

(2) Certificate--The documentation issued by a department-approved Internet examination provider licensee or an ANSI-CFP Program examination licensee verifying that an individual has complied with the requirements of this section.

(3) Certification--The process whereby a certified food manager certificate is issued.

(4) Certified food manager--A person who has demonstrated that he or she has the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a certified food manager examination and becoming certified as described in this section.

(5) Certified food manager examination--A department-approved Internet examination or an ANSI-CFP Program accredited on-site examination for food manager certification.

(6) Department--The Texas Department of State Health Services.

(7) Examination site--The physical location at which the department-approved examination is administered.

(8) Food--A raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(9) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(10) Internet examination--A department-approved examination delivery system utilizing the Internet for food manager certification.

(11) Law--Applicable local, state and federal statutes, regulations and ordinances.

(12) Licensee--The individual, corporation, or company that is licensed by the department to administer a department-approved examination for food manager certification.

(13) On-site examination--An ANSI-CFP Program accredited paper and computer-based examination for food manager certification administered by a certified food manager program.

(14) Person--An association, corporation, partnership, individual or other legal entity, government or governmental subdivision or agency.

(15) Personal validation question--A question designed to establish the identity of the candidate taking a certified food manager examination by requiring an answer related to the candidate's personal information such as a driver's license number, address, date of birth, or other similar information that is unique to the candidate.

(16) Reciprocity--Acceptance by state and local regulatory authorities of a department-approved certified food manager certificate.

(17) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(18) Two-Year Renewal Certificate--The certificate issued by the department from May 6, 2004 to April 24, 2008, verifying that a certified food manager has completed the application and submission of fees for renewal of a department-issued certificate.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating training, supervising or directing food preparation activities and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspection of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by a food safety examination. To be certified, a food manager shall pass a department-approved Internet examination or an accredited ANSI-CFP Program on-site examination. A state-approved examination for issuance or renewal of a food manager certificate must test an applicant on the food allergen awareness information described by Texas Health and Safety Code §437.027(b).

(3) Certificate reciprocity. A certificate issued to an individual who successfully completes a department-approved examination shall be accepted as meeting the training and examination requirements under Texas Health and Safety Code, §438.046(b).

(4) Certificate availability. The original food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

(d) On-site examination. ANSI-CFP Program accredited food safety certification examinations shall be the only department-approved paper and computer-based examinations.

(e) Internet examinations. A department-approved examination utilizing the Internet for delivery shall meet the examination criteria outlined in this section.

(f) Responsibilities for Internet examination providers.

(1) Compliance with food manager laws and rules. Internet examination providers are responsible for compliance with food manager laws and rules applicable to Internet examinations in this section.

(2) Examination Security Agreement. Internet examination providers shall submit the department security agreement signed by the certified food manager Internet examination provider licensee.

(3) Examination security. Candidates taking Internet examinations shall be advised on the application that outside training materials or assistance shall not be used during administration of the examination and that appropriate measures shall be taken to assure that the examination is not compromised.

(g) Internet examination development. Internet examination development shall meet the criteria established by *the CFP Standards for Accreditation of Food Manager Certification Programs,* §4.0, Food Safety Certification Examination Development, as amended[~~, 2008, at http://www.foodprotect.org/managers-certification/,~~] with the exception of the proctor requirement at §4.14 [~~§4.14(a)~~].

(1) Examination questions. Internet examinations shall consist of a minimum of 75 statistically valid questions that are administered at one time following any voluntary training that may precede the examination.

(2) Examination forms. Each candidate shall receive a unique form of the examination with regard to question sequence.

(3) Time allotment for non-proctored Internet examination providers. Time allotted for administration of non-proctored examinations shall not exceed 90 minutes.

(h) Internet examination administration.

(1) Registration requirements for Internet examinations. The licensee shall register the candidates and require the candidates to:

(A) verify their identity;

(B) provide responses to ten personal validation questions; and

(C) maintain examination security.

(2) Licensee examination disclosure information. The licensee shall inform the candidate that:

(A) reference materials shall not be used during the examination;

(B) the candidate shall not receive assistance from anyone during the examination; and

(C) examination questions shall not be replicated in any fashion.

(3) Personal validation questions. The licensee shall verify a candidate's identity throughout the examination. The personal validation process shall include the following elements:

(A) a minimum of five personal validation questions selected from the ten questions provided during registration shall be incorporated at various times during the examination;

(B) the personal validation questions shall be randomly generated with respect to time and order;

(C) the same personal validation questions shall not be asked more than once during the same examination; and

(D) the examination session shall cease and the candidate shall be automatically exited from the examination if a candidate answers a personal validation question incorrectly.

(4) System support. The Internet examination provider licensee shall include the following Internet examination system capabilities and security measures:

(A) capability to browse or review previously completed examination questions;

(B) capability to navigate logically and systematically through the examination;

(C) technical support personnel for Internet examination issues;

(D) security of personal candidate information in transit and at rest;

(E) a back-up and disaster recovery system capability; and

(F) assurance that examination data is maintained in a secure and safe environment and readily available to the department.

(5) Reporting requirements for non-proctored Internet examination administrators. Internet examination administrators who administer examinations in non-proctored locations shall submit a semi-annual report to enable the department to evaluate examination security and system performance for each language in which the examination is offered. The report shall include:

(A) statistical data to enable measurement of central tendency, ranges of examination scores, standard deviation, standard error of measurement, and examination cut score;

(B) number of examinations administered;

(C) number and percentage of candidates passing the examination;

(D) number of personal validation questions used;

(E) number of examinations discontinued due to incorrect responses to personal validation questions; and

(F) statistics describing the performance of each item used on the examinations administered during the six-month period.

(i) Certified food manager certificates.

(1) General certificate issuance. Certificates shall be issued by the department-approved examination provider. Candidates whose certificates are issued after successful passage of a department-approved examination shall be deemed to meet the requirements for food manager certification.

(2) Certificate period. A certified food manager certificate issued by a department-approved examination provider under this section shall comply with the *CFP Standards for Accreditation of Food Protection Manager Certification Programs,* §7.3, Effective Date of Certificate[~~, as amended, 2008, at http://www.foodprotect.org/managers-certification/~~].

(3) Recertification. Candidates may become recertified by passing a department-approved examination.

(j) Department certificates.

(1) Two-year renewal certificate. Food manager certificates issued by the department from May 6, 2004 to April 24, 2008, shall be renewed every two years and may be renewed two times.

(2) Department certificate replacement. An individual requesting a certified food manager certificate replacement shall submit a completed written application to the department with the appropriate

non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(k) Department certificate fees. All fees are payable to the Department of State Health Services and are non-refundable. Fees shall be submitted with the appropriate form that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. Fees shall be:

(1) Two-year renewal certificate fee. The fee for a two-year renewal certificate shall be $10.

(2) Replacement certificate fee. A replacement certificate fee for the department examination shall be $15.

(3) Texas.gov [~~Texas Online Authority~~] fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by Texas.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through Texas.gov [~~Texas Online~~].

(l) Licensing of certified food manager licensee. The department shall issue a license to a certified food manager licensee meeting the requirements of this section. A license issued under these rules shall expire two years from the date of issuance. A license is not transferable on change of ownership, name, or examination site location.

(1) Application. Persons wishing to apply for a certified food manager license shall submit a completed application to the department.

(2) Security agreement. The licensee shall submit a signed security agreement that individual examination items, examination item banks, certified food manager certification examinations, examination answer sheets, and candidate scores shall be secure at all times, and during administration that the examinations shall remain secure.

(3) Certified food manager licensee fee. The completed license application shall include the appropriate non-refundable fee as specified in subsection (n)(1) of this section.

(4) Certification examination. Department-approved examination(s) utilized by the certified food manager licensee shall be designated on the application.

(5) Number of examination sites utilized. The license application shall indicate the number of examination sites to be utilized under the certified food manager license.

(m) Responsibilities of licensee.

(1) Compliance with food manager laws and rules. The licensee is responsible for compliance with applicable food manager laws and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (n) of this section.

(n) Required fees. All fees are payable to the Department of State Health Services and are non-refundable. Fees shall be submitted with the appropriate form that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. Fees shall be:

(1) Certified food manager licensee fee. Certified food manager licenses shall be valid for a two-year period and fees shall be based on the number of examination sites at which the licensee administers the examinations based on the following scale:

(A) one site:

(i) the two-year license fee for initial, renewal, or change of ownership shall be $400; and

(ii) a license fee for a program amendment during the current licensure period shall be $200;

(B) two to ten sites:

(i) the two-year license fee for initial, renewal, or change of ownership shall be $1,000; and

(ii) a license fee for a program amendment during the current licensure period shall be $500;

(C) over ten sites:

(i) the two-year license fee for initial, renewal, or change of ownership shall be $2,000; and

(ii) a license fee for a program amendment during the current licensure period shall be $1,000.

(2) Late fee. A certified food manager licensee submitting a completed renewal application to the department after the expiration date shall pay an additional $100 as a late fee.

(3) Texas.gov [~~Texas Online Authority~~] fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by Texas.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through Texas.gov [~~Texas Online~~].

(o) Certified food manager licensee registry. The department shall maintain a registry of all certified food manager licensees. The registry shall be made available on the department website.

(p) Department audits. Audits of certified food manager licensees may be conducted to assess compliance with these rules. Audits may be based on analysis of data compiled by the department. Licensees shall allow personnel authorized by the department access for the purposes of an audit.

(q) Denial, suspension and revocation of certified food manager license. A certified food manager license may be denied, suspended or revoked for the following reasons:

(1) breach of the security agreement;

(2) delinquency in payment of fees as described in this section; or

(3) violation of the provisions of this section.

(r) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(s) Suspension of License Relating to Child Support and Child Custody.

(1) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession of or access to a child, the department shall immediately determine if a license has been issued to the obligator named and:

(A) record the suspension of the license in the department's records;

(B) report the suspension as appropriate; and

(C) demand surrender of the suspended license.

(2) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The board will provide notice as appropriate to the licensee or to others concerned with the license.

(3) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Texas Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(4) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsections (j) and (k) of this section are met.

§229.177. Certification of Food Managers in Areas Under the Department of State Health Services Permitting Jurisdiction.

(a) Purpose. The purpose of this section is to implement a food manager certification requirement as authorized in the Texas Health and Safety Code [~~(HSC)~~], Chapter 437, §437.0076(b). Certification of food managers after testing on food safety principles reduces the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

(b) Food manager certification required. One certified food manager must be employed by each food establishment permitted under Texas Health and Safety Code [~~HSC~~], §437.0055. Certification must be obtained by passing a department approved examination at an approved examination site[~~,~~] and meeting all requirements in Texas Health and Safety Code [~~HSC~~], Chapter 438, Subchapter G, and §229.176 of this title (relating to Certification of Food Managers).

(c) Food manager certification exemptions. The following food establishments are exempt from the requirements in subsection (b) of this section:

(1) establishments that handle only prepackaged food and do not package food as exempted in Texas Health and Safety Code [~~HSC~~], §437.0076(c);

(2) child care facilities as exempted by Texas Health and Safety Code, [~~HSC~~], §437.0076(f);

(3) establishments that do not prepare or handle exposed Time/Temperature Control for Safety (TCS) food--(formerly Potentially Hazardous Food (PHF)), as defined in 2017 FDA Food Code 1-201.10 [~~§228.2 of this title (relating to Definitions)~~]; or

(4) nonprofit organizations as defined in §229.371(9) of this title (relating to Permitting Retail Food Establishments).

(d) Responsibilities of a certified food manager. Responsibilities of a certified food manager include:

(1) identifying hazards in the day-to-day operation of a food establishment that provide food for human consumption;

(2) developing or implementing specific policies, procedures or standards to prevent foodborne illness;

(3) supervising or directing food preparation activities and ensuring appropriate corrective actions are taken as needed to protect the health of the consumer;

(4) training the food establishment employees on the principles of food safety; and

(5) performing in-house self-inspections of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(e) Certificate reciprocity. A certificate issued to an individual who successfully completes a department approved examination shall be accepted as meeting the training and testing requirements under Texas Health and Safety Code [~~HSC~~], §438.046(b).

(f) Certificate posting. The original food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

§229.178. Accreditation of Food Handler Education or Training Programs.

(a) Purpose. This section is intended to provide the framework for accrediting food safety education or training programs for food handlers in accordance with the Texas Health and Safety Code [~~(HSC)~~] Chapter 438, Subchapter D, §438.0431. A uniform standard governing the accreditation of food handler programs enhances the recognition of reciprocity among regulatory agencies and reduces the expense of duplicate education incurred when food handlers work in multiple regulatory jurisdictions. Education of the food handlers provides more qualified employees, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

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

(1) Accredited food handler program--A program approved by the department that meets the standards set forth in this section.

(2) Department--The Texas Department of State Health Services.

(3) Food--A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(4) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(5) Food handler--A food service employee who works with unpackaged food, food equipment or utensils, or food contact surfaces.

(6) Law--Applicable local, state and federal statutes, regulations and ordinances.

(7) Licensee--The individual, corporation or company that is licensed by the department to operate certified food handler programs.

(8) Person--An association, corporation, individual, partnership or other legal entity, government or governmental subdivision or agency.

(9) Reciprocity--Acceptance by state and local regulatory authorities of a food handler certificate issued by a department accredited food handler program.

(10) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(11) Sponsor--An individual designated in writing to the department, by the licensee, as the person responsible for administrative management of the program.

(c) Food handler education and training program. The department may accredit an education or training program for basic food safety. The program shall include employee knowledge, responsibilities and training as required in Chapter 228 of this title (relating to Retail Food Establishments) [~~the Texas Food Establishment Rules (TFER)~~].

(1) Education or training course curriculum. A food handler training or education course shall include the following basic food safety principles.

(A) Foodborne disease outbreak. Instruction on foodborne disease outbreak shall include the definition of foodborne disease outbreak, the causes and preventive measures, including employee reporting requirements as defined in Chapter 228, Subchapter B of this title (relating to Management and Personnel).

(B) Good hygienic practices. Instruction on good hygienic practices shall include the procedures as required in Chapter 228, Subchapter B of this title.

(C) Preventing contamination by employees. Instruction shall include the training as required in Chapter 228, Subchapter C of this title (relating to Food), regarding the training requirements for contact with ready to eat food with their bare hands.

(D) Cross Contamination. Instruction on cross contamination shall include procedures on the prevention of cross-contamination of foods, sanitization methods and corrective actions as required in 2017 FDA Food Code, Chapters 3 and 4 [~~Chapter 228, Subchapter C of this title and Chapter 228, Subchapter D of this title (relating to Equipment, Utensils, and Linens)~~].

(E) Time and temperature. Instruction shall include time and temperature control of foods to limit pathogen growth or toxin production as required in Chapter 228, Subchapter C of this title.

(F) Food Allergen Awareness. Instruction shall include the food allergen awareness information described by Texas Health and Safety Code §437.027(b).

(2) Course length. The course length may not exceed two hours.

(3) Course examination. A training or education program may require a participant to achieve a passing score on an examination to successfully complete the course.

(4) Internet programs. A program accredited under this section may be delivered through the Internet.

(d) Food handler certificate.

(1) Certificate period. A food handler certificate issued by an accredited food handler program shall be valid for two years.

(2) Certificate reciprocity. Department accredited food handler program issued certificates shall be recognized statewide by regulatory authorities as the valid proof of successful completion of a department accredited food handler program.

(e) Licensing of an accredited food handler program licensee. The department shall issue a license of accreditation to each certified food handler program licensee who has demonstrated compliance with this section. A license issued under these rules will expire two years from the date of issuance. This license is not transferable on change of ownership, or site location.

(f) Responsibilities of a licensee.

(1) Compliance with certified food handler program law and rules. The licensee is responsible for compliance with applicable certified food handler program law and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (g) of this section.

(g) Required fees. All fees are payable to the department and are non-refundable. Fees must be submitted with the appropriate completed application that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas.

(1) Accredited food handler program license fee for initial, renewal, or change of ownership. A program fee shall be $600 for a two-year license for each food handler program.

(2) Accredited food handler program amended license fee. Program amendment fees shall be $300.

(3) Late fee. Accredited food handler program licensees submitting a completed renewal application to the department after the expiration date shall pay an additional $100 as a late fee.

(4) Texas.gov [~~Texas Online Authority~~] fee. For all applications and renewal applications, the department is authorized to

collect subscription and convenience fees, in amounts determined by Texas.gov [~~the Texas Online Authority~~], to recover costs associated with application and renewal application processing through Texas.gov [~~Texas Online~~].

(h) Certified food handler program registry. The department shall maintain a program registry of all accredited food handler programs. The registry shall be made available on the department website.

(i) Department audits. Classroom audits may be conducted to assess program compliance. Licensee shall allow personnel authorized by the department access for the purposes of an audit. Audits may be based on analysis of data compiled by the department.

(j) Denial, suspension and revocation of program accreditation. An accredited food handler program license may be denied, suspended or revoked for the following reasons:

(1) a licensee is delinquent in payment of fees as described in this section; or

(2) violation of the provisions of this section.

(k) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(l) Suspension of License Relating to Child Support and Child Custody.

(1) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession of or access to a child, the department shall immediately determine if a license has been issued to the obligator named, and:

(A) record the suspension of the license in the department's records;

(B) report the suspension as appropriate; and

(C) demand surrender of the suspended license.

(2) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The board will provide notice as appropriate to the licensee or to others concerned with the license.

(3) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Texas Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(4) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act, and this chapter; however, the license will not be renewed until subsection (g) of this section is met.

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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Cynthia Hernandez
General Counsel
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For further information, please call: (512) 834-6753

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 4. LIFE AND ANNUITY

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figures in the proposed amendments to 28 TAC Chapter 4 are not included in the print version of the Texas Register. The figures are available in the on-line version of the September 22, 2023, issue of the Texas Register.)

The Texas Department of Insurance (TDI) proposes to repeal 28 TAC §4.1117.

TDI proposes to amend 28 TAC §§4.201 - 4.206, 4.601 - 4.608, 4.611, 4.613 - 4.628, 4.1001, 4.1002, 4.1004, 4.1005, 4.1008, 4.1010, 4.1011, 4.1101 - 4.1104, 4.1106 - 4.1116, 4.1201, 4.1502 - 4.1510, 4.1602 - 4.1606, 4.1609 - 4.1613, 4.1702 - 4.1707, 4.2102 - 4.2106, 4.2302, 4.2304, 4.2306 - 4.2312, 4.2322, 4.2701, 4.2702, 4.2705, 4.2706, 4.2712 - 4.2716, 4.2721 - 4.2726, 4.2731 - 4.2734, 4.2801 - 4.2808, 4.2811, 4.2821 - 4.2827, 4.2829, and 4.2831 - 4.2836. The amendments are necessary to correct internal section and figure citations made obsolete by the administrative transfer of certain subchapters from Chapter 3 to a new Chapter 4.

EXPLANATION. On July 28, 2023, the *Texas Register* published notice in 48 TexReg 4127 of the administrative transfer of certain subchapters concerning life insurance and annuity products, from Chapter 3, relating to life, accident, and health insurance and annuities, to a new Chapter 4 in Title 28 of the Texas Administrative Code.

The administrative transfer revised each subchapter and section designation included in the transfer to reflect its new orientation in Chapter 4, but no rule text was amended during the transfer. This proposal now amends internal section and figure citations made obsolete by the administrative transfer.

As part of the administrative transfer notice, the *Texas Register* published a comparison table illustrating the new organization and designations of subchapters, divisions, and sections in Chapter 4. The transfer table is available on TDI's website at www.tdi.texas.gov/rules.

In addition to amendments to defunct citations, the proposal also makes nonsubstantive changes to (1) add or amend Insurance Code section titles and citations for accessibility and consistency with agency rule drafting style preferences; (2) update TDI contact information, including mailing, physical, and website addresses; and (3) correct and revise punctuation, capitalization, and grammar to reflect current agency drafting style and plain language preferences, as appropriate.

Specifically, amendments to multiple sections include the deletion of "shall" or replacement of "shall" with "must" or another

context-appropriate word. The purpose of changing the word "shall" is to provide plain language clarification of the rule text, consistent with current agency style and guidance on the TDI website. Resources TDI uses for plain language guidance include plainlanguage.gov, which provides federal plain language guidelines, and the National Archives guidelines for clear legal documents. Both sources advise using alternatives to the word "shall" to provide clarity for readers.

The proposal replaces "pursuant to" with "under" or "in accordance with," as appropriate; replaces "subchapter" or "chapter" with "title" in citations to other sections in Title 28 of the Texas Administrative Code; and removes "the" when not needed before "Insurance Code." These proposed amendments, along with other nonsubstantive amendments discussed in the following paragraphs, reflect current agency drafting style, adhere to plain language practices, and promote consistency in TDI rule text.

In addition, the administrative transfer and proposed amendments (1) enhance accessibility through thoughtful reorganization; (2) promote readability through nonsubstantive plain language amendments; (3) preserve the capacity of Chapter 4 with deliberate organization; and (4) restore the capacity of Chapter 3 for future rulemaking projects.

This proposal includes nonsubstantive amendments to provisions related to the National Association of Insurance Commissioners (NAIC) rules, regulations, directives, or standards. Because the rules relate to NAIC rules, regulations, directives, or standards, Insurance Code §36.004 requires TDI to consider whether authority exists to enforce or adopt the provisions. TDI has determined that §36.004 does not prohibit the proposed amendments because they are nonsubstantive updates that do not change or expand previously adopted requirements.

The proposed amendments to the sections are described in detail in the following paragraphs, organized by subchapter.

Subchapter C. Consumer Notices for Life Insurance Policy and Annuity Contract Replacements.

Section 4.201. Purpose. The proposed amendments add the title to the Insurance Code §1114.006 citation and remove "the" before "Insurance Code."

Section 4.202. Definitions. The proposed amendments add the title to the Insurance Code Chapter 4054 citation and remove the word "shall."

Section 4.203. Consumer Notice Content and Format Requirements. The proposed amendments update section and figure citations made obsolete after the administrative transfer. The amendments also update the TDI mailing address where persons may request forms specified in the subchapter, amend punctuation, and replace "pursuant to" with "under."

Section 4.204. Consumer Notice Regarding Replacement for Insurers Using Agents. The proposed amendments update figure citations made obsolete after the administrative transfer and replace "shall" with "must." No amendments are proposed to the contents of the figure.

Section 4.205. Direct Response Consumer Notices. The proposed amendments update figure citations made obsolete after the administrative transfer and replace "shall" with "must." No amendments are proposed to the contents of the figures.

Section 4.206. Filing Procedures for Substantially Similar Consumer Notices. The proposed amendments remove §4.206(a), which provides the filing procedure for an insurer subject to Insurance Code Chapter 1114 beginning on December 27, 2007, and ending January 31, 2008. The proposal redesignates the remaining subsections and removes the other effective dates in the section.

The proposed amendments also update figure citations made obsolete after the administrative transfer and add or correct titles to the Insurance Code Chapter 1114 and §1701.054 citations. The proposal also replaces multiple citations to filing requirements found in 28 TAC Chapter 3, Subchapter A, with a general citation to 28 TAC Chapter 3, Subchapter A. The amendments also replace "shall" with "must" and "prior to" with "before" and correct grammar by adding "been" to §4.206(a)(1).

Subchapter F. Individual Life Insurance Policy Form Checklist and Affirmative Requirements.

Section 4.601. Payment of Premiums. The proposed amendments replace "which" with "that," "shall" with "will," "thereof to" with "at," and "his" with "the."

Section 4.602. Grace Period. The proposed amendment replaces "shall" with "must."

Section 4.603. Entire Contract. The proposed amendments remove the word "shall" and replace "which" with "that."

Section 4.604. Incontestable Clause. The proposed amendments add the title to the Insurance Code §1101.006 citation, replace the citation and title of §3.118(e) with §4.621(e), replace "which" with "that," and remove "whatsoever."

Section 4.605. Statements of the Insured. The proposed amendments add the title to the Insurance Code §705.004 citation and replace "which" with "that."

Section 4.606. Misstatement of Age. The proposed amendments replace "shall be such as" with "is the amount that" and amend punctuation.

Section 4.607. Policy Loans. The proposed amendments add the title to the Insurance Code Chapter 1110 citation; amend punctuation; remove "of," "herein," and one instance of "thereon"; replace "which" with "that," "thereto" with "to the policy," "therefor" with "for the loan," and "thereon" with "on the loan"; and add "of the policy" and "in this subchapter" to clarify the sentence given the removal of "thereon" and "herein" from the subsection.

Section 4.608. Automatic Nonforfeiture Benefits. The proposed amendment adds the title to the Insurance Code Chapter 1105 citation.

Section 4.611. Reinstatement. The proposed amendments replace "which" with "that," "shall" with "must," "shall be" with "is," and "shall not have" with "has not."

Section 4.613. Family Group Special Requirements. The proposed amendments replace "shall" with "must" and "which" with "that."

Section 4.614. Dependent Child Riders and Family Term Riders. The proposed amendments add the corresponding titles to the Insurance Code §1101.006 and §1105.007 citations, amend punctuation, and replace "prior to" with "before."

Section 4.615. Requirements for a Package Consisting of a Deferred Life Policy with an Accidental Death Rider Attached. The proposed amendments add the title to the Insurance Code Chapter 1701 citation and replace "which" with "that."

Section 4.616. Substitute or Change of Insured Riders. The proposed amendments add the word "and" at the end of §4.616(d)(3) to clarify that all elements in §4.616(d) must be clearly described. The proposal also replaces the word "shall" with "must" and amends punctuation.

Section 4.617. Preliminary Term Life Insurance. The proposed amendments add "and" after §4.617(1) to clarify that both requirements apply to a contract of life insurance containing a preliminary term insurance rider. The proposal also corrects the spelling of "contestability."

Section 4.618. Conversion Provision. The proposed amendments add "and" after §4.618(3) to clarify that a conversion provision in a policy must comply with the requirements in the section. The proposal also replaces "shall" with "must."

Section 4.619. Limitations of Lawsuits. The proposed amendment replaces "shall accrue" with "accrues."

Section 4.620. Backdating Policies. The proposed amendments replace "which" with "that," "that which" with "what," "his" with "their," and "prior to" with "before" and remove "thereby."

Section 4.621. Settlement at Maturity. The proposed amendments remove "either of" to reflect that §4.621(c) contains more than two paragraphs, amend punctuation, and replace "which would" with "that."

Section 4.622. Tontine Provisions. The proposed amendments replace "which" with "that."

Section 4.623. Assignment Provisions. The proposed amendments replace "which" with "that."

Section 4.624. Provisions Relating to Dividends, Coupon Benefits, or Other Guaranteed Returns. The proposed amendments add the title to the Insurance Code §841.253 citation and replace "which" with "that."

Section 4.625. Premiums Paid in Advance. The proposed amendments amend punctuation and replace "which" with "that" and "therein" with "in the policy."

Section 4.626. Annuity Contracts. The proposed amendments update section citations made obsolete after the administrative transfer by replacing "Sections 3.101 - 3.128" with "All sections in Subchapter F" and replacing the word "title" with "chapter." The proposal also replaces "which" with "that."

Section 4.627. Certain Prohibited Provisions. The proposed amendments replace "which" with "that."

Section 4.628. Renewal Premium on Term Policies. The proposed amendment replaces "shall" with "must."

Subchapter J. Indeterminate Premium Reduction Policies.

The proposal adds "Life -" to the title of Subchapter J to clarify the applicability of the subchapter.

Section 4.1001. Purpose and Scope. The proposed amendments add the title to the Insurance Code Chapter 541 citation and replace "which" with "that" and "subsequent to" with "after." The proposal also adds "and" after §4.1001(a)(1) to clarify that the subchapter applies to life insurance policies that have both characteristics in §4.1001(a).

Section 4.1002. Policy Form Submission. The proposed amendments replace "its" with "the insurer's" to clarify the subject of §4.1002(a)(1), amend punctuation, and replace "which" with "that."

Section 4.1004. Summary of Provisions. The proposed amendments replace "which" with "that" and "subsequent to" with "after."

Section 4.1005. Relation of Initial to Later Premium Charge. The proposed amendment replaces "which" with "that."

Section 4.1008. Minimum Nonforfeiture Values. The proposed amendments add the title to the Insurance Code Chapter 1105 citation and replace "code" with "Insurance Code." The proposal also removes "wherein" and "are required" and adds "which requires" for clarity.

Section 4.1010. Artificial Maximum Premiums Prohibited. The proposed amendments add the titles to the Insurance Code Chapters 1105 and 425, Subchapter B, citations. The proposal also replaces "subsequent to" with "after" and amends punctuation.

Section 4.1011. General Enforcement. The proposed amendment adds the title to the Insurance Code Chapter 541 citation.

Subchapter K. Standards for Acceleration-of-Life-Insurance Benefits for Individual and Group Policies and Riders.

The proposal adds "Life -" to the title of Subchapter K to clarify the applicability of the subchapter.

Section 4.1101. Purpose; Severability. The proposed amendments remove the capitalization of the first word of paragraphs (1) through (5) of §4.1101(a) to reflect the punctuation of the subsection. The proposal also amends punctuation, removes "shall," and replaces "shall remain" with "remains."

Section 4.1102. Acceleration-of-Life-Insurance: Scope of Benefits. The proposed amendments update section citations made obsolete after the administrative transfer, amend punctuation, and remove "shall" and "either." The proposal also replaces "which" with "that," "Acceleration-of-life-insurance" with "Acceleration-of-Life-Insurance," "that" with "That," and "shall" with "must" or "will."

Section 4.1103. Required Policy Definitions; Evidence of Total and Permanent Disability. The proposed amendments update a section citation made obsolete after the administrative transfer and add the titles to the Insurance Code §1111.052 and §1201.003 citations. The proposal also removes "the" before "Insurance Code" and replaces "shall" with "must." The proposal also clarifies §4.1103(a) by removing "either" and amending punctuation throughout the section.

Section 4.1104. Standards for Medical Diagnoses. The proposed amendments replace "shall" with "must."

Section 4.1106. Methods for Determining Benefits and Allowable Charges and Fees. The proposed amendments replace the capitalized catchlines with lowercased catchlines and amend punctuation. The proposal also replaces "shall" with "must" or "may," "which" with "that," "annum" with "year," "one percent" with "1%," "90 day" with "90-day," "Commissioner" with "commissioner," and "regards" with "regard."

Section 4.1107. Limitations on Reduction of Cash Values. The proposed amendments update a section citation made obsolete after the administrative transfer and replace "Lien Method " with "lien method" and "shall" with "may." The proposal also removes "the" before "Insurance Code," amends punctuation, and adds the title to the Insurance Code Chapter 1105 citation.

Section 4.1108. Pro Rata Reduction of Loan upon Acceleration of Benefits. The proposed amendments update a section citation

made obsolete after the administrative transfer and replace "Lien Method" with "lien method."

Section 4.1109. Effect of Acceleration of Benefits on Nonforfeiture Calculations. The proposed amendments add the title to the Insurance Code Chapter 1105 citation, replace "shall" with "must," and remove "the" before "Insurance Code."

Section 4.1110. Calculation of Reserves. The proposed amendments update a section citation made obsolete after the administrative transfer, remove "the" before "Insurance Code," and add titles to the citations for Insurance Code Chapter 425, §425.058, and §425.069. The proposal also replaces "shall" with "must," "which" with "that," and "Lien Method" with "lien method."

Section 4.1111. Unfair, Discriminatory or Deceptive Practices Prohibited. The proposed amendments add a comma after "Discriminatory" in the section title and add commas in §4.1111(b) for consistency with the amendment to the section title.

The proposal also removes the parentheses around the title to Insurance Code Chapter 541, removes "the" before "Insurance Code," and replaces "shall" with "may."

Section 4.1112. Notice and Disclosure Requirements for Life Insurance Contracts Containing Acceleration-of-life-insurance Benefits. The proposed amendments capitalize "Acceleration-of-Life-Insurance" in the section title and update section citations made obsolete after the administrative transfer.

The proposal also corrects punctuational errors and replaces "shall" with "must," "which" with "that," "section" with "subsection," and "shall be" with "is."

Section 4.1113. Notice and Disclosure Requirements for Marketing Materials. The proposed amendments update section citations made obsolete after the administrative transfer, amend punctuation, and replace "shall" with "must" and "which" with "that." The proposal also adds an "and" at the end of §4.1113(a)(2) to clarify that a disclosure required under the section must include information in §4.1113(a)(1) - (3).

Section 4.1114. Requirements for Acceleration-of-life-insurance Benefits That Fund Long-Term Care Expenses. The proposed amendments update section citations made obsolete after the administrative transfer, capitalize "Acceleration-of-Life-Insurance" in the section title, clarify that the citation to Subchapter Y is found in Chapter 3 of Title 28, and correct the title for Chapter 3, Subchapter Y.

The amendments also replace "To" with "to" in the title citation to §4.1115 and "chapter" with "title" and correct capitalization throughout the section for consistency with the punctuation used.

Section 4.1115. Requirements for Benefits Represented To Be Qualified for Favorable Federal Tax Treatment. The proposed amendments update section citations made obsolete after the administrative transfer and correct cited section titles in the rule text. The proposal also replaces "To" with "to" in the title of §4.1115; replaces "his or her" with "their," "shall" with "must" or "may," "long term" with "long-term," "prior to" with "before," and "which" with "that"; removes "shall"; adds "of this paragraph" in §4.1115(b)(2)(B); and amends punctuation.

Section 4.1116. Disclosure Related to Tax Qualification of Benefits and Benefits' Effect on Public Assistance. The proposed amendments update section citations made obsolete after the administrative transfer and remove redundant citations to a section title previously cited in §4.1116. The proposal removes the phrase "a life insurance contract" in §4.1116(b) because it is redundant and amends punctuation throughout the section.

The amendments also replace "back-slashes" with "slashes," "acceleration-of-life insurance" with "acceleration-of-life-insurance," and "regards" with "regard."

Section 4.1117. Effective Date. Section 4.1117 is proposed for repeal because the section states the amendments become effective 20 days after the date the adopted rule is filed with the Office of the Secretary of State. This is standard practice for rules under Government Code §2001.036(a) and, as a result, the section is unnecessary.

Subchapter L. Insurance Sold in Connection with Prepaid Funeral Contracts.

The proposal adds "Life -" to the title of Subchapter L to clarify the applicability of the subchapter.

Section 4.1201. Introduction to Joint Memorandum of Understanding. The proposed amendments add the title to the Occupations Code §651.159 citation and update a section citation made obsolete after the administrative transfer.

Subchapter O. Variable Life Insurance.

The proposal adds "Life -" to the title of Subchapter O to clarify the applicability of the subchapter.

Section 4.1502. Definitions. The proposed amendments add a title to the Insurance Code Chapter 1152 citation, add "with" in §4.1502(10), amend punctuation, and replace "which" with "that" and "pursuant to" with "under."

Section 4.1503. Qualifications of Insurer to Issue Variable Life Insurance. The proposed amendments update section citations made obsolete after the administrative transfer, add a title to the Insurance Code Chapter 1152 citation, and correct a title and citation to Chapter 21, Subchapter B, Division 1.

The amendments also remove "concerning notice and hearing" because that citation is outdated and remove "a" before the phrase "life insurance business in this state" to correct the grammar of the sentence. The amendments amend punctuation and replace "subsection" with "section," "which" with "that," "prior to" with "before," "pursuant to" with "under," and "contractholder" with "contract holder."

Section 4.1504. Insurance Contract and Filing Requirements. The proposed amendments add titles to the citations for Insurance Code Chapters 1105 and 1110 and "Chapter 3" to a citation in §4.1504(1)(A). The amendments also replace "chapter" with "title" in relation to the citation to Chapter 3, Subchapter A, and remove a redundant reference to the title of §4.1509.

The amendments also add "and" at the end of §4.1504(3)(P)(v) and §4.1504(4)(A)(iii) to reflect that all the elements listed in those paragraphs must be included under §4.1504(3)(P) and §4.1504(4)(A), and add "or" at the end of §4.1504(5)(C)(iv) to reflect that contracts may offer the dividend options in §4.1504(5)(C)(i) - (v).

The amendments also update section citations made obsolete after the administrative transfer and replace multiple outdated words or terms with language that conforms to current agency drafting style and plain language preferences. These changes remove "of" and "therefor"; amend punctuation; and replace "which" with "that," "contractholder" with "contract holder," "his or her" with "the insured's," "which result" with "that results," "pursuant to" with "under," "prior to" with "before," "thereof"

with "of those provisions," "thereon" with "on the contract," and "subsequent to" with "after."

Section 4.1505. Reserve Liabilities for Variable Life Insurance. The proposed amendments add a title to the Insurance Code Chapter 425, Subchapter B, citation and replace "paid up" with "paid-up" and "which" with "that."

Section 4.1506. Separate Accounts. The proposed amendments add titles to the Insurance Code Chapters 1105 and 1152 citations, update section citations made obsolete after the administrative transfer, and correct a reference to the title of a cited administrative code citation.

The proposal adds "and" at the end of §4.1506(7)(F) to clarify that the insurer must disclose in writing all charges that may be made against the separate account including, but not limited to, the elements in §4.1506(7). The proposal also adds "and" at the end of §4.1506(10)(C)(iii) to clarify the information to be included under §4.1506(10)(C). The proposal also removes an "or" at the end of §4.1506(1)(B)(i) because it is redundant. These proposed amendments clarify the rule requirements but are nonsubstantive in nature and do not change the requirements under the rule.

The proposal also amends punctuation and replaces "pursuant to" with "under," "prior to" with "before," "which" with "that," "thereunder" with "under the contract" or "adopted under that section," "which evidences" with "evidencing," and "contractholders" with "contract holders."

Section 4.1507. Information Furnished to Applicants. The proposed amendments update a section citation made obsolete after the administrative transfer and amend punctuation. The proposal also replaces "which" with "that," "contractholder" with "contract holder," "the manner in which" with "how," "prior to" with "before," and "shall" with "must," "may," or "will."

Section 4.1508. Application. The proposed amendments add "and" after §4.1508(2) to clarify that the application for a variable life contract must contain all the elements in the section and replace "shall" with "must" and "which" with "that."

Section 4.1509. Reports to Contractholders. The proposed amendments update a section citation made obsolete after the administrative transfer and add an "and" at the end of §4.1509(2)(D) to clarify that a statement or statements provided annually to contract holders must contain the elements listed in the paragraph.

The proposal also replaces "contractholder" with "contract holder" in the section title and in rule text and replaces "shall" with "must," "pursuant to" with "under," "of" with "or," which" with "that," "prior to" with "before," "therein" with "in the statement" and "his or her" with "their."

Section 4.1510. Separability. The proposed amendments replace the range of section citations with the corresponding citation to Subchapter O and change "title" to chapter." The proposal also removes "thereby," amends the title of Subchapter O for consistency with proposed changes to the subchapter's title, and replaces "thereof" with "of such provisions" and "shall" with "will."

Subchapter P. Required Reinstatement Relating to Mental Incapacity of the Insured for Individual Life Policies Without Nonforfeiture Benefits.

The proposal adds "Life -" to the title of Subchapter P to clarify the applicability of the subchapter.

Section 4.1602. Applicability. The proposed amendments update a section citation made obsolete after the administrative transfer, remove punctuation, and replace "which" with "that."

Section 4.1603. Severability. The proposed amendment removes "shall."

Section 4.1604. Definitions. The proposed amendments remove "shall"; amend punctuation; and replace "Incapacity" with "incapacity" and "Commissioner of Insurance" with "commissioner of insurance."

Section 4.1605. Eligibility Requirements. The proposed amendments remove the language "set forth in paragraphs (1) - (4) of this subsection" at the end of the first sentence in §4.1605 to simplify and clarify the provision. The section is not broken into subsections and there are only four paragraphs in the section, so it is not necessary to list each paragraph. The amendments add the word "following" to clarify the sentence given the removal and replace "shall" with "must" and "prior to" with "before."

Section 4.1606. Payment of Past Due Premiums. The proposed amendment replaces "annum" with "year."

Section 4.1609. Notification and Disclosure Requirements. The proposed amendments update section citations made obsolete after the administrative transfer, remove a cited section title that is redundant, amend punctuation, and replace "thereto" with "to the policy" and "which" with "that."

Section 4.1610. Reinstatement Procedures. The proposed amendment replaces "shall" with "must."

Section 4.1611. Reduced Benefits. The proposed amendments replace "shall" with "must."

Section 4.1612. Form Filing Procedures. The proposed amendments update section citations made obsolete after the administrative transfer and remove two redundant section title citations. The amendments also add "Chapter 3" to the citation in §4.1612(c) and amend the title of Subchapter A in §4.1612(c).

Section 4.1613. Notice and Disclosure Form. The proposed amendments update section and figure citations made obsolete after the administrative transfer. The amendments also remove a redundant title citation and replace "shall" with "must." No amendments are proposed to the contents in the figures.

Subchapter Q. Nonforfeiture Standards for Individual Life Insurance in Employer Pension Plans.

The proposal adds "Life -" to the title of Subchapter Q to clarify the applicability of the subchapter.

Section 4.1702. Definitions. The proposed amendments remove "shall," correct punctuation, and replace "National Association of Insurance Commissioners" with "NAIC" for consistency. The amendments also correct the case law citation in §4.1702(8) by italicizing the names of the parties for consistency with §4.1703.

Section 4.1703. Standard. The proposed amendments change the *Norris* case law citation in §4.1703(d) to reflect the same case law citation used in §4.1702(8) for consistency. The amendments also remove an unnecessary reference to a list of insurance code sections, update the TDI mailing address; add the titles to the citations for Insurance Code Chapter 425, Subchapter B, and Chapter 1105, Subchapter B; remove "herein"; and replace "paid up" with "paid-up" and "which" with "that."

Section 4.1704. Alternate Rule. The proposed amendments update a section citation made obsolete after the administrative transfer, remove an unnecessary reference to a list of insurance code sections, and add titles to the citations for Insurance Code Chapter 425, Subchapter B, and Chapter 1105, Subchapter B. The amendments also update the TDI mailing address and replace "which" with "that."

Section 4.1705. Unfair Discrimination. The proposed amendment adds a title to the Insurance Code §541.057 citation.

Section 4.1706. Severability. The proposed amendments remove "thereby" and replace "shall" with "will" and "thereof" with "of these provisions."

Section 4.1707. 2001 CSO Mortality Table. The proposed amendments replace the sections cited with a citation to "Subchapter AA, Division 3" and replace "shall" with "must," "pursuant to" with "under," and "title" with "chapter."

Subchapter U. Variable Annuities.

Section 4.2102. Definitions. The proposed amendments add a title to the Insurance Code Chapter 1152 citation, amend punctuation, and replace "which" with "that," "pursuant to" with "under," and "contractholder" with "contract holder."

Section 4.2103. Qualifications of Insurer To Issue Variable Annuities. The proposed amendments replace "To" with "to" in the section title and update a section citation made obsolete after the administrative transfer.

The amendments also amend punctuation and replace "he or she" with "the commissioner"; "State Board of Insurance" with "Department of Insurance"; "which" with "that"; and "shall" with "must," "may," or "will."

Section 4.2104. Separate Accounts. The proposed amendments add a title to the Insurance Code Chapter 1152 citation and update section citations made obsolete after the administrative transfer. The amendments also remove redundant instances of "or" at the end of §4.2104(a)(2)(A) and §4.2104(j)(1) and add "and" at the end of §4.2104(j)(3)(C) to clarify that the insurer must include all the information in paragraph (3), if applicable.

The amendments also replace "To" with "to" in a title citation, amend punctuation, and replace "which" with "that," "contractholders" with "contract holders," "prior to" with "before," "pursuant to" with "under," and "thereunder" with "adopted under that section" or "under the contract," as appropriate.

Section 4.2105. Contract Requirements. The proposed amendments replace outdated Insurance Article citations with current Insurance Code citations and their corresponding titles. The amendments also replace a citation and title to "Board Order 40701" with "Chapter 3, Subchapter A" and its corresponding title citation.

The amendments also amend punctuation throughout, remove "thereunder" and "the" before "Internal Revenue Code," and replace "which," "as of which," or "of which" with "that"; "him or her" or "his or her" with "the commissioner" or "the contract holder," as appropriate; "chapter" with "title"; "prior to" with "before"; "contractholder" with "contract holder"; "pursuant to" with "under"; "shall have" with "has"; "previous to" with "before"; " subparagraph" with " subparagraphs"; and "shall" with "must," "may," "will," or "do."

Section 4.2106. Separability. The proposed amendments remove "thereby" and replace "thereof" with "of these sections" and "shall" with "will."

Subchapter W. Annuity Disclosures.

Division 1: Annuity Contract Disclosures.

Section 4.2302. Applicability and Scope. The proposed amendments remove "the" before Insurance Code and Finance Code for consistency, add titles to the Insurance Chapter 102 citation and the Finance Code Chapter 154 citation, and amend punctuation.

Section 4.2304. Definitions. The proposed amendments update a section citation made obsolete after the administrative transfer and add titles to the Insurance Code Chapter 102 and 4054 citations. The amendments also remove "the" before Insurance Code and "shall" throughout the section and replace "subchapter" with "title."

Section 4.2306. Guaranteed and Non-guaranteed Elements. The proposed amendments update section citations made obsolete after the administrative transfer, replace "Non-guaranteed" with "Non-Guaranteed" in the section title, and replace "subchapter" with "title."

Section 4.2307. Effect on Other Law. The proposed amendments replace "pursuant to" with "under."

Section 4.2308. Required Consumer Notices. The proposed amendments update section citations made obsolete after the administrative transfer and add the title to the Insurance Code §1152.110 citation. The amendments remove "the" before Insurance Code, amend punctuation, and replace "subchapter" with "title," "Internet" with "internet," "which" with "and," "prior to" with "before," and "shall" with "must" or "will."

Section 4.2309. Disclosure Document. The proposed amendment replaces "shall" with "must."

Section 4.2310. Buyer's Guide. The proposed amendments correct punctuation and replace "NAIC" with "National Association of Insurance Commissioners (NAIC)" and "SEC's" with "Securities and Exchange Commission (SEC)."

Section 4.2311. Free Look Period. The proposed amendments replace "shall" with "must" and "shall mean" with "means."

Section 4.2312. Report to Contract Owners. The proposed amendment replaces "shall" with "must."

Division 2: Annuity Suitability Disclosures.

Section 4.2322. Required Forms. The proposed amendments add "(NAIC)" at the end of the first use of "National Association of Insurance Commissioners" and then replace all instances of "National Association of Insurance Commissioners" with "NAIC." The proposal also removes "Texas" before "Insurance Code" for consistency with current agency rule drafting style.

Subchapter AA. Mortality Tables.

Division 1: Annuity Mortality Tables.

Section 4.2701. Purpose. The proposed amendments update section and figure citations made obsolete after the administrative transfer. No amendments are proposed to the contents in the figures.

Section 4.2702. Definitions. The proposed amendments update a section citation made obsolete after the administrative transfer, replace "Actuaries'" with "Actuaries" and "table" with "Table,"

and amend punctuation. The amendments also add "(NAIC)" at the end of the first use of "National Association of Insurance Commissioners" and then replace all instances of "National Association of Insurance Commissioners" with "NAIC."

Section 4.2705. Application of the 1994 GAR Table. The proposed amendments update a figure citation made obsolete after the administrative transfer. No amendments are proposed to the contents in the figures.

Section 4.2706. Application of the 2012 IAR Mortality Table. The proposed amendments update figure citations made obsolete after the administrative transfer. Amendments to figure citations are proposed in both the rule text and the text of Figure: 28 TAC §4.2706.

Division 2. Smoker-Nonsmoker Composite Mortality Tables.

Section 4.2712. Definitions. The proposed amendments update punctuation and remove "shall."

Section 4.2713. Alternate Tables. The proposed amendments update section citations made obsolete after the administrative transfer, remove an unnecessary reference to a list of insurance code sections in two places, and add the title to the Insurance Code, Chapter 1105, Subchapter B, citation. The amendments also remove a redundant title to a section cited earlier in §4.2713, amend punctuation, update a TDI mailing address, remove "herein," and replace "paid up" with "paid-up."

Section 4.2714. Conditions. The proposed amendment adds the title to the Insurance Code §425.068 citation.

Section 4.2715. Severability. The proposed amendments remove "thereby" and replace "thereof" with "of these sections" and "shall" with "will."

Section 4.2716. 2001 CSO Mortality Table. The proposed amendments update section citations made obsolete after the administrative transfer and replace "shall" with "must," "pursuant to" with "under," and "title" with "chapter."

Division 3. 2001 CSO Mortality Table.

Section 4.2721. Purpose. The proposed amendments update a section citation made obsolete after the administrative transfer and add titles to the citations for Insurance Code Chapter 425, Subchapter B; §425.058; and §1105.055.

Section 4.2722. Definitions. The proposed amendments update punctuation, remove "shall," and capitalize "Mortality."

Section 4.2723. 2001 CSO Mortality Table. The proposed amendments update section citations made obsolete after the administrative transfer and add titles to the citations for Insurance Code Chapter 425, Subchapter B; §425.058; and §1105.055. The proposal also corrects a citation from Insurance Code "§1055.055(h)" to "§1105.055(h)" in §4.2723(b).

The amendments also remove a redundant title to a section cited earlier in §4.2723; replace "Commissioner of Insurance" with "commissioner," "title" with "chapter," and "pursuant to" with "under"; and update a TDI mailing address and the TDI website where the 2001 CSO Mortality Table may be accessed.

Section 4.2724. Conditions. The proposed amendments update section citations made obsolete after the administrative transfer and add the title to the Insurance Code §425.068 citation. The amendments also replace "Chapter 3, Subchapter EE" with "Chapter 4, Subchapter BB, Division 3" in a title citation and correct inconsistent capitalization in §4.2724(a)(1) - (3) to reflect the punctuation used in the section.

Section 4.2725. Applicability of the 2001 CSO Mortality Table to Chapter 3, Subchapter EE of this Title. The proposed amendments update section citations made obsolete after the administrative transfer and replace "Chapter 3, Subchapter EE" with "Chapter 4, Subchapter BB, Division 3" in the section title and rule text. The amendments also amend punctuation, replace "shall be" with "is" and "shall" with "may," and remove "shall," as appropriate.

Section 4.2726. Gender-Blended Tables. The proposed amendments add titles to the citations for Insurance Code Chapter 541 and Chapter 425, Subchapter B; and update the TDI mailing address and the TDI website where the blended tables developed by the American Academy of Actuaries CSO Task Force may be accessed.

Division 4. Preferred Mortality Tables.

Section 4.2731. Purpose. The proposed amendments update a section citation made obsolete after the administrative transfer and add titles to the Insurance Code Chapter 425, Subchapter B and §425.058 citations.

Section 4.2732. Definitions. The proposed amendments remove "shall" and amend punctuation.

Section 4.2733. 2001 CSO Preferred Class Structure Table. The proposed amendments update section citations made obsolete after the administrative transfer and add the title to the Insurance Code Chapter 425, Subchapter B citation. The amendments also replace "pursuant to" with "under" and "prior to" with "before" and update the TDI mailing address and the TDI website where the 2001 CSO Preferred Class Structure Mortality Table may be accessed.

Section 4.2734. Conditions. The proposed amendments update punctuation and replace "NAIC" with "National Association of Insurance Commissioners (NAIC)," "prior to" with "before," and "shall" with "must" or "will."

Subchapter BB. Life and Annuity Reserves.

Division 1. Actuarial Opinion and Memorandum Regulation.

Section 4.2801. Purpose. The proposed amendments remove the language "described in paragraphs (1) - (3) of this section" at the end of the first sentence in §4.2801 to simplify and clarify the provision. The section is not broken into subsections and there are only three paragraphs in the section, so it is not necessary to list out each paragraph. The amendments also add the word "following" to clarify the sentence given the removal and add the title to the Insurance Code §425.054 citation.

Section 4.2802. Scope and Applicability. The proposed amendments update section citations made obsolete after the administrative transfer and add the title to the Insurance Code Chapter 425, Subchapter B citation. The amendments also replace "thereof" with "of the statement of opinion," "shall apply" with "applies," "shall have" with "has," "shall be" with "is," "which" with "that," "his or her" with "their," and "shall" with "must."

Section 4.2803. Commissioner Discretion. The proposed amendments update section citations made obsolete after the administrative transfer and replace "which" with "that."

Section 4.2804. Definitions. The proposed amendments update section citations made obsolete after the administrative transfer and add titles to the Insurance Code §884.307 and §884.402 ci-

tations. The proposal also amends punctuation; removes "shall"; and replaces "pursuant to" with "under," "his or her" with "their," and "which includes" with "including."

Section 4.2805. General Requirements. The proposed amendments update a section citation made obsolete after the administrative transfer and add titles to the Insurance Code §§425.054, 425.064, 425.065, 425.068, and 425.069 citations.

Section 4.2806. Statement of Actuarial Opinion Based on an Asset Adequacy Analysis. The proposed amendments update figure and section citations made obsolete after the administrative transfer and add the title to the Insurance Code Chapter 425, Subchapter B citation. The proposal also updates section citations in Figure: 28 TAC §4.2806(b)(2). No other amendments are proposed to the contents in the figures.

The amendments replace "be at least" with "include the following" in §4.2806(f)(1)(C)(ii) for clarity and amend punctuation. The proposal also capitalizes the words beginning each paragraph in §4.2806(f)(1) to reflect the amended punctuation and replaces "subsequent to" with "before" and "being" with "may be" in §4.2806(f)(1)(B) to clarify that before an alternative statement may be issued, the company must file certain requirements.

The proposed amendments also correct a reference to the title of 28 TAC §7.18 and replaces "NAIC" with "National Association of Insurance Commissioners," "that which" with "what," "which" with "that," and "he or she" or "his or her" with "the appointed actuary" or "their."

Section 4.2807. Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary. The proposed amendments update section citations made obsolete after the administrative transfer and add titles to the citations for Insurance Code Chapters 401 and 425, Subchapter B. The proposal replaces citations to Insurance Code §§425.054 - 425.057 with Chapter 425, Subchapter B.

The amendments replace a colon at the end of a statement with "the following" and a period and correct capitalization for consistency with the subsection's organization.

The proposal also updates a TDI mailing address; removes "the" before Insurance Code; amends punctuation; and replaces "which" with "that," "his or her" with "the appointed actuary's," and "their" with "the other actuaries.'"

Section 4.2808. Asset Adequacy Analysis Exemption. The proposed amendments update section citations made obsolete after the administrative transfer, capitalize "Commissioner" as it appears in the title for §4.2803, and replace "pursuant to" with "under" and "shall" with "must."

Division 2. Strengthened Reserves Pursuant to Insurance Code §425.067.

Section 4.2811. Strengthened Reserves Pursuant to Insurance Code §425.067. The proposed amendments add titles to the Insurance Code §425.053 and §425.067 citations and replace "pursuant to" with "under" in the section title.

Division 3. Valuation of Life Insurance Policies.

Section 4.2821. Purpose. The proposed amendments revise capitalization to reflect current agency drafting style. .

Section 4.2822. Adoption of Tables of Select Mortality Factors. The proposed amendments update a figure citation made obsolete after the administrative transfer and replace "age last birthday" with "age-last-birthday," "age nearest birthday" with "age-nearest-birthday," and "which" with "that." No amendments are proposed to the contents in the figures.

Section 4.2823. Applicability. The proposed amendments update section citations made obsolete after the administrative transfer and add the title to the Insurance Code Chapter 425, Subchapter B citation. The proposal also amends punctuation and replaces "Nonlevel" with "nonlevel" and "shall" with "does" or "must."

Section 4.2824. Definitions. The proposed amendments update section and figure citations made obsolete after the administrative transfer; remove a redundant title already cited; update punctuation; and replace "subchapter" with "title," "shall" with "must" or "may," and "one percent" with "1%." These amendments are made in the rule text and in the text of Figure: 28 TAC §4.2824(2).

Proposed amendments also add or correct titles to the citations for Insurance Code Chapter 425, Subchapter B and §§425.061, 425.064, and 425.068; remove "shall" and instances of "the" before Insurance Code; replace "one year" with "one-year,"; and correct capitalization throughout the section. These nonsubstantive amendments are meant to align the section with other similar sections.

Section 4.2825. General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves. The proposed amendments update section citations made obsolete after the administrative transfer; correct a title citing to Insurance Code Chapter 425, Subchapter B; and remove a redundant title already cited.

The amendments correct capitalization and add "or" at the end of §4.2825(b)(3)(G)(iii) to reflect that, if select mortality factors are elected, it may be those found in §4.2825(b).

The amendments also remove "the" before "Insurance Code"; amend punctuation; and replace "shall" with "must, "percent" with "%," "prior to" with "before," and "subchapter" or "chapter" with "title."

Section 4.2826. Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums of Guaranteed Nonlevel Benefits (Other than Universal Life Policies). The proposed amendments update section citations made obsolete after the administrative transfer; add the title to the Insurance Code Chapter 425, Subchapter B citation; and remove a redundant title already cited. The amendments also update punctuation and replace "prior to" with "before," "subsequent to" with "after," "twenty-four" with "24," and "twenty-five" with "25."

Section 4.2827. Calculation of Minimum Valuation Standard for Flexible Premium and Fixed Premium Universal Life Insurance Policies That Contain Provisions Resulting in the Ability of a Policyholder to Keep a Policy in Force Over a Secondary Guarantee Period. The proposed amendments update section citations made obsolete after the administrative transfer; correct capitalization in §4.2827(d) to reflect the subsection organization; amend punctuation; and replace "one year" with "one-year," "which" with "that," and "shall" with "must."

Section 4.2829. 2001 CSO Mortality Table. The proposed amendments update section citations made obsolete after the administrative transfer by replacing "§§3.9101 - 3.9106" with "Subchapter AA, Division 3" and replace "shall" with "must," "title" with "chapter," and "pursuant to" with "under."

Division 4. Preneed Life Insurance Minimum Mortality Standards for Determining Reserve Liabilities and Nonforfeiture Values.

Section 4.2831. Purpose and Applicability. The proposed amendments update a section citation made obsolete after the administrative transfer and replace "of the Insurance Code" with titles to the Insurance Code §425.058 and §1105.055 citations. The amendments also replace "chapter" with "title" and add "Insurance Code" before the Insurance Code citations.

Section 4.2832. Definitions. The proposed amendments add titles to the Finance Code Chapter 541 and §541.002 citations, remove "shall" and "the" before Finance Code, amend punctuation, and replace "which" with "that."

Section 4.2833. Minimum Valuation Mortality Standards. The proposed amendments update a section citation made obsolete after the administrative transfer and replace "subchapter" with "title" and "shall be" with "is."

Section 4.2834. Minimum Valuation Interest Rate Standards. The proposed amendments correct the title for the Insurance Code Chapter 425, Subchapter B and Chapter 1105 citations; remove "the" before Insurance Code; and replace "shall be" with "are."

Section 4.2835. Minimum Valuation Method Standards. The proposed amendments update the titles for the Insurance Code Chapter 425, Subchapter B and Chapter 1105 citations; update punctuations; replace "shall be" with "is"; and remove "the" before "Insurance Code."

Section 4.2836. Transitional Use of the 2001 CSO Mortality Table. The proposed amendments update section citations made obsolete after the administrative transfer by replacing "§§3.9101 - 3.9106" with "Subchapter AA, Division 3." The proposal also replaces "shall" with "must."

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Rachel Bowden, director of Regulatory Initiatives in the Life and Health Division, has determined that during each year of the first five years the proposed repeal and amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering them, other than that imposed by statute. Ms. Bowden made this determination because the proposed repeal and amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with them.

Ms. Bowden does not anticipate 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 repeal and amendments are in effect, Ms. Bowden expects that administering them will have the public benefit of ensuring that TDI's rules are accurate and transparent by reflecting updated citations to sections in Chapter 4 and current state agency addresses, and by eliminating errors in punctuation, grammar, and typography.

Ms. Bowden expects that the proposed repeal and amendments will not increase the cost of compliance for stakeholders because they do not impose substantive changes.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed repeal and amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. The proposed amendments are nonsubstantive and do not change requirements in the rule sections. 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.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed repeal and 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 or limit existing regulation because proposed amendments are nonsubstantive, but will repeal one existing section;

- 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 October 23, 2023. 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 October 23, 2023. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

SUBCHAPTER C. CONSUMER NOTICES FOR LIFE INSURANCE POLICY AND ANNUITY CONTRACT REPLACEMENTS

28 TAC §§4.201 - 4.206

STATUTORY AUTHORITY. TDI proposes amendments to §§4.201 - 4.206 under Insurance Code §§1114.006, 1114.007, and 36.001.

Insurance Code §1114.006 provides that the commissioner by rule adopt or approve model documents to be used for consumer notices under Insurance Code Chapter 1114.

Insurance Code §1114.007 authorizes the commissioner to adopt reasonable rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A, to accomplish and enforce the purposes of Insurance Code Chapter 1114.

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. Subchapter C affects Insurance Code §§1114.006, 1114.051, and 1114.055.

§4.201. Purpose.

The purpose of this subchapter is to specify the content and procedural requirements for consumer notices for life insurance policy and annuity contract replacements as required by [~~the~~] Insurance Code §1114.006, concerning Consumer Notice Documents.

§4.202. Definitions.

When used in this subchapter, the words "agent" and "producer" [~~shall~~] mean, unless the context clearly indicates otherwise, an individual who holds a license under Insurance Code Chapter 4054, concerning Life, Accident, and Health Agents, and who sells, solicits, or negotiates life insurance or annuities in this state.

§4.203. Consumer Notice Content and Format Requirements.

(a) The text contained in Figure: 28 TAC §4.204(b) [~~§3.9504(b)~~], Figure: 28 TAC §4.205(1), [~~§3.9505(1)~~] and Figure: 28 TAC §4.205(2) [~~§3.9505(2)~~] must be in at least 10-point type and presented in the same order as indicated in each figure and without any change to the specified text, including bolding effects, except as provided in subsections (b), (c), and (d) of this section.

(b) Under §4.206 [~~Pursuant to §3.9506~~] of this title (relating to Filing Procedures for Substantially Similar Consumer Notices), in lieu of using the notices contained in Figure: 28 TAC §4.204(b) [~~§3.9504(b)~~] or Figure: 28 TAC §4.205(1) [~~§3.9505(1)~~], an insurer may file a notice with the department that is substantially similar to the text contained in Figure: 28 TAC §4.204(b) [~~§3.9504(b)~~] or Figure: 28 TAC §4.205(1) [~~§3.9505(1)~~] for review and approval by the commissioner. The commissioner will approve the notice if, in the commissioner's opinion, the notice protects the rights and interests of applicants to at least the same extent as the notices adopted in Figure: 28 TAC §4.204(b) [~~§3.9504(b)~~] or Figure: 28 TAC §4.205(1) [~~§3.9505(1)~~]. An insurer required to send the notice specified in Figure: 28 TAC §4.205(2) [~~§3.9505(2)~~] may not file a notice that is substantially similar to that figure for review and approval by the commissioner.

(c) Commissioner approval of a notice is not required if a notice promulgated or approved under this subchapter is used and amendments to that notice are limited to the omission of references not applicable to the product being sold or replaced. For purposes of this subchapter, a reference in any notice required under this subchapter to a product that is being sold or replaced is applicable if the reference could be applicable under any possible circumstances and therefore may not be omitted from the required notice.

(d) An insurer may add a company name and identifying form number to notices specified under this subchapter without obtaining commissioner approval.

(e) The promulgated forms specified in this subchapter are available upon request from the Life and Health Division, Life and Health Lines, MC: LH-LHL, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Life and Health Division, Life and Health Lines, MC-LH-LHL, P.O. Box 12030, Austin, Texas 78711-2030~~], or by accessing the department website at www.tdi.texas.gov/forms.

§4.204. Consumer Notice Regarding Replacement for Insurers Using Agents.

(a) An agent who initiates an application for a life insurance policy or annuity contract must [~~shall~~] submit to the insurer, with or as part of the application, a statement signed by both the applicant and the agent as to whether the applicant has existing life insurance policies or annuity contracts.

(b) If the applicant states that the applicant does have existing policies or contracts, the agent must [~~shall~~] present and read to the applicant, not later than at the time of taking the application, a notice regarding replacement that contains the text contained in Figure: 28 TAC §4.204(b) [~~§3.9504(b)~~], or substantially similar notice filed with the department and approved under this subchapter. The notice must [~~shall~~] be signed by both the applicant and the agent attesting that the notice has been read aloud by the agent or that the applicant did not wish the notice to be read aloud, in which case the agent is not required to read the notice aloud.
Figure: 28 TAC §4.204(b)
[~~Figure: 28 TAC §3.9504(b)~~]

§4.205. Direct Response Consumer Notices.

In the case of a life insurance or annuity application initiated as a result of a direct response solicitation, the insurer must [~~shall~~] inquire whether the applicant, by applying for the proposed policy or contract, intends to replace, discontinue, or change an existing life insurance policy or annuity contract. The inquiry may be included with, or submitted as a part of, each completed application for such policy or contract.

(1) If the insurer has proposed the replacement or if the applicant indicates a replacement is intended and the insurer continues with the replacement, the insurer must [~~shall~~] send a notice that contains the text in Figure: 28 TAC §4.205(1) [~~§3.9505(1)~~], or a substantially similar notice filed with the department and approved under this subchapter.
Figure: 28 TAC §4.205(1)
[~~Figure: 28 TAC §3.9505(1)~~]

(2) If the applicant indicates a replacement or change is not intended or if the applicant fails to respond to the statement, the insurer must [~~shall~~] send the applicant, with the policy or contract, a new policy or contract notice that contains the statements in Figure: 28 TAC §4.205(2) [~~§3.9505(2)~~].
Figure: 28 TAC §4.205(2)
[~~Figure: 28 TAC §3.9505(2)~~]

§4.206. Filing Procedures for Substantially Similar Consumer Notices.

~~[(a) Beginning with the effective date of this subchapter and ending January 31, 2008, an insurer subject to Insurance Code Chapter 1114 may use a consumer notice that is substantially similar to the text promulgated in Figure: 28 TAC §3.9504(b) or Figure: 28 TAC §3.9505(1) immediately after filing the consumer notice with the department. An insurer who has filed a consumer notice that is substantially similar to the text promulgated in Figure: 28 TAC §3.9504(b) or Figure: 28 TAC §3.9505(1) in the period of time beginning with the effective date of this subchapter and ending on January 31, 2008, will receive a notice of approval or disapproval of the consumer notice from the commissioner.]~~

~~[(1) An insurer who has filed a consumer notice that is substantially similar to the text promulgated in Figure: 28 TAC §3.9504(b) or Figure: 28 TAC §3.9505(1) in the period of time beginning with the effective date of this subchapter and ending on January 31, 2008, who~~

receives a notice of approval from the commissioner may continue to use the approved consumer notice unless and until such time as the commissioner withdraws approval of the notice.]

[(2) An insurer who has filed a consumer notice that is substantially similar to the text promulgated in Figure: 28 TAC §3.9504(b) or Figure: 28 TAC §3.9505(1) in the period of time beginning with the effective date of this subchapter and ending on January 31, 2008, who receives a notice of disapproval from the commissioner shall stop using the consumer notice, but may refile the notice subject to the requirements of §3.5(b)(6) of this chapter (relating to Filing Authorities and Categories).]

(a) [(b)] An [Effective February 1, 2008, an] insurer may not use, issue, or deliver a notice that is substantially similar to a promulgated consumer notice specified in Figure: 28 TAC §4.204(b) [§3.9504(b)] or Figure: 28 TAC §4.205(1) [§3.9505(1)] until it has been approved.

(1) An [Effective February 1, 2008, an] insurer subject to Insurance Code Chapter 1114, concerning Replacement of Certain Life Insurance Policies and Annuities, using agents must either use the text of the notice contained in Figure: 28 TAC §4.204(b) [§3.9504(b)], which is not subject to filing and approval, or a consumer notice substantially similar to the text contained in Figure: 28 TAC §4.204(b), [§3.9504(b)] which has been filed under this section and approved.

(2) In [Effective February 1, 2008, in] the case of an applicant responding to a direct response solicitation, an insurer subject to Insurance Code Chapter 1114 must either use the text contained in Figure: 28 TAC §4.205(1) [§3.9505(1)], which is not subject to filing and approval, or a consumer notice substantially similar to the text contained in Figure: 28 TAC §4.205(1), [§3.9505(1)] which has been filed under this section and approved.

(b) [(c)] A [Effective February 1, 2008, a] filing of a consumer notice that is substantially similar to a promulgated consumer notice specified in Figure: 28 TAC §4.204(b) [§3.9504(b)] or Figure: 28 TAC §4.205(1) [§3.9505(1)] must be filed in accordance with the submission requirements of Chapter 3, Subchapter A [§3.4] of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings) [chapter (relating to General Submission Requirements), and is subject to the same standards and procedures as a filing made under §3.5(a)(1) of this chapter. A filing of a consumer notice that is substantially similar to a promulgated consumer notice specified in Figure: 28 TAC §3.9504(b) or Figure: 28 TAC §3.9505(1) will be processed according to the procedures specified in §3.7 of this chapter (relating to Form Acceptance and Procedures). A consumer notice that is disapproved by the commissioner is subject to the requirements of §3.5(b)(6) of this chapter].

(c) [(d)]Insurers [Effective April 1, 2008, insurers] subject to Chapter 1114 who elect not to use a consumer notice specified in this subchapter must [shall] file a notice that is substantially similar to a promulgated consumer notice specified in Figure: 28 TAC §4.204(b) [§3.9504(b)] or Figure: 28 TAC §4.205(1) [§3.9505(1)] no later than 60 days before [prior to] use. A consumer notice that is substantially similar to a promulgated consumer notice specified in Figure: 28 TAC §4.204(b) [§3.9504(b)] or Figure: 28 TAC §4.205(1) [§3.9505(1) filed after April 1, 2008,] is subject to Insurance Code §1701.054, concerning Approval of Form [(relating to approval of forms)]. Insurers that have filed and received approval of a consumer notice [before April 1, 2008,] may continue to use the approved consumer notice unless and until such time as the commissioner withdraws approval of the notice.

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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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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SUBCHAPTER F. INDIVIDUAL LIFE INSURANCE POLICY FORM CHECKLIST AND AFFIRMATIVE REQUIREMENTS

28 TAC §§4.601 - 4.608, 4.611, 4.613 - 4.628

STATUTORY AUTHORITY. TDI proposes amendments to §§4.601 - 4.608, 4.611, and 4.613 - 4.628 under Insurance Code §§541.401, 543.001(c), 1701.060 and 36.001.

Insurance Code §541.401 provides that the commissioner may adopt and enforce reasonable rules necessary to accomplish the purposes of Insurance Code Chapter 541.

Insurance Code §543.001(c) provides that the commissioner may adopt and enforce rules as provided by Insurance Code Chapter 541, Subchapter I to accomplish the purposes of §543.001(b)(1), prohibiting misrepresentation, as those purposes relate to life insurance companies.

Insurance Code §1701.060 authorizes the commissioner to adopt reasonable rule 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. Subchapter F affects Insurance Code Chapters 541, 705, 1101, 1105, 1110, and §841.253 and §1701.060.

§4.601. Payment of Premiums.

(a) The policy must provide that premiums are payable in advance. The policy may provide that the premium is payable at the home office; it may provide that the premium is payable to an agent of the company; or it may provide that the premium is payable at the home office of the company or to an agent of the company.

(b) The policy must provide that a receipt signed by one or more of the officers of the company will be delivered upon payment of the premium. The policy must designate the officers who may sign the receipt. Any manner of "designation" is acceptable if it will enable the policyholder to determine that the [his] receipt has been signed by an authorized person.

(c) A policy that [which] permits a change in the manner of payment of premium (e.g., from annual to semiannual, quarterly, etc.):

(1) may either specify the amount of premiums required for the periods authorized or the formula for the determination of such premiums; or

(2) may define the amounts by appropriate reference to rates being charged at the date of issue.

(d) The policy may provide that any unpaid premiums or installments at [~~thereof to~~] the end of the current policy year will [~~shall~~] be deducted from the proceeds payable on death.

§4.602. Grace Period.

(a) The policy must provide for a grace period of at least one month for the payment of every premium after the first, during which period the policy must [~~shall~~] remain in full force and effect. If the grace period is expressed in days, at least 31 days of grace must be granted.

(b) The policy may provide for an interest charge on the unpaid premium during the grace period. If an interest charge is provided for, the interest rate must be specified.

(c) The policy may stipulate that if the insured should die during the grace period, the overdue premium or overdue installment will be deducted from any settlement under the policy. If an interest charge is provided against the overdue payment, the accrued interest may also be deducted.

(d) This section is not applicable to single premium policies.

§4.603. Entire Contract.

(a) The policy must provide that the policy, or policy and application, [~~shall~~] constitute the entire contract between the parties. Regardless of any statement to the contrary, the policy will be deemed incomplete if it attempts to incorporate by reference the provisions of any instrument that [~~which~~] changes or adds to the terms of the policy.

(b) Some policy forms contain a provision that the application, if attached, [~~shall~~] constitute a part of the contract. If a policy containing such a provision is submitted without the application, the approval will authorize its issuance only without the application.

§4.604. Incontestable Clause.

(a) The policy must provide that it will be incontestable not later than two years from its date as provided in Insurance Code §1101.006, concerning Incontestability. If a reinstatement is contested for misrepresentation, then no representation other than one causing the reinstatement may be used to contest the policy. Any contest of the reinstatement may be for a material and fraudulent misrepresentation only and reinstatement may not be contested more than two years after it is effectuated, provided that this provision does not affect the company's right to contest a policy for a representation respecting the initial policy issuance or a different reinstatement during the incontestable period applicable to such issuance or reinstatement. Accidental death benefits and disability benefits need not be subject to such provision.

(b) Any provision that [~~which~~] could lengthen the contestable period of a policy beyond two years from its date is prohibited. For example, the policy may not state that it is incontestable after two years "while the policy is continuously in force."

(c) The policy may contain provisions that [~~which~~] allow its validity to be contested at any time [~~whatsoever~~] for:

(1) nonpayment of premium; or

(2) violation of the conditions of the policy relating to naval or military services in time of war. Note: War clauses are discussed in §4.621(e) [~~§3.118(e)~~] of this title (relating to Settlement at Maturity) [~~(relating to Conversion Provision)~~].

(d) If the form under review contains no reference to contest after reinstatement, it will also be acceptable.

(e) If more than one person is insured, the policy form must state that it is incontestable with respect to each insured.

§4.605. Statements of the Insured.

(a) The policy must provide that all statements made by the insured will, in the absence of fraud, be deemed representations and not warranties. The policy may provide that statements made on behalf of the insured will also, in the absence of fraud, be deemed representations and not warranties.

(b) Policy applications sometimes contain agreements that [~~which~~] call attention to some, or all, of the elements that [~~which~~] must be proved in avoiding the policy for misrepresentation. Such agreements are acceptable, provided:

(1) they do not attempt to burden the insured's representations with the legal consequences of warranties;

(2) they do not attempt to require the insured to prove the nonexistence of grounds upon which the insurer could contest the policy; and

(3) they do not attempt to permit the insurer to avoid liability on grounds less stringent than under Insurance Code §705.004, concerning Policy Provision: Misrepresentation in Policy Application, or other applicable law.

§4.606. Misstatement of Age.

(a) The policy must provide that if the age of the insured has been understated, the amount payable under the policy is the amount that [~~shall be such as~~] the premium paid would have purchased at the correct age. The word "misstated" may be used instead of "understated."

(b) If more than one life is insured (e.g., by inclusion of premium payor benefits or under family group plan), the amount payable on the death of deceased may be adjusted because of a misstatement in the age of a surviving insured[~~,~~] if the actuarial construction of the contract so requires.

§4.607. Policy Loans.

(a) A policy loan provision is not required in term insurance policies, nor in pure endowments issued or granted as original policies or in exchange for lapsed or surrendered policies.

(b) Loans must be made available at any time while the policy is in force after premiums for three full years have been paid and a cash value is available.

(c) The loan clause must provide for proper assignment of the policy to the company.

(d) The policy must be the sole security for the loan.

(e) Insurance Code Chapter 1110, concerning Interest Rates on Certain Policy Loans, deals with interest rates. Insurers may comply with Chapter 1110 by refiling reprinted and renumbered policies with a new loan provision or by filing a loan endorsement that [~~which~~] may be attached to newly issued policies on and after an effective date specified by the insurer. The maximum rate of interest must be specified in the policy or loan endorsement. The policy may provide that interest may be made payable in advance to the end of the current policy year.

(f) The loan clause must provide for lending a sum equal to[~~,~~] or, at the option of the policy owner, less than[~~,~~] the cash value of the policy and [~~of~~] any dividend additions to the policy [~~thereto~~].

(g) The policy may provide that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year and may collect interest in advance on the loan to the end of the current year.

(h) The policy may provide that loans may be deferred for not more than six months after application for the loan [~~therefor~~] is made.

The six-month period may commence with the date of receipt of the request by the company, if the policy so provides.

(i) The loan clause must provide that failure to repay any such advance, or to pay interest on the loan [~~thereon~~], will not void the policy until the total indebtedness [~~thereon~~] to the company equals or exceeds the cash value of the policy. The policy may not be terminated merely for failure to pay loan interest when due. Since the policy may be voided when the indebtedness equals or exceeds the cash value, this provision may be so worded that benefits cease upon the precise moment that the indebtedness equals such value.

(j) No condition other than as [~~herein~~] provided in this subchapter will be exacted as a prerequisite to any such loan.

§4.608. Automatic Nonforfeiture Benefits.

(a) Nonforfeiture values are governed by Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance.

(b) Occasionally, the cash value (because of the inclusion of accumulated dividends, coupon benefits, or other guaranteed returns) is more than sufficient to purchase the maximum amount of extended term insurance available under the policy. In such cases, the policy must clearly provide for the equitable disposition of the entire cash value.

(c) Automatic nonforfeiture benefits are not applicable to single premium policies.

§4.611. Reinstatement.

(a) All policies that [~~which~~] have nonforfeiture benefits must provide that if, in the event of default in premium payments, the value of the policy must [~~shall~~] be applied for the purchase of other insurance, and if such insurance is [~~shall be~~] in force and the original policy has not [~~shall not have~~] been surrendered to the company and cancelled, the policy may be reinstated within three years, or longer at the option of the company, from such default upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest. Evidence of insurability need not be restricted to evidence of good health only.

(b) If more than one life is insured, evidence of insurability may be required on each individual as a condition precedent to reinstatement of the policy, but the policy may provide for reinstatement of only those lives which are insurable.

(c) This section is not applicable to single premium policies.

§4.613. Family Group Special Requirements.

(a) A family group life insurance policy is considered to be any life insurance policy, other than a regular joint life insurance policy, that grants benefits upon the death of each of the insured members of the family. This does not include individual policies with payor death benefits or beneficiary death benefits when such benefits are provided as a part of the basic policy, or by supplementary agreement and when such additional benefits are designed primarily to promote the continuance of the basic policy. The requirements pertaining to family group policies may not be avoided, however, by merely adding insureds under an individual contract by means of riders or supplementary agreements.

(b) There must [~~shall~~] be included on the face of the policy the name and age of each insured; the name of the beneficiary; the maximum amount that [~~which~~] is payable to the payee in the policy in the case of death of such insured person or persons; and designation of all paragraphs or provisions limiting or reducing the payment to less than the maximum provided in the policy. Suicide clauses are the most common type of reduction provision. The suicide clause, if used, should clearly indicate any effect that [~~which~~] the suicide of one insured would have on the insurance of other insureds.

(c) Premiums deductible by the terms of the policy and indebtedness to the company on the policy are considered as counterclaims by the company against the beneficiary. It is not necessary that provisions for such deductions be placed on the face of the policy.

(d) The "face" of the policy means the first page of the policy.

(e) If the policy provides for coverage that [~~which~~] will become effective on the lives of persons who become members of the family group (by birth or adoption) after the policy is issued, information relative to these future members need not be stated on the face of the policy. The policy form will be acceptable if the provisions relative to these additional members are clear and unambiguous.

§4.614. Dependent Child Riders and Family Term Riders.

(a) The rider must specify the effect on the rider of the death of the insured(s) under the base policy before [~~prior to~~] the expiry date(s) of the rider. The following are acceptable:

(1) the rider may terminate, in which case no incontestability provision is required;

(2) the rider may convert to paid-up term insurance;

(3) if paid-up term insurance can be surrendered for its cash value, the rider must contain the "surrender within 30 days" statement required by Insurance Code §1105.007, concerning Computation of Cash Surrender Value Following Default; or

(4) the premium for the rider may be waived to the expiry date(s).

(b) If paid-up term insurance is available on the death of the insured under the base policy, the rider or the policy may not provide an incontestable provision for the rider less favorable than specified in Insurance Code §1101.006, concerning Incontestability, with respect to the coverage for each insured from the date the coverage for that insured becomes effective.

(c) The rider or policy must specify the effect on the rider should the insured(s) under the base policy commit suicide.

§4.615. Requirements for a Package Consisting of a Deferred Life Policy with an Accidental Death Rider Attached.

(a) The application must contain a statement that [~~which~~] discloses the deferred nature of the insurance and that [~~which~~] reflects the amount of insurance in force during the deferred period. It may not state only the ultimate amount.

(b) The brief description on the face page and filing back, if any, must call attention to the deferred nature of the insurance, and in no way refer to the accidental death benefit.

(c) If a separate premium is charged for the accidental death benefit, the schedule page must reflect the gross premium broken down in such a manner as to reflect the gross premium for the deferred life insurance and the accidental death benefit independently.

(d) The policy schedule page must reflect the reduced death benefit payable each year the reduction in benefits is maintained, as well as the ultimate face amount payable after the full face amount becomes available. This provision may be in the form of actual figures, a percentage of the ultimate face amount, the premiums plus interest, if applicable, or other provision not in violation of Insurance Code Chapter 1701, concerning Policy Forms, or other laws.

(e) The death benefit during the period of deferred insurance must be as great as the sum of the gross premiums paid (with or without

interest). The death benefit may be based on the gross annual premium even though other modes are available under the policy.

(f) The accidental death benefit must be made a part of the entire contract.

(g) The contract of deferred insurance and accidental death benefit must reflect a different form number from any other contract of deferred insurance the company offers.

§4.616. Substitute or Change of Insured Riders.

(a) The rider must [~~shall~~] contain a statement requiring submission of an application signed by both the owner and the substitute insured.

(b) The rider may require evidence of insurability of the substitute insured.

(c) The following must [~~shall~~] be clearly specified:

(1) policy date;

(2) face amount;

(3) premium structure, including a description of the determination of premiums for a substitute insured; and[~~,~~]

(4) the plan of insurance.

(d) The disposition of the following items must [~~shall~~] be clearly described:

(1) indebtedness under the old policy;

(2) inclusion or exclusion of any supplementary benefits upon exchange;

(3) dividends, if a participating policy; and

(4) adjustments of reserves and cash values.

§4.617. Preliminary Term Life Insurance.

The following requirements apply to a contract of life insurance containing a preliminary term insurance rider:

(1) a grace period must be allowed for payment of the first premium due on the principal policy; and

(2) the date of commencement of the preliminary term insurance, which is the date of inception of the contract as a whole, must be used to measure the period of contestability [~~contestibility~~] and suicide.

§4.618. Conversion Provision.

A conversion provision in a policy must comply with the following:

(1) the conversion provision must [~~shall~~] state the plan and face amount of the new policy;

(2) the text of the provision must [~~shall~~] state what premium rates will apply to the new policy;

(3) the text of the provision must [~~shall~~] discuss the settlement of cash values under the original contract if the policy is converted on a date other than the expiry date; and

(4) the provision must [~~shall~~] specify that evidence of insurability is not required.

§4.619. Limitations of Lawsuits.

The policy must not contain a provision limiting the time within which any action at law or in equity may be commenced to less than two years after the cause of action accrues [~~shall accrue~~].

§4.620. Backdating Policies.

(a) The policy must not contain a provision by which it is issued or takes effect more than six months before the original application for the insurance was made, if [~~thereby~~] the insured would rate at an age younger than their [~~his~~] age at the date when the application was made, according to their [~~his~~] age at the nearest birthday.

(b) The restrictions against backdating are not violated by the exercise of conversion privileges contained in the original policy and that [~~which~~] relate back to the original issue date of the policy, even though the conversion privilege by its terms is such that the amount of insurance at the conversion may exceed what [~~that which~~] was in force before [~~prior to~~] conversion.

§4.621. Settlement at Maturity.

(a) If the policy provides that proceeds may be paid in installments, it must contain a representative table showing the amounts of such installments.

(b) If the settlement options provision indicates that modes of payment other than monthly may be available, then the amount of such payments must be determinable from the text. If the settlement option indicates a commuted value or present value, to be paid upon death of a payee, the interest rate used to determine this value must be given.

(c) No policy may contain a provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy, plus dividend additions, if any, less any indebtedness to the company on the policy, and less any premium that may, by the terms of the policy, be deducted. The policy may provide an exception to this general rule, and reduce the amount of insurance payable on maturity if death occurs from [~~either of~~] the following causes:

(1) suicide, while sane or insane;

(2) by following stated hazardous occupations; or

(3) from aviation activities under conditions specified by the policy.

(d) Status clauses that [~~, which would~~] attempt an exception if death occurs while the insured is engaged in the hazardous occupation or aviation activity[~~,~~] are prohibited.

(e) Military service may be classed as a hazardous occupation, and benefits may be reduced under authority of this exception. In the alternative, the insurer may, in the incontestable clause, make provisions for contesting the validity of the policy for violations of conditions relating to naval and military services in time of war.

(f) Policies with graded death benefits, such as juvenile policies, will not be approved if they provide for reduction in the amount insured on the face of the policy. Such policies can properly be written by providing the lower amount of insurance in the face of the policy, and making appropriate provisions for increases; or, in the alternative, the in-force insurance at the various durations may be stated in the face of the policy.

(g) The policy must not provide for deduction of all indebtedness of the holder of the contract to the company. The only allowable deduction for indebtedness is an indebtedness on account of and secured by the policy.

§4.622. Tontine Provisions.

Any life insurance policy that [~~which~~] is a tontine policy or that [~~which~~] contains a tontine provision will be disapproved. Provisions by which dividends during the participating period are not allocated or paid annually are prohibited as being within the tontine principle unless the policyholder acquires, on termination of the policy, a vested interest in the dividends that [~~which~~] have accrued.

§4.623. Assignment Provisions.

There is no prohibition against a provision that [~~which~~] permits the assignment of the policy benefits or proceeds. However, policies that [~~which~~] make provision for dividends, coupon accumulations, or other guaranteed returns, and that [~~which~~] also contain provision for the assignment of these funds to a third party for the purpose of establishing an investment for the policyholder are prohibited.

§4.624. Provisions Relating to Dividends, Coupon Benefits, or Other Guaranteed Returns.

(a) Any provision by which the insurer undertakes to pay specific amounts will be treated as definite contract benefits and valued in accordance with Insurance Code §841.253, concerning Life Insurance Company's Payment of Dividends.

(b) Any policy that [~~which~~] contains a provision promising to pay "dividends" from specified sources must clearly state that the payment of such dividends must be made from profits or expense loading.

(c) Any policy that [~~which~~] provides for the payment of dividends, coupon benefits, or other guaranteed returns must specify the disposition that [~~which~~] will be made of such accumulations if no option is exercised by the policyholder either on their maturity or in the event of default in premium payments. Acceptable dispositions are that they be:

(1) applied to the purchase of additional insurance;

(2) left to accumulate at interest;

(3) withdrawn in cash; or

(4) applied to the payment of premiums.

§4.625. Premiums Paid in Advance.

(a) The policy may contain provisions under which the company will accept advance payments of premiums; but in no event may the company undertake to accept deposits that [~~which~~] would exceed the maximum amount required to pay all future premiums that [~~which~~] will become due under the policy, including any options contained in the policy [~~therein~~]. The contract may permit the insured to withdraw excess deposits in cash, but any provisions that [~~which~~] would cause a forfeiture of principal[~~,~~] or exact a surrender charge are prohibited. The contract must state the interest rate used to discount the future premiums and must provide for disposition of any unused premiums on surrender of the contract or death of the insured.

(b) This section is not applicable to single premium policies.

§4.626. Annuity Contracts.

All sections in Subchapter F [~~Sections 3.101-3.128~~] of this chapter [~~title~~] (relating to Individual Life Insurance Policy Form Checklist and Affirmative Requirements) apply to the review of ordinary life insurance policies and are not applicable to annuity contracts. Any contract that [~~which~~] provides death benefits in excess of the total premium paid, without interest or with interest at a specified rate, or the cash value at time of death, if greater, will be considered a life insurance policy. This requirement cannot be avoided by combining riders or endorsements to a basic annuity, as all pertinent instruments collectively constitute the contract.

§4.627. Certain Prohibited Provisions.

(a) Any policy that [~~which~~] contains a title, heading, or other indication of its provisions that [~~which~~] is misleading will be disapproved. For example, a title, heading, etc., will be misleading if it contradicts the provisions of the policy. A life insurance policy may not be described or referred to as a "bond," nor may premiums be described or referred to as "deposits."

(b) The policy may not contain the words "Approved by the Texas Department of Insurance," "Approved by TDI," "Approved by the commissioner of insurance," or words of a similar import or nature.

§4.628. Renewal Premium on Term Policies.

Renewable term policies may specify rates for renewal terms in dollars and cents, by reference to rates in use by the company on the original issue date or by reference to the rates in use by the company on the renewal date. If such rates are specified by reference to the rates in effect on the date of issue, such rates must [~~shall~~] be submitted with the policy.

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

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SUBCHAPTER J. INDETERMINATE PREMIUM REDUCTION POLICIES

28 TAC §§4.1001, 4.1002, 4.1004, 4.1005, 4.1008, 4.1010, 4.1011

STATUTORY AUTHORITY. TDI proposes amendments to §§4.1001, 4.1002, 4.1004, 4.1005, 4.1008, 4.1010, and 4.1011 under Insurance Code §§543.001(c), 1701.060, and 36.001.

Insurance Code §543.001(c) provides that the commissioner may adopt and enforce reasonable rules as provided by Insurance Code Chapter 541, Subchapter I to accomplish the purposes of §543.001(b)(1), prohibiting misrepresentation, as those purposes relate to life insurance companies.

Insurance Code §1701.060 specifies that the commissioner may adopt rules necessary to implement the purpose 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. Subchapter J affects Insurance Code Chapter 1105 and §543.001.

§4.1001. Purpose and Scope.

(a) This subchapter is promulgated to regulate life insurance policies that [~~which~~] have the following characteristics:

(1) the premium for the policy is guaranteed for an initial period of time but after [~~subsequent to~~] such initial period, a maximum premium charge is specified in the policy; thereafter, the insurer reserves the right to charge a lesser unspecified amount (this type of policy is hereinafter referred to as "an indeterminate premium reduction policy"); and

(2) one of the purposes of the policy is to provide insureds with insurance coverage at a lower initial premium than would be ob-

tainable from the insurer if the premiums were required to be unchangeable by the insurer for the life of the policy.

(b) A major purpose of this subchapter is to promote an accurate presentation and description to the insurance-buying public of the indeterminate premium reduction policy. Adequate disclosure is one of the principal objectives of the sections. The sections attempt to ensure that prospective insureds receive a fair, adequate, and accurate impression of the true nature of the indeterminate premium reduction policy. Some of the sections also give notice of certain legal interpretations. The sections are supplementary to and cumulative of other statutes and rules including those promulgated under authority of Insurance Code Chapter 541, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. This subchapter is applied and interpreted in accordance with the foregoing purposes.

§4.1002. Policy Form Submission.

(a) No indeterminate premium reduction policy may be approved for use in Texas unless the insurer files with the Texas Department of Insurance, in conjunction with such indeterminate premium reduction policy, a statement:

(1) that, to the best of the insurer's [~~its~~] knowledge and belief, the policy submitted is in compliance with this subchapter;

(2) that advertising and solicitation will be in compliance with this subchapter;

(3) that any premium redetermination will not reflect a distribution of company surplus nor a return of previously collected premiums; and

(4) that any nonguaranteed premium rates used to market the policy are lower than rates that [~~which~~] the insurer is willing to guarantee in a fixed premium policy with the same or similar benefits for insureds of essentially the same class of risk.

(b) A nonguaranteed premium means any charge for insurance, including any percentage deviation from a maximum charge, that an insurer or insurance agent mentions or illustrates as a possible charge for coverage other than the maximum guaranteed premium specified in the policy.

§4.1004. Summary of Provisions.

(a) Upon application for an indeterminate premium reduction policy or group certificate, a separate form containing a summary that [~~which~~] adequately describes the contractual premium provisions must be signed by the applicant and submitted to the insurer in conjunction with the application. A portion of the summary must include the following information:

(1) the fact that the premium might be changed in the policy;

(2) the frequency of the possible changes;

(3) the fact that the nonguaranteed premium (if used in solicitation or advertising) is not guaranteed but the full maximum could be charged; and

(4) for participating policies, a statement that dividends are only payable if declared by the insurer. If it is not likely that dividends will be paid, a statement to that effect must be included.

(b) The summary required by these sections must be kept with a copy of the application after [~~subsequent to~~] its receipt by the insurer and maintained in the insurer's files during the existence of the contract.

§4.1005. Relation of Initial to Later Premium Charge.

If the policy offers an initial premium that [~~which~~] is different from the maximum guaranteed premium specified in the policy for later policy years, no solicitation or advertisement may display or state the smaller premium in such a fashion that the larger premium charge is rendered obscure or deemphasized. The smaller premium may not be displayed more prominently than the larger premium charge.

§4.1008. Minimum Nonforfeiture Values.

The minimum basis for cash values is stated in Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance, which requires [~~wherein~~] the adjusted premiums [~~are required~~] to be computed as a "uniform percentage of the respective premiums specified by the policy." Maximum guaranteed premiums in the policy are specified premiums as defined by the Insurance Code [~~code~~]. Cash values, if any, will not be required to be redetermined when premiums are reduced for in-force policies. Minimum nonforfeiture values for indeterminate premium group policies on other than the term plan must be calculated in accordance with this section.

§4.1010. Artificial Maximum Premiums Prohibited.

(a) No insurer may incorporate an increment into a maximum premium in an indeterminate premium reduction policy in order to be able to show an increased reduction in later policy years or to reduce cash values, if any, as provided in Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance, or reserves as provided in Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law.

(b) As a condition precedent to policy form approval, there must accompany each submission of an indeterminate premium reduction policy a certification by a qualified actuary to the following: that the maximum premiums specified in the policy do not incorporate an increment as specified in subsection (a) of this section. An approval of a policy form after [~~subsequent to~~] receipt of the foregoing certification may not be construed as a determination by the Texas Department of Insurance that the certification is true and accurate.

§4.1011. General Enforcement.

A failure to follow and abide by the representations and disclosure provisions required by this subchapter in marketing the indeterminate premium reduction policy is grounds for a withdrawal of approval of the insurer's previously approved indeterminate premium reduction policy forms and is grounds for disapproval of subsequently filed indeterminate premium reduction policy forms. The provisions of this section are additional to and cumulative of all other enforcement provisions provided by law including Insurance Code Chapter 541, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices.

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

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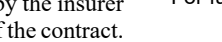

SUBCHAPTER K. STANDARDS FOR ACCELERATION-OF-LIFE-INSURANCE

BENEFITS FOR INDIVIDUAL AND GROUP POLICIES AND RIDERS

28 TAC §§4.1101 - 4.1104, 4.1106 - 4.1116

STATUTORY AUTHORITY. TDI proposes amendments to §§4.1101 - 4.1104 and 4.1106 - 4.1116 under Insurance Code §§1111.053, 1701.060, and 36.001.

Insurance Code §1111.053 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1111, Subchapter B.

Insurance Code §1701.060 specifies that the commissioner may adopt rules necessary to implement the purpose 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. Subchapter K affects Insurance Code §1111.052.

§4.1101. Purpose; Severability.

(a) The commissioner enacts this subchapter to:

(1) expand [~~Expand~~] the circumstances under which insurers can offer acceleration-of-life-insurance benefits, thus enhancing financial choices for insureds facing terminal or life-threatening illnesses or conditions;

(2) implement [~~Implement~~] revised statutory requirements for certain group and individual life insurance contracts;

(3) set [~~Set~~] uniform standards for offering acceleration-of-life-insurance benefits that will be applicable to all group and individual life insurance plans, creating a level playing field for insurers and key protections for consumers;

(4) allow [~~Allow~~] insurers, with proper disclosures, to offer benefits that will qualify for favorable tax treatment under federal law, as well as benefits that may not qualify for favorable tax treatment, but that are available to a broader class of insureds; and

(5) ensure [~~Ensure~~] that acceleration-of-life-insurance benefit provisions that fund long-term care expenses conform basic definitions and eligibility triggers to those in rules setting minimum standards for long-term care insurance contracts.

(b) If a court of competent jurisdiction holds that any provision of this subchapter is inconsistent with any statutes of this state, is unconstitutional or for any other reason is invalid, the remaining provisions [~~shall~~] remain in full effect. If a court of competent jurisdiction holds that the application of any provision of this subchapter to particular persons, or in particular circumstances, is inconsistent with any statutes of this state, is unconstitutional or for any other reason is invalid, the provision remains [~~shall remain~~] in full effect as to other persons or circumstances.

§4.1102. Acceleration-of-Life-Insurance: Scope of Benefits.

(a) An acceleration-of-life-insurance benefit provision provides a special benefit under a life insurance contract that [~~, which~~] prepays all or a portion of the death benefit[~~,~~] based [~~either~~] on a long-term care illness, specified disease, or terminal illness.

(b) The following words and terms, when used in this subchapter, [~~shall~~] have the following meanings[~~,~~] unless the context clearly indicates otherwise.[~~:~~]

(1) Life insurance contract--An individual life insurance policy, a group life insurance policy or certificate of insurance, or a rider to an individual or group life insurance policy or group certificate of insurance.

(2) Long-term care illness--An illness or physical condition that results in the inability to perform the activities of daily living or the substantial and material duties of any occupation. Evidence of a long-term care illness includes, but is not limited to, illnesses or conditions that [~~which~~] require:

(A) confinement in a convalescent nursing home, residential care or intermediate nursing facility, defined consistently with the provisions of §3.3812 of this title (relating to Policy Standards for Provider); or

(B) adult day care services, as defined and provided consistently with §3.3804(b) of this title (relating to Definitions), and home health care services, as defined and provided consistently with §3.3804(b) of this title.

(3) Specified disease--An illness or physical condition that is likely to cause permanent disability or premature death, including, but not limited to, the following:

(A) AIDS;

(B) a malignant tumor;

(C) a condition requiring organ transplantation;

(D) a coronary artery disease resulting in acute infarction or requiring surgery;

(E) a permanent neurological deficit resulting from cerebral vascular accident; or

(F) a condition of similar severity as specified in the life insurance contract that [~~, which~~] would be expected to impair the insured's quality or length of life in the absence of appropriate medical attention.

(4) Terminal illness--An illness or physical condition, including a physical injury, that can reasonably be expected to result in death in two years or less.

(c) Any portion of the death benefit remaining after reduction of the death benefit due to payment of any acceleration-of-life-insurance benefit referred to in this section and related charges, interest or liens, as allowed by §4.1106(3) [~~§3.4306(3)~~] of this title (relating to Methods for Determining Benefits and Allowable Charges and Fees) must [~~shall~~] be paid upon the death of the insured.

(d) Prepayment of acceleration-of-life-insurance benefits may be in a single sum or in installments.

(e) The acceleration-of-life-insurance benefits, related charges, interest, discounts, or liens allowed under this subchapter, and the balance of the death benefit of the life insurance contract will [~~shall~~] constitute full settlement on maturity of the face amount of the contract.

(f) Specific additional requirements for life insurance contracts that pay for long-term care expenses through acceleration-of-life-insurance benefit provisions are contained in §4.1114 [~~§3.4314~~] of this title (relating to Requirements for Acceleration-of-Life-Insurance [~~Acceleration-of-life-insurance~~] Benefits That [~~that~~] Fund Long-Term Care Expenses).

§4.1103. Required Policy Definitions; Evidence of Total and Permanent Disability.

(a) Acceleration-of-life-insurance benefits, and the illness, condition, care, or confinement necessary to evidence that the insured has [either] a long-term care illness, specified disease, or terminal illness, must [shall] be clearly defined in the life insurance contract consistently with this subchapter.

(b) Such illness, condition, care, or confinement is evidence of total and permanent disability for purposes of meeting the standards for providing acceleration-of-life-insurance benefits set forth in [the] Insurance Code[,] §1111.052, concerning Authority to Pay Accelerated Term Life Benefits, and §1201.003, concerning Applicability of Chapter, and §4.1102 [§3.4302] of this title (relating to Acceleration-of-Life-Insurance: Scope of Benefits).

§4.1104. Standards for Medical Diagnoses.

The acceleration-of-life-insurance benefit provision may require a medical diagnosis of conditions and/or documentation of care or confinement as defined in the life insurance contract to establish eligibility for acceleration-of-life-insurance benefits. This may include a written medical opinion, satisfactory to the company, that the insured has a terminal illness, a long-term care illness, or a specified disease. If additional diagnoses by a physician selected by the company are required, the acceleration-of-life-insurance benefit provision, or a disclosure statement attached to the front of the policy or rider, must specify that the additional diagnoses are at the expense of the company and how conflicting diagnoses will be reconciled. The specific standards sufficient to meet such eligibility requirements must [shall] be defined in the life insurance contract, and any acceleration-of-life-insurance benefit must [shall] be conditioned only upon such requirement or requirements as defined.

§4.1106. Methods for Determining Benefits and Allowable Charges and Fees.

The acceptable methods for determining an acceleration-of-life-insurance benefit, and allowable charges and fees associated with the benefit, are as specified in this section.

(1) Additional premium or cost of insurance charge method [Premium or Cost of Insurance Charge Method]. The acceleration-of-life-insurance benefit provision must specify and define any separately identifiable additional premium or cost-of-insurance charge, if applicable to the life insurance contract, for any acceleration-of-life-insurance benefit, and, upon payment of such benefit, reduce the death benefit of the contract in an amount equal to the acceleration-of-life-insurance benefit paid.

(2) Actuarial discount methods [Discount Methods]. The acceleration-of-life-insurance benefit provision must specify or define any administrative fee, not to exceed $150, and any sound and reasonable actuarial discount, calculated in accordance with either subparagraph (A) or (B) of this paragraph, as applicable, that [which] may reduce the amount of the acceleration-of-life-insurance benefit in instances where no additional premium or cost-of-insurance charge is payable in advance by the policy or certificate holder. Upon payment of such benefit, the death benefit of the life insurance contract will be reduced by no more than an amount equal to the acceleration-of-life-insurance benefit paid, plus the actuarial discount and any administrative fee deducted to provide the benefit. Each subsequently approved acceleration-of-life-insurance benefit request may provide for an administrative fee and discount, subject to the limits defined in this paragraph. The acceleration-of-life-insurance benefit may be calculated based on either the present value actuarial discount as described in subparagraph (A) of this paragraph, or, in regard [regards] to an insured with a terminal illness, on the interest-only actuarial discount as described in subparagraph (B) of this paragraph.

(A) Present value actuarial discount [Value Actuarial Discount]. The acceleration-of-life-insurance benefit may be based upon the present value of future benefits provided under the life insurance contract, less the present value of future premiums, plus the present value of future dividends, if applicable. The actuarial discount used to reach this present value calculation must be appropriate to the life insurance contract design and based on sound actuarial principles. For an insured with a terminal illness, the present value actuarial discount may [shall] not reduce the amount of benefits accelerated by more than 15% of the face amount of such benefits. For other insureds eligible for acceleration-of-life-insurance benefits, the interest rate used to derive the present value actuarial discount applied to the face amount of the benefits accelerated may [shall] not exceed the greater of:

(i) the current yield on 90-day [90 day] treasury bills;

(ii) the current maximum adjustable policy loan interest rate based on Moody's Corporate Bond Yield Averages, or any successor thereto;

(iii) the life insurance contract's guaranteed cash value interest rate plus 1% [one percent] per year [annum]; or

(iv) an alternate rate approved by the commissioner [Commissioner].

(B) Interest-only actuarial discount [Actuarial Discount]. This discount may be applied only in regard [regards] to the death benefit of an insured with a terminal illness. The interest-only actuarial discount may [shall] not reduce the amount of the acceleration-of-life-insurance benefit by more than 10% per year [annum].

(3) Lien method [Method]. In instances where no additional premium or cost of insurance charge is payable in advance by the policy or certificate holder, and the acceleration-of-life-insurance benefit is not reduced by a present value or interest-only actuarial discount, the insurer may consider the acceleration-of-life-insurance benefit, any administrative expense charges, any due and unpaid premiums and any accrued interest as a lien against the death benefit of the life insurance contract, in accordance with the following.[:]

(A) The acceleration-of-life-insurance provision must specify or define any administrative fee, not to exceed $150, and any interest charge on the amount of the acceleration-of-life-insurance benefit.

(B) Access to cash value, if any, may be restricted to any excess of the cash value over the sum of the lien and any outstanding loans. Future access to additional policy loans and any partial withdrawals may also be limited to any excess of the cash values over the sum of the lien and any other outstanding policy loans.

(C) The lien cannot exceed the value of the death benefit of the life insurance contract. The contract must [shall] state that coverage will terminate at such time as the lien equals the value of the death benefit.

(D) The interest rate and interest rate methodology used in the calculation must [shall] be based on sound actuarial principles and disclosed in the contract and actuarial memorandum. The interest rate accrued on the portion of the lien equal to the cash value of the life insurance contract at the time of the benefit acceleration must [shall] be no more than the policy loan interest rate stated in the contract. Each subsequently approved acceleration-of-life-insurance benefit request may provide for an administrative fee and lien, subject to the limits set forth in this paragraph. The maximum interest rate used may [shall] not exceed the greater of:

(i) the current yield on 90-day [~~90 day~~] treasury bills;

(ii) the current maximum adjustable policy loan interest rate based on Moody's Corporate Bond Yield Averages, or any successor thereto;

(iii) the policy's guaranteed cash value interest rate plus 1% per year [~~one percent per annum~~]; or

(iv) an alternate rate approved by the commissioner [~~Commissioner~~].

§4.1107. Limitations on Reduction of Cash Values.

Except as otherwise authorized under the lien method [~~Lien Method~~] for determining benefits under §4.1106(3) [~~§3.4306(3)~~] of this title (relating to Methods for Determining Benefits and Allowable Charges and Fees), if the cash values are reduced by the acceleration-of-life-insurance benefit, related charges, and interest, the reduction may [~~shall~~] not be unjust and may [~~shall~~] not exceed an amount equal to the pro rata portion of the cash value associated with the death benefit used in providing the acceleration-of-life-insurance benefit. Future cash values may [~~shall~~] not be less than the minimum cash values required by [~~the~~] Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance, for the reduced future guaranteed death benefits. These minimum cash values are equal to the present value of the reduced future guaranteed benefits less the present value of future adjusted premiums, decreased by the amount of any indebtedness, including liens, under the life insurance contract. The mortality and interest used in calculating the minimum cash values will be as provided in [~~the~~] Insurance Code Chapter 1105, for life insurance coverage, disregarding any acceleration-of-life-insurance benefits.

§4.1108. Pro Rata Reduction of Loan upon Acceleration of Benefits.

Unless the insurer is using the lien method [~~Lien Method~~] for determining benefits under §4.1106(3) [~~§3.4306(3)~~] of this title (relating to Methods for Determining Benefits and Allowable Charges and Fees), if there is a loan on the life insurance contract, the insurer may deduct up to a pro rata portion of the loan from the amount of the acceleration-of-life-insurance benefit.

§4.1109. Effect of Acceleration of Benefits on Nonforfeiture Calculations.

An acceleration-of-life-insurance benefit provision or rider must [~~shall~~] be disregarded in ascertaining nonforfeiture benefits under [~~the~~] Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance.

§4.1110. Calculation of Reserves.

(a) Reserves for an acceleration-of-life-insurance benefit must [~~shall~~] be based on tables of disablement, morbidity, or mortality appropriate for determining liability for the benefits provided. Such disablement or morbidity tables must [~~shall~~] be certified as appropriate by a member of the American Academy of Actuaries and approved by the Texas Department of Insurance under [~~the~~] Insurance Code §425.058(k), concerning Computation of Minimum Standard: General Rule, and §425.069, concerning Reserve Computation: Indeterminate Premium Plans and Certain Other Plans. Reserves for the death benefits or other supplementary benefits provided by a life insurance contract that [~~which~~] includes an acceleration-of-life-insurance benefit must [~~shall~~] be calculated disregarding such benefit, using mortality and interest rates as provided in [~~the~~] Insurance Code Chapter 425, concerning Reserves and Investments for Life Insurance. The basis of reserves for any life insurance contract that [~~which~~] contains an acceleration-of-life-insurance benefit provision must [~~shall~~] accompany the filing of the contract with the Texas Department of Insurance.

(b) Reserves for an acceleration-of-life-insurance benefit under the lien method [~~Lien Method~~] for determining benefits under §4.1106(3) [~~§3.4306(3)~~] of this title (relating to Methods for Determining Benefits and Allowable Charges and Fees), including accrued interest, represent assets of the company for statutory reporting purposes. For any life insurance contract on which the lien exceeds the policy's statutory reserve liability, such excess must be held as a non-admitted asset.

§4.1111. Unfair, Discriminatory, or Deceptive Practices Prohibited.

(a) Acceleration-of-life-insurance benefit provisions are subject to [~~the~~] Insurance Code Chapter 541, [~~(~~] concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices, [~~)~~] and rules promulgated under Chapter 541.

(b) Insurers offering acceleration-of-life-insurance benefits may [~~shall~~] not engage in unfair, discriminatory, or deceptive practices in relation to the offer, sale, or administration of acceleration-of-life-insurance benefits, including, but not limited to, the following practices:

(1) reclassification of the insured as a result of payment of the benefit specified in an acceleration-of-life-insurance benefit provision to a class of risk less favorable than the class of risk to which the insured originally belonged;

(2) unfair discrimination among insureds with differing qualifying events; or

(3) unfair discrimination among insureds with similar qualifying events.

§4.1112. Notice and Disclosure Requirements for Life Insurance Contracts Containing Acceleration-of-Life-Insurance [~~Acceleration-of-life-insurance~~] Benefits.

(a) Except as otherwise stated in this section, every life insurance contract containing an acceleration-of-life-insurance benefit provision is [~~shall be~~] subject to the notice and disclosure requirements in paragraphs (1) - (5) of this subsection [~~section~~].

(1) Except as otherwise provided in this paragraph, the face of every such life insurance contract must [~~shall~~] contain a prominent notice printed, over-printed or stamped, as appropriate, substantially as follows: "Death benefits, cash values, and loan values will be reduced if an acceleration-of-life-insurance benefit is paid." This statement must [~~shall~~] be appropriately modified for contracts that [~~which~~] have no cash or loan values, or in which the cash value is not reduced.

(2) The title of any acceleration-of-life-insurance benefit must [~~shall~~] be descriptive of the coverage provided and must [~~shall~~] use such terms as "acceleration-of-life-insurance benefit," "accelerated benefit," or words of similar import.

(3) At the time of the payment of a lump sum acceleration-of-life-insurance benefit, or, if periodic payments are being made, no less frequently than every 12 months, the insurer must [~~shall~~] send a statement to the owner or holder of the life insurance contract, specifying:

(A) the amount of benefits paid (or the amount of benefits paid since the last report);

(B) the effect of the acceleration-of-life-insurance benefit payment on the death benefit, face amount, specified amount, accumulation values, cash values, loan amounts, future charges, and future premiums; and

(C) the amount of benefits remaining available for acceleration.

(4) Notice that the owner of the life insurance contract will receive the statement described in paragraph (3) of this subsection must

[~~shall~~] be included in the acceleration-of-life-insurance benefit provisions of the life insurance contract.

(5) As appropriate, the disclosures contained in either subsection (a) or (b) of §4.1116 [~~§3.4316~~] of this title (relating to Disclosures Related to Tax Qualification of Benefits and Benefits' Effect on Public Assistance), and the disclosure contained in subsection (c) of §4.1116 [~~§3.4316~~], or disclosures substantially similar to these disclosures, must be included on or attached to the front page of each life insurance contract subject to this subchapter, except as provided in subsection (e) of §4.1116 [~~§3.4316~~].

(b) The notice and disclosure requirements in subsection (a) must be provided only with the document actually containing the acceleration-of-life-insurance provisions. For example, if acceleration-of-life insurance benefits are provided through a rider to a life policy, the disclosures must only be provided with the rider, not the policy.

§4.1113. Notice and Disclosure Requirements for Marketing Materials.

(a) Any "invitation to contract," as defined in §21.102 of this title (relating to Scope), used in the marketing, solicitation, or sale of a life insurance contract containing an acceleration-of-life-insurance provision must [~~shall~~] clearly and concisely disclose the following:

(1) the illness, condition, care, or confinement necessary to trigger eligibility for any acceleration-of-life-insurance benefit;

(2) the effect that an acceleration-of-life-insurance benefit provision will have on the death benefit and other values available under the life insurance contract; and

(3) the tax-related disclosures contained in either subsection (a) or (b) of §4.1116 [~~§3.4316~~] of this title (relating to Disclosures Related to Tax Qualification of Benefits and Benefits' Effect on Public Assistance), as appropriate, and the disclosure contained in subsection (c) of §4.1116 [~~§3.4316~~], or disclosures substantially similar to these disclosures.

(b) No insurer or agent, in marketing a life insurance contract that [~~which~~] provides acceleration-of-life-insurance benefits, may mention, illustrate, or refer to the contract as an alternative or substitute for catastrophic major medical health insurance.

§4.1114. Requirements for Acceleration-of-Life-Insurance [~~Acceleration-of-life-insurance~~] Benefits That Fund Long-Term Care Expenses.

When a life insurance contract provides for payment of long-term care expenses funded through an acceleration-of-life-insurance benefit provision, the long-term care provisions of the contract must meet the following requirements of Chapter 3, Subchapter Y of this title [~~chapter~~] (relating to Standards for Long-Term Care Insurance, Non-Partnership and Partnership Long-Term Care Insurance Coverage Under Individual and Group Policies and Annuity Contracts, and Life Insurance Policies that Provide Long-Term Care Benefits Within the Policy) [~~Standards for Long-Term Care Insurance Coverage under Individual and Group Policies~~)]:

(1) terms [~~Terms~~] must be defined consistently with §3.3804 of this title (relating to Definitions);

(2) definitions [~~Definitions~~] and descriptions of providers must be consistent with the requirements of §3.3812 of this title (relating to Policy Standards for Provider);

(3) to [~~To~~] the extent that the acceleration-of-life-insurance provisions provide for payment of home health or adult day care expenses, such provisions must meet applicable standards contained in §3.3815 of this title (relating to Standards for Home Health and Adult Day Care Benefits);

(4) conditions [~~Conditions~~] triggering eligibility for benefits must comply with §3.3818 of this title (relating to Standards for Eligibility for Benefits); and

(5) to [~~To~~] the extent that the acceleration-of-life-insurance benefit is intended to fund long-term care expenses that will qualify for favorable tax treatment under federal law, the long-term care provisions of the contract must further comply with the provisions of §4.1115 [~~§3.4315~~] of this title (relating to Requirements for Benefits Represented to [~~To~~] Be Qualified for Favorable Federal Tax Treatment) that are applicable to expenses paid for a "qualified long-term care illness," as defined in §4.1115 [~~§3.4315~~], and any additional federal requirements for favorable tax treatment.

§4.1115. Requirements for Benefits Represented to [~~To~~] Be Qualified for Favorable Federal Tax Treatment.

(a) On or after the effective date of this subchapter, no life insurance contract providing for acceleration-of-life-insurance benefits may be represented to be tax-qualified under federal law governing taxation of such benefits unless such benefits meet the requirements set forth in subsections (b) - (d) of this section.

(b) Acceleration-of-life-insurance benefits described as tax-qualified must be limited to insureds who have a "qualified terminal illness" or a "qualified long-term care illness," as those terms are defined (and terms used within the definitions are defined) in paragraphs (1) - (3) of this subsection.

(1) An insured has a "qualified terminal illness" if a physician certifies that, as of the date of the certification, the insured has a terminal illness, as defined in §4.1102(b) [~~§3.4302(b)~~] of this title (relating to Acceleration-of-Life-Insurance [~~Acceleration of Life Insurance~~]: Scope of Benefits).

(2) An insured has a "qualified long-term care illness" if the insured has a "long-term care illness" as defined in §4.1102(b) [~~§3.4302(b)~~] of this title, and a licensed health care practitioner, acting within the scope of their [~~his or her~~] license, certifies, within 12 months before [~~prior to~~] the approval of the insured's request to exercise the acceleration-of-life-insurance provision, that the insured's illness or physical condition has caused the insured to:

(A) be unable to perform, without substantial assistance from another individual, at least two activities of daily living for a period of at least 90 days due to functional incapacity;

(B) be disabled at a level similar to the level described in subparagraph (A) of this paragraph, as determined by rules promulgated by the United States Secretary of the Treasury, in consultation with the United States Secretary of Health and Human Services, under section 7702B of the Internal Revenue Code of 1986, as amended by the Health Insurance Portability and Accountability Act of 1996; or

(C) require substantial supervision to protect the insured from threats to the insured's health and safety due to the impairment of cognitive ability.

(3) The following words and terms, when used in this section, [~~shall~~] have the following meanings[~~,~~] unless the context clearly indicates otherwise.[~~:~~]

(A) Activities of daily living--Bathing, continence, dressing, eating, toileting and transferring, as those terms are defined in §3.3804(b) of this title (relating to Definitions).

(B) Impairment of cognitive ability--The deterioration or loss in intellectual capacity requiring substantial supervision for protection of self and others, as established by the clinical diagnosis of any licensed practitioner in this state authorized to make such a diagnosis. Such diagnosis must [~~shall~~] include the patient's history and physical,

neurological, psychological and/or psychiatric evaluations, and laboratory findings.

(C) Substantial supervision--Continual supervision (that [~~which~~] may include cueing by verbal prompting, gestures, or other demonstrations) by another person that is necessary to protect a cognitively impaired individual from threats to the individual's health or safety.

(c) Any acceleration-of-life-insurance benefit paid to an insured with a qualified long-term care illness is limited in use to payment for instances in which the individual has incurred expenses for qualified long-term [~~long term~~] care services, as defined in section 7702B of the Internal Revenue Code of 1986, as amended by the Health Insurance Portability and Accountability Act of 1996. Such payments will not fail to meet this test solely because they are made on a per diem or periodic basis without regard to expenses incurred during the period.

(d) Any acceleration-of-life-insurance benefit provision providing for payment of expenses incurred for qualified long-term care services by an insured with a qualified long-term care illness:

(1) may [~~shall~~] not pay or reimburse expenses incurred under Medicare or that would be reimbursable under Medicare but for the application of a deductible or coinsurance amount, except expenses that [~~which~~] are reimbursable under Medicare only as a secondary payor;

(2) may coordinate benefits with Medicare benefits; and

(3) must meet all requirements of §4.1114 [~~§3.4314~~] of this title (relating to Requirements for Acceleration-of-Life-Insurance [~~Acceleration-of-life-insurance~~] Benefits That [~~that~~] Fund Long-Term Care Expenses).

§4.1116. Disclosures Related to Tax Qualification of Benefits and Benefits' Effect on Public Assistance.

(a) Except as provided in subsection (e) of this section, on or after the effective date of this subchapter, if an insurer markets, delivers, issues for delivery, or renews a life insurance contract in Texas that provides only acceleration-of-life-insurance benefits that are intended to qualify for favorable tax treatment under federal law, the contract, and any invitation to contract as provided under §4.1113 [~~§3.4313~~] of this title (relating to Notice and Disclosure Requirements for Marketing Materials), must include a disclosure substantially similar to the disclosure set forth in this subsection. When a series of words are separated by slashes [~~back-slashes~~] (e.g., policy/certificate/rider), the insurer should choose the most appropriate word or words under the circumstances. DISCLOSURE: "The acceleration-of-life-insurance benefits offered under this policy/certificate/rider are intended to qualify for favorable tax treatment under the Internal Revenue Code of 1986. If the acceleration-of-life-insurance benefits qualify for such favorable tax treatment, the benefits will be excludable from your income and not subject to federal taxation. Tax laws relating to acceleration-of-life-insurance benefits are complex. You are advised to consult with a qualified tax advisor about circumstances under which you could receive acceleration-of-life-insurance benefits excludable from income under federal law."

(b) Except as provided in subsection (e) of this section, on or after the effective date of this subchapter, if an insurer markets, delivers, issues for delivery, or renews a life insurance contract in Texas [~~a life insurance contract~~] that contains an acceleration-of-life-insurance benefits provision that meets the requirements of this subchapter, but that allows benefits to be accelerated in circumstances in which such benefits would not qualify for favorable tax treatment under federal law, the contract, and any invitation to contract as provided under §4.1113 [~~§3.4313~~] of this title [~~(relating to Notice and Disclosure Requirements for Marketing Materials)~~], must include a disclosure substantially similar to the disclosure set forth in this subsection. When a series of words are separated by slashes [~~back-slashes~~] (e.g., policy/certificate/rider), the insurer should choose the most appropriate word or words under the circumstances. DISCLOSURE: "The acceleration-of-life-insurance benefits offered under this policy/certificate/rider may or may not qualify for favorable tax treatment under the Internal Revenue Code of 1986. Whether such benefits qualify depends on factors such as your life expectancy at the time benefits are accelerated or whether you use the benefits to pay for necessary long-term care expenses, such as nursing home care. If the acceleration-of-life-insurance benefits qualify for favorable tax treatment, the benefits will be excludable from your income and not subject to federal taxation. Tax laws relating to acceleration-of-life-insurance benefits are complex. You are advised to consult with a qualified tax advisor about circumstances under which you could receive acceleration-of-life-insurance benefits excludable from income under federal law."

(c) Except as provided in subsection (e) of this section, on or after the effective date of this subchapter, if an insurer markets, delivers, issues for delivery, or renews a life insurance contract in Texas that provides acceleration-of-life-insurance benefits, the contract, and any invitation to contract as provided under §4.1113 [~~§3.4313~~] of this title [~~(relating to Notice and Disclosure Requirements for Marketing Materials)~~], must include a disclosure substantially similar to the disclosure set forth in this subsection. DISCLOSURE: "Receipt of acceleration-of-life-insurance benefits may affect your, your spouse or your family's eligibility for public assistance programs such as medical assistance (Medicaid), Aid to Families with Dependent Children (AFDC), supplementary social security income (SSI), and drug assistance programs. You are advised to consult with a qualified tax advisor and with social service agencies concerning how receipt of such a payment will affect you, your spouse and your family's eligibility for public assistance."

(d) The disclosure requirements of this section must be provided only with the document actually containing the acceleration-of-life-insurance provisions. For example, if acceleration-of-life-insurance [~~acceleration-of-life insurance~~] benefits are provided through a rider to a life policy, the disclosures must only be provided with the rider, not the policy.

(e) In regard [~~regards~~] to certificates of coverage for group life insurance policies, the disclosures required by this section must be provided only to certificate holders obtaining group life coverage on or after the effective date of this subchapter.

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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Jessica Barta
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 676-6555

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28 TAC §4.1117

STATUTORY AUTHORITY. TDI proposes the repeal of §4.1117 under Insurance Code §§1111.053, 1701.060, and 36.001.

Insurance Code §1111.053 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1111, Subchapter B.

Insurance Code §1701.060 specifies that the commissioner may adopt rules necessary to implement the purpose 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 4.1117 affects Insurance Code §1111.052.

§4.1117. Effective Date.

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

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SUBCHAPTER L. INSURANCE SOLD IN CONNECTION WITH PREPAID FUNERAL CONTRACTS

28 TAC §4.1201

STATUTORY AUTHORITY. TDI proposes amendments to §4.1201 under Occupations Code §651.159 and Insurance Code §36.001.

Occupations Code §651.159 provides the commissioner adopt a memorandum of understanding with the Texas Funeral Service Commission and the Texas Department of Banking.

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 4.1201 affects Occupations Code §651.159.

§4.1201. Introduction to Joint Memorandum of Understanding.

(a) Occupations Code §651.159, concerning Memorandum of Understanding: Prepaid Funeral Services, mandates the Texas Department of Insurance, the Texas Funeral Service Commission, and the Texas Department of Banking to adopt by rule a joint memorandum of understanding relating to prepaid funeral services and transactions that:

(1) outlines the responsibilities of each agency in regulating these services and transactions;

(2) establishes procedures to be used by each agency in referring complaints to one of the other agencies;

(3) establishes procedures to be used by each agency in investigating complaints;

(4) establishes procedures to be used by each agency in notifying the other agencies of a complaint or of the investigation of a complaint;

(5) describes actions the agencies regard as deceptive trade practices;

(6) specifies the information the agencies provide consumers and when that information is to be provided; and

(7) sets the administrative penalties each agency imposes for violations.

(b) Any revisions to the joint memorandum of understanding will be adopted by rule by each agency.

(c) The joint memorandum of understanding entered into by the three agencies is found at §4.1202 [~~§3.9002~~] of this title (relating to Joint Memorandum of Understanding).

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

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SUBCHAPTER O. VARIABLE LIFE INSURANCE

28 TAC §§4.1502 - 4.1510

STATUTORY AUTHORITY. TDI proposes amendments to §§4.1502 - 4.1510 under Insurance Code §1152.002 and §36.001.

Insurance Code §1152.002 authorizes the commissioner to adopt rules that are fair, reasonable, and appropriate to augment and implement Insurance Code Chapter 1152, including rules establishing requirements for agent licensing, standard policy provisions, and disclosure.

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. Subchapter O affects Insurance Code §1152.101.

§4.1502. Definitions.

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

(1) Affiliate of an insurer--Any person, directly or indirectly, controlling, controlled by, or under common control with such insurer; any person who regularly furnishes investment advice to such insurer with respect to its separate accounts for which a specific fee or commission is charged; or any director, officer, partner, or employee

of such insurer, controlling or controlled person, or person providing investment advice or any member of the immediate family of such person.

(2) Agent--Any person, corporation, partnership, or other legal entity that [~~which~~] is licensed by this state as a life insurance agent.

(3) Assumed investment rate--The rate of investment return that [~~which~~] would be required to be credited to a variable life contract, after deduction of charges for taxes, investment expenses, and mortality and expense guarantees to maintain the variable death benefit equal at all times to the amount of death benefit, other than incidental insurance benefits, which would be payable under the plan of insurance if the death benefit did not vary according to the investment experience of the separate account.

(4) Benefit base--The amount to which the net investment return is applied.

(5) Cash surrender value--The net cash surrender value plus any amounts outstanding as contract loans.

(6) Commissioner--The commissioner of insurance of this state.

(7) Contract cost factors--Those amounts that [~~which~~] affect the price per thousand of life insurance coverage or other benefits. They include interest, mortality, expense charges, and fees, including any surrender charges, but not persistency assumptions.

(8) Contract processing day--The day on which charges authorized in the contract are deducted from the contract value.

(9) Contract value--The amount to which interest is credited, and against which separately identified mortality charges, expense charges, fees, and other charges are debited.

(10) Control (including the terms "controlling," "controlled by," and "under common control with")--The possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control is presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing more than 10% of the voting securities of any other person. This presumption may be rebutted by a showing made to the satisfaction of the commissioner that control does not exist in fact. The commissioner may determine, after furnishing all persons in interest with notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

(11) Flexible premium contract--Any variable life contract other than a scheduled premium variable life contract as defined in the definition of scheduled premium variable life contract.

(12) General account--All assets of the insurer other than assets in separate accounts established under [~~pursuant to~~] Insurance Code Chapter 1152, concerning Separate Accounts, Variable Contracts, and Related Products, or under [~~pursuant to~~] the corresponding sections of the insurance laws of the state of domicile of a foreign or alien insurer, whether or not for variable life insurance.

(13) Incidental insurance benefit--All insurance benefits in a variable life contract, other than the variable death benefit and the minimum death benefit, including, but not limited to, accidental death and dismemberment benefits, disability benefits, guaranteed insurability options, family income, or term riders.

(14) Minimum death benefit--The amount of the guaranteed death benefit, other than incidental insurance benefits, payable under a variable life contract regardless of the investment performance of the separate account.

(15) Net cash surrender value--The maximum amount payable to the contract owner upon surrender.

(16) Net investment return--The rate of investment return in a separate account to be applied to the benefit base.

(17) Person--An individual, corporation, partnership, association, trust, or fund.

(18) Scheduled premium contract--Any variable life contract under which both the amount and timing of premium payments are fixed by the insurer.

(19) Separate account--A separate account established under [~~pursuant to~~] Insurance Code Chapter 1152, or under [~~pursuant to~~] the corresponding section of the insurance laws of the state of domicile of a foreign or alien insurer.

(20) Structural changes--Those changes that [~~which~~] are separate from the automatic workings of the contract. Such changes usually would be initiated by the contract owner and include changes in the guaranteed benefits, changes in latest maturity date, or changes in allowable premium payment period.

(21) Variable death benefit--The amount of the death benefit, other than incidental benefits payable under a variable life contract dependent on the investment performance of the separate account, which the insurer would have to pay in the absence of any minimum death benefit.

(22) Variable life contract--Any individual variable life insurance contract that [~~which~~] provides for life insurance the amount or duration of which varies according to the investment experience of any separate account or accounts established and maintained by the insurer as to such contract, under [~~pursuant to~~] Insurance Code Chapter 1152, or under [~~pursuant to~~] the corresponding section of the insurance laws of the state of domicile of a foreign or alien insurer.

§4.1503. Qualifications of Insurer to Issue Variable Life Insurance. The following requirements are applicable to all insurers either seeking authority to issue variable life insurance in this state or having the authority to issue variable life insurance in this state.

(1) Licensing and approval to do business in this state. An insurer may not deliver or issue for delivery in this state any variable life insurance contracts unless:

(A) the insurer is licensed or organized to do [~~a~~] life insurance business in this state; and

(B) after having complied with the provisions of Insurance Code Chapter 1152, concerning Separate Accounts, Variable Contracts, and Related Products [~~concerning notice and hearing~~], the commissioner has authorized, either as part of the insurer's original certificate of authority or by charter amendment, the insurer to issue, deliver, and use variable life contracts, and only after the commissioner has considered, among other things, the following:

(i) whether the plan of operation for the issuance of variable life contracts is sound;

(ii) whether the general character, reputation, and experience of the management and those persons or firms proposed to supply consulting, investment, administrative, or custodial services to

the insurer are such as to reasonably assure competent operation of the variable life business of the insurer in this state; and

(iii) whether the present and foreseeable future financial condition of the insurer and its method of operation in connection with the issuance of such contracts is not likely to render its operation hazardous to the public or its contract holders [~~contractholders~~] in this state. The commissioner will consider, among other things:

(I) the history of operation and financial condition of the insurer;

(II) the qualifications, fitness, character, responsibility, reputation, and experience of the officers and directors and other management of the insurer and those persons or firms proposed to supply consulting, investment, administrative, or custodial services to the insurer;

(III) the applicable law and regulations under which the insurer is authorized in its state of domicile to issue variable life contracts. The state of entry of an alien insurer will be deemed its state of domicile for this purpose; and

(IV) if the insurer is a subsidiary of, or is affiliated by common management or ownership with, another company, its relationship to such other company and the degree to which the requesting insurer, as well as the other company, meets these standards.

(2) Filing for approval to do business in this state. Before any insurer may deliver or issue for delivery any variable life contract in this state, it must file with the Texas Department of Insurance the following information, and any other information specifically requested, for the consideration of the commissioner, on making the determination required by paragraph (1)(B) of this section:

(A) copies of and a general description of the variable life contracts it intends to issue;

(B) a general description of the methods of operation of the variable life insurance business of the insurer, including methods of distribution of contracts and the names of those persons or firms proposed to supply consulting, investment, administrative, custodial, or distributive services to the insurer;

(C) with respect to any separate account maintained by an insurer for any variable life contract, a statement of the investment policy the insurer intends to follow for the investment of the assets held in such separate account, and a statement of procedures for changing such investment policy. The statement of investment policy must include a description of the investment objectives intended for the separate account;

(D) a description of any investment advisory services contemplated as required by §4.1506 [~~§3.806~~] of this title (relating to Separate Accounts);

(E) a copy of the statutes and regulations of the state of domicile of a foreign or alien insurer under which it is authorized to issue variable life contracts;

(F) biographical data not previously filed with the commissioner with respect to officers and directors of the insurer on the appropriate biographical form used in Texas;

(G) a statement of the insurer's actuary describing the mortality and expense risks that [~~which~~] the insurer will bear under the contract; and

(H) the provisions of subparagraphs (A) - (G) of this paragraph will be deemed to have been satisfied to the extent that the information required by the commissioner is provided in form identical to the insurer's registration statement filed under 15 United States Code §77a, et seq.

(3) Standards of suitability. Every insurer seeking approval to enter into the variable life insurance business in this state must establish and maintain a written statement specifying the standards of suitability to be used by the insurer. Such standards of suitability must specify that no recommendation will be made to an applicant to purchase a variable life contract and that no variable life contract will be issued in the absence of reasonable grounds to believe that the purchase of such contract is not unsuitable for such applicant on the basis of information furnished after reasonable inquiry of such applicant concerning the applicant's insurance and investment objectives, financial situation and needs, and any other information known to the insurer or the agent making the recommendation.

(4) Use of sales material. An insurer authorized to transact variable life insurance business in this state may not use any sales material, advertising material, or descriptive literature or other materials of any kind in connection with its variable life insurance business in this state unless it complies with Chapter 21, Subchapter B, Division 1 [~~§§21.101 - 21.122~~] of this title (relating to Insurance Advertising) [~~(relating to Insurance Advertising, Certain Trade Practices, and Solicitation)~~]. An insurer issuing flexible premium variable life contracts must provide, to all prospective purchasers, an illustration of cash surrender values before [~~prior to~~] or at the time of delivery of the contract. Any illustration of cash surrender values delivered to an applicant or prospective applicant under [~~pursuant to~~] this section [~~subsection~~] must:

(A) include a hypothetical gross investment return of 0.0%, and when other hypothetical gross investment returns are included, the current gross investment return must, to the extent permitted by federal law, be included;

(B) give equal prominence to both guaranteed and nonguaranteed aspects of the contract if guarantees are included in the contract;

(C) prominently display, by way of written statement, the hypothetical nature of the illustration as it relates to investment returns;

(D) prominently state that a contract may terminate due to insufficient premiums and/or poor investment performance; and

(E) prominently show, by way of written statement, that excessive loans or withdrawals may cause the contract to lapse due to insufficient cash surrender value and, at the option of the insurer, prominently display the effects of loans or withdrawals on contract values.

(5) Requirements applicable to contractual services. Any material contract between an insurer and suppliers of consulting, investment, administrative, sales, marketing, custodial, or other services with respect to variable life insurance operations must be in writing and provide that the supplier of such services furnish the commissioner with any information or reports in connection with such services that [~~which~~] the commissioner may request in order to ascertain whether the variable life insurance operations of the insurer are being conducted in a manner consistent with these regulations, and any other applicable law or regulations.

(6) Reports to the commissioner. Any insurer authorized to transact the business of variable life insurance in this state must submit to the commissioner, in addition to any other materials that [~~which~~] may be required by this subchapter or any other applicable laws or rules:

(A) an annual statement of the business of its separate account or accounts in such forms as may be prescribed by the National Association of Insurance Commissioners;

(B) before [~~prior to~~] use in this state, any information furnished to applicants as provided for in §4.1507 [~~§3.807~~] of this title (relating to Information Furnished to Applicants);

(C) before [~~prior to~~] use in this state, the form of any of the reports to contract holders [~~contractholders~~] as provided for in §4.1509 [~~§3.809~~] of this title (relating to Reports to Contract Holders [~~Contractholders~~]); and

(D) such additional information concerning its variable life insurance operations or its separate accounts as the commissioner deems necessary.

(7) Treatment of material reported under paragraph (6) of this section. Receipt of the material specified in paragraph (6) of this section does not imply approval or acceptance of the material. The commissioner will require the redistribution of any previously distributed material that [~~which~~] is found to be false, misleading, deceptive, or inaccurate in any material respect.

(8) Authority of the commissioner to disapprove. Any material required to be filed with the commissioner, or approved by the commissioner, will be subject to disapproval if at any time it is found by the commissioner not to comply with the standards established by these rules.

§4.1504. Insurance Contract and Filing Requirements.

The commissioner will not approve any variable life insurance form filed under [~~pursuant to~~] these rules unless it conforms to the requirement of applicable law.

(1) Filing of variable life contracts. All variable life contracts, and all riders, endorsements, applications, and other documents that [~~which~~] are to be attached to and made a part of the contract and that [~~which~~] relate to the variable nature of the contract, must be filed with the commissioner and approved or exempted, as applicable, by the commissioner before [~~prior to~~] delivery or issuance for delivery in this state.

(A) Each variable life contract, rider, endorsement, and application must be filed in accordance with Chapter 3, Subchapter A, of this title [~~chapter~~] (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings). A flexible premium variable life contract submission must be accompanied by the following:

(i) a mathematical demonstration comparing the specimen contract's cash surrender values, assuming the contract's assumed investment rate, if any, or in the absence of an assumed investment rate, on a rate not to exceed the maximum interest rate allowed by Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance, to the minimum cash surrender value described in paragraph (2)(F) of this section. The specimen contract should be for the minimum initial face amount permitted to be issued to a male age 35. The demonstration should not assume changes in face amount that [~~which~~] are optional to the contract holder [~~contractholder~~]. The maturity date and the premium paying period should be the maximum permitted by the contract. The premium for each year should be the greater of the minimum premium permitted for that year or the premium that will allow the contract to mature at the maturity date assuming guaranteed charges and the assumed investment rate, if any, or, in the absence of an assumed investment rate, a rate not to exceed the maximum interest rate permitted by Insurance Code Chapter 1105;

(ii) an actuarial description that [~~which~~] sets forth maximum expense charges, loads, and surrender charges, applicable to the contract at issue and upon a change in basic coverage for all ages, bands, and classes of risk, will be provided in conjunction with the contract.

(B) The commissioner may approve variable life contracts and related forms with provisions the commissioner deems to be not less favorable to the contract holder [~~contractholder~~] and the beneficiary than those required by these rules.

(2) Mandatory contract benefit and design requirements. Variable life contracts delivered or issued for delivery in this state must comply with the following minimum requirements.

(A) Mortality and expense risks must be borne by the insurer. The expense charges must be subject to the maximums stated in the contract. The charge for mortality must be stated in the contract and may not exceed a mortality rate for the attained age of the insured in a table specified for the calculation of cash surrender values in Insurance Code Chapter 1105. Provided, for insurance issued on a substandard basis, the charge for mortality may be the mortality rate for the attained age of the insured in such other tables as may be specified by the company and approved by the Texas Department of Insurance.

(B) For scheduled premium contracts, a minimum death benefit must be provided in an amount at least equal to the initial face amount of the contract so long as premiums are duly paid (subject to paragraph (4) of this section).

(C) The contract must reflect the investment experience of one or more separate accounts established and maintained by the insurer. The insurer must demonstrate that the reflection of investment experience in the variable life contract is actuarially sound.

(D) Each variable life contract must be credited with the full amount of the net investment return applied to the benefit base.

(E) Any changes in variable death benefits of each variable life contract must be determined at least annually.

(F) The cash surrender value of each variable life contract must be determined at least monthly. The method of computation of cash surrender values and other nonforfeiture benefits, as described in the contract and in a statement filed with the commissioner in this state in which the contract is delivered, or issued for delivery, must be in accordance with recognized actuarial procedures that recognize the variable nature of the contract. The method of computation must be such that if the net investment return credited to the contract at all times from the date of issue should be equal to the assumed investment rate with premiums and benefits determined accordingly under the terms of the contract, then the resulting cash surrender values and other nonforfeiture benefits must be at least equal to the minimum values required by Insurance Code Chapter 1105, for a general account contract with such premiums and benefits. The assumed investment rate may not exceed the maximum interest rate permitted under Insurance Code Chapter 1105. If the contract does not contain an assumed investment rate, this demonstration must be based on a rate not to exceed the maximum interest rate permitted under Insurance Code Chapter 1105. The method of computation may disregard incidental minimum guarantees as to the dollar amounts payable. Incidental minimum guarantees include, for example, but are not limited to, a guarantee that the amount payable at death or maturity is at least equal to the amount that otherwise would have been payable if the net investment return credited to the contract at all times from the date of issue had been equal to the assumed investment rate.

(3) Mandatory contract provisions. Every variable life contract filed for approval in this state must contain at least the following.

(A) The cover page or pages corresponding to the cover page of each contract must contain:

(i) a prominent statement in either contrasting color or in boldface type that the amount or duration of death benefit may be variable or fixed under specified conditions;

(ii) a prominent statement in either contrasting color or in boldface type that cash surrender values may increase or decrease in accordance with the experience of the separate account, subject to any specified minimum guarantees;

(iii) a statement describing any minimum death benefit required under [~~pursuant to~~] paragraph (2)(B) of this section;

(iv) the method, or a reference to the contract provision that [~~which~~] describes the method, for determining the amount of insurance payable at death;

(v) a captioned provision that the contract holder [~~contractholder~~] may return the variable life contract within 10 days of receipt of the contract by the contract holder [~~contractholder~~], and receive a refund equal to the premiums paid;

(vi) such other items as are currently required for fixed benefit life contracts and that [~~which~~] are not inconsistent with this subchapter.

(B) A grace period in accordance with this subparagraph.

(i) For scheduled premium contracts, a provision for a grace period of not less than 31 days from the premium due date that [~~which~~] must provide that when the premium is paid within the grace period, cash surrender values will be the same, except for the deduction of any overdue premium, as though the premium were paid on or before the due date.

(ii) For flexible premium contracts, a provision for a grace period beginning on the contract processing day when the total charges authorized by the contract that are necessary to keep the contract in force until the next contract processing day exceed the amounts available under the contract to pay such charges in accordance with the terms of the contract. Such grace period must end on a date not less than the later of the date 61 days after the contract processing day when the grace period begins, or the date that [~~which~~] is 31 days after the mailing date of the report to contract holders [~~contractholders~~] required by §4.1509(3) [~~§3.809(3)~~] of this title (relating to Reports to Contract Holders [~~Contractholders~~]). The death benefit payable during the grace period will equal the death benefit in effect immediately before [~~prior to~~] such period less any overdue charges. If the contract processing days occur monthly, the insurer may require payment of an amount equal to the greater of:

(I) not more than three times the charges that [~~which~~] were due on the contract processing day on which the amounts available under the contract were insufficient to pay all charges authorized by the contract that are necessary to keep such contract in force until the next contract processing day; or

(II) the amount necessary to keep such contract in force for a period of three calendar months from the contract processing day on which the amounts available under the contract were insufficient to pay all charges authorized by the contract.

(C) For scheduled premium contracts, a provision that the contract will be reinstated at any time within two years from the date of default upon the written application of the insured and evidence of insurability, including good health, satisfactory to the insurer, unless the cash surrender value has been paid or the period of extended insurance has expired, upon the payment of any outstanding indebtedness arising after [~~subsequent to~~] the end of the grace period following the date of default together with accrued interest on the contract [~~thereon~~] to the date of reinstatement and payment of an amount not exceeding the greater of:

(i) all overdue premiums at an interest rate not exceeding the contract loan interest rate in effect for the period during and after the lapse of the contract, and any indebtedness in effect at the end of the grace period following the date of default with interest at a rate not exceeding the contract loan interest rate in effect for the period during and after the lapse of the contract; or

(ii) 110% of the increase in cash surrender value resulting from reinstatement plus all overdue premiums for incidental insurance benefits with interest at a rate not exceeding the contract loan interest rate in effect for the period during and after the lapse of the contract.

(D) A full description of the benefit base and [~~of~~] the method of calculation and application of any factors used to adjust variable benefits under the contract.

(E) A provision designating the separate account to be used and stating that:

(i) the assets of such separate account must be available to cover the liabilities of the general account of the insurer only to the extent that the assets of the separate account exceed the liabilities of the separate account arising under the variable life contracts supported by the separate account; and

(ii) the assets of such separate account must be valued at least as often as any contract benefits vary but at least monthly.

(F) A provision specifying what documents constitute the entire insurance contract.

(G) A designation of the officers who are empowered to make an agreement or representation on behalf of the insurer and an indication that statements by the insured, or on the insured's [~~his or her~~] behalf, are considered as representations and not warranties.

(H) An identification of the owner of the insurance contract.

(I) A provision setting forth conditions or requirements as to the designation, or change of designation, of a beneficiary and a provision for disbursement of benefits in the absence of a beneficiary designation.

(J) A statement of any conditions or requirements concerning the assignment of the contract.

(K) A description of any adjustments in benefits under the contract to be made in the event of misstatement of age or sex of the insured.

(L) A provision that the contract will be incontestable by the insurer after it has been in force for two years during the lifetime of the insured, provided, however, that any increase in the amount of the contract's death benefits after [~~subsequent to~~] the contract issue date, which increase occurred upon a new application or request of the owner and was subject to satisfactory proof of the insured's insurability, will be incontestable after any such increase has been in force, during the lifetime of the insured, for two years from the date of issue of such increase.

(M) A provision stating that the investment policy of the separate account may not be changed without the approval of the insurance commissioner of the state of domicile of the insurer, and that the approval process is on file with the commissioner of this state.

(N) A provision that the payment of variable death benefits in excess of any minimum death benefits, cash surrender values, contracts loans, or partial withdrawals (except when used to pay the premiums) or partial surrenders may be deferred:

(i) for up to two months for death benefit payments or six months for all other payments from the date of request [~~therefor~~], if such payments are based on contract values that [~~which~~] do not depend on the investment performances of the separate accounts; or

(ii) for any period during which the New York Stock Exchange is closed for trading (except for normal holiday closing) or when the Securities and Exchange Commission has determined that a state of emergency exists that [~~which~~] may make such payment impractical.

(O) If settlement options are provided, at least one such option must be provided on a fixed basis only.

(P) A detailed and complete definition for the basis for computing the contract value and the cash surrender value of the contract. For flexible premium variable life contracts, the definition must include the following:

(i) the guaranteed maximum expense charges and loads;

(ii) any limitation on the crediting of additional interest. Interest credits may not remain conditional for a period longer than 12 months;

(iii) any assumed investment rate or rates;

(iv) the guaranteed maximum mortality charges;

(v) any other guaranteed charges; and

(vi) any surrender or partial withdrawal charges.

(Q) Premiums or charges for incidental insurance benefits must be stated separately.

(R) Any other contract provisions required by this subchapter.

(S) Such other items as are currently required for fixed benefit life insurance contracts and are not inconsistent with this subchapter.

(T) A provision for nonforfeiture insurance benefits. The insurer may establish either a reasonable minimum cash surrender value amount[~~,~~] or a reasonable death benefit that [~~which~~] may be purchased under any nonforfeiture option, below which any nonforfeiture option will not be available.

(U) If a flexible premium contract does not provide for a guarantee of death benefit coverage, but does provide for a "maturity date," "end date," or similar date, then the contract must also contain a statement, in close proximity to that date, that it is possible that the coverage may not continue to the maturity date even if scheduled premiums are paid in a timely manner.

(4) Contract loan provision. Every variable life contract, other than term insurance contracts and pure endowment contracts, delivered or issued for delivery in this state must contain provisions that [~~which~~] are not less favorable to the contract holders [~~contractholders~~] than the following.

(A) A provision for contract loans after the contract has been in force for one full year that [~~which~~] provides the following:

(i) at least 75% of the contract's cash surrender value may be borrowed;

(ii) the amount borrowed must bear interest at a rate not to exceed that permitted by Insurance Code Chapter 1110, concerning Interest Rates on Certain Policy Loans;

(iii) any indebtedness must be deducted from the proceeds payable on death; and

(iv) any indebtedness must be deducted from the cash surrender value upon surrender or in determining any nonforfeiture benefit.

(B) For scheduled premium contracts, whenever the indebtedness exceeds the cash surrender value, the insurer must give notice of any intent to cancel the contract if the excess indebtedness is not repaid within 31 days after the date of mailing of such notice. For flexible premium contracts, whenever the total charges authorized by the contract that are necessary to keep the contract in force until the next following contract processing day exceed the amounts available under the contract to pay such charges, a report must be sent to the contract holder [~~contractholder~~] containing the information specified by §4.1509(3) [~~§3.809(3)~~] of this title [~~(relating to Reports to Contractholders)~~].

(C) The contract may provide that if, at any time, so long as premiums are duly paid, the variable death benefit is less than it would have been if no loan or withdrawal had ever been made, the contract holder [~~contractholder~~] may increase such variable death benefit up to what it would have been if there had been no loan or withdrawal by paying an amount not exceeding 110% of the corresponding increase in cash surrender values and by furnishing such evidence of insurability as the insurer may require.

(D) The contract may specify a reasonable minimum amount that [~~which~~] may be borrowed at any time, but such minimum may not apply to any automatic premium loan provision.

(E) No contract loan provision is required if the contract is under extended insurance nonforfeiture option.

(F) The contract loan provisions must be constructed so that variable life insurance contract holders [~~contractholders~~] who have not exercised such provisions are not disadvantaged by the exercise of those provisions [~~thereof~~].

(G) Amounts paid to the contract holders [~~contractholders~~] upon the exercise of any contract loan provision must be withdrawn from the separate account and must be returned to the separate account upon repayment except that a stock insurer may provide the amounts for contract loans from the general account.

(5) Other contract provisions. The following provisions may in substance be included in a variable life contract or related form delivered or issued for delivery in this state:

(A) an exclusion for suicide within two years of the issue date of the contract, provided, however, that to the extent of the increased death benefits only, the contract may provide an exclusion for suicide within two years of any increase in death benefits that results [~~which result~~] from an application or request of the owner after [~~subsequent to~~] the contract issue date;

(B) incidental insurance benefits may be offered on a fixed or variable basis;

(C) contracts issued on a participating basis must offer to pay dividend amounts in cash. In addition, such contracts may offer the following dividend options:

(i) the amount of the dividend may be credited against premium payments;

(ii) the amount of the dividend may be applied to provide amounts of additional fixed or variable benefit life insurance;

(iii) the amount of the dividend may be deposited in the general account at a specified minimum rate of interest;

(iv) the amount of the dividend may be applied to provide paid-up amounts of fixed benefit one-year term insurance; or

(v) the amount of the dividend may be deposited as a variable deposit in the separate account or separate accounts;

(D) a provision allowing the contract holder [~~contractholder~~] to elect in writing in the application for the contract or thereafter an automatic premium loan on a basis not less favorable than that required of contract loans under paragraph (4) of this section, except that a restriction that no more than two consecutive premiums can be paid under this provision may be imposed;

(E) a provision allowing the contract holder [~~contractholder~~] to make partial withdrawals; and/or

(F) any other contract provision approved by the commissioner.

§4.1505. Reserve Liabilities for Variable Life Insurance.

(a) Reserve liabilities for variable life insurance contracts must be established under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.

(b) For scheduled premiums contracts, reserve liabilities for the guaranteed minimum death benefit must be the reserve needed to provide for the contingency of death occurring when the guaranteed minimum death benefit exceeds the death benefit that would be paid in the absence of the guarantee, and be maintained in the general account of the insurer and must not be less than the greater of the following minimum reserve:

(1) the aggregate total of the term costs, if any, covering a period of one full year from the valuation date, of the guarantee on each variable life contract, assuming an immediate one-third depreciation in the current value of the assets in the separate account followed by a net investment return equal to the assumed investment rate; or

(2) the aggregate total of the "attained age level" reserves on each variable life insurance contract. The "attained age level" reserve on each variable life insurance contract must not be less than zero and must equal the "residue," as described in subparagraph (A) of this paragraph, of the prior year's "attained age level" reserve in the contract, with any such "residue," increased or decreased by a payment computed on an attained-age basis as described in subparagraph (B) of this paragraph.

(A) The "residue" of the prior year's "attained age level" reserve on each variable life insurance contract may not be less than zero and must be determined by adding interest at the valuation interest rate to such prior year's reserve, deducting the tabular claims based on the "excess," if any, of the guaranteed minimum death benefit over the death benefit that would be payable in the absence of such guarantee, and dividing the net result by the tabular probability of survival. The "excess" referred to in the preceding sentence must be based in the actual level of death benefits that would have been in effect during the preceding year in the absence of the guarantee, taking appropriate account of the reserve assumptions regarding the distribution of death claim payments over the year.

(B) The payment referred to in this paragraph must be computed so that the present value of a level of that amount each year over the future premium paying period of the contract is equal to (i) minus (iii), where:

(i) is the present value of the future guaranteed minimum death benefits;

(ii) is the present value of the future death benefits that would be payable in the absence of such guarantee; and

(iii) is any "residue," as described in subparagraph (A) of this paragraph, of the prior year's "attained age level" reserve on such variable life insurance contract. If the contract is paid-up [~~paid up~~], the payment must equal (i) minus (ii) minus (iii). The amounts of the future death benefits referred to in clause (ii) of this paragraph must be computed assuming a net investment return of the separate account that [~~which~~] may differ from the assumed investment rate and/or the valuation interest but in no event may exceed the maximum interest rate permitted for the valuation of life contracts.

(3) The valuation interest rate and mortality table used in computing the two minimum reserves described in paragraph (2)(A) and (B) of this subsection must conform to permissible standards for the valuation of life insurance contracts. In determining such minimum reserve, the insurer may employ suitable approximations and estimates, including, but not limited to, groupings and averages.

(c) For flexible premium contracts, reserve liabilities for any guaranteed minimum death benefit must be maintained in the general account of the insurer and may not be less than the aggregate total of the term costs, if any, covering the period provided for in the guarantee not otherwise provided for by the reserves held in the separate account assuming an immediate one-third depreciation in the current value of the assets of the separate account followed by a net investment return equal to the valuation interest rate. The valuation interest rate and mortality table used in computing this additional reserve, if any, must conform to permissible standards for the valuation of life insurance contracts. In determining such minimum reserve, the insurer may employ suitable approximations and estimates, including, but not limited to, groupings and averages.

(d) Reserve liabilities for all fixed incidental insurance benefits and any guarantees associated with variable incidental insurance benefits must be maintained in the general account, and reserve liabilities for all variable aspects of the variable incidental insurance benefits must be maintained in a separate account, in amounts determined in accordance with the actuarial procedures appropriate to such benefit.

§4.1506. Separate Accounts.

The following requirements apply to the establishment and administration of variable life insurance separate accounts by any domestic insurer.

(1) Establishment of separate accounts. Any domestic life insurance company issuing variable life contracts must establish one or more separate accounts under [~~pursuant to~~] Insurance Code Chapter 1152, concerning Separate Accounts, Variable Contracts, and Related Products.

(A) If no law or other regulation provides for the custody of separate account assets and if such insurer is not the custodian of such separate account assets, all contracts for custody of such assets must be in writing and the commissioner has authority to review and

approve of both the terms of any such contract and the proposed custodian before [~~prior to~~] the transfer of custody.

(B) In connection with the handling of separate account assets, such insurer may not, without prior written approval of the commissioner, employ in any material manner any person who:

(i) within the last 10 years has been convicted of any felony or a misdemeanor arising out of such person's conduct involving embezzlement, fraudulent conversion, or misappropriation of funds or securities or involving violation of 18 United States Code §§1341, 1342, or 1343, as amended; [~~or~~]

(ii) within the last 10 years had been found by any state regulatory authority to have violated or has acknowledged violation of any provision of any state insurance law involving fraud, deceit, or knowing misrepresentation; or

(iii) within the last 10 years has been found by federal or state regulatory authorities to have violated or has acknowledged violation of any provision of federal or state laws involving fraud, deceit, or knowing misrepresentation.

(C) All persons with access to the cash, securities, or other assets allocated to or held by the separate account must be under bond in the amount of not less than $100,000.

(2) Amounts in the separate account. The insurer must maintain in each separate account assets with a value at least equal to the greater of the valuation reserves for the variable portion of the variable life insurance contracts or the benefit base for such contracts.

(3) Investments by the separate account.

(A) No sale, exchange, or other transfer of assets may be made by an insurer or any of its affiliates between any of its separate accounts or between any other investment account and one or more of its separate accounts unless:

(i) in case of a transfer into a separate account, such transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which the transfer is made; and

(ii) such transfer, whether into or from a separate account, is made by a transfer of cash; but other assets may be transferred if approved by the commissioner in advance.

(B) The separate account must have sufficient net investment income and readily marketable assets to meet anticipated withdrawals under contracts funded by the account.

(4) Limitations on ownership.

(A) A separate account may not purchase or otherwise acquire the securities of any issuer, other than securities issued or guaranteed as to principal and interest by the United States, if immediately after such purchase or acquisition the value of such investment, together with prior investment of such account in such security valued as required by these rules, would exceed 10% of the value of the assets of the separate account. Upon appropriate documentation by the company that[~~, which~~] evidences that a waiver of this limitation will not render the operation of the separate account hazardous to the public or contract holders [~~contractholders~~] in this state, the commissioner may in writing waive this limitation.

(B) No separate account may purchase or otherwise acquire the voting securities of any issuer if, as a result of such acquisition, the insurer and its separate accounts in the aggregate will own more than 10% of the total issued and outstanding voting securities of such issuer. Upon appropriate documentation by the company evidencing[~~, which evidences~~] that a waiver of this limitation will not render the operation of the separate account hazardous to the public or the contract holders [~~contractholder~~] in this state, the commissioner may in writing waive this limitation.

(C) The percentage limitations specified in subparagraph (A) of this paragraph may not be construed to preclude the investment of the assets of separate accounts in shares of investment companies registered under [~~pursuant to~~] 15 United States Code §§80b-1 - 80b-21, as amended, or other pools of investment assets if the investments and investment policies of such investment companies or asset pools comply substantially with the provisions of paragraph (3) of this section and other applicable portions of this regulation.

(5) Valuation of separate account assets. Investments of the separate account must be valued at their market value on the date of valuation, or at amortized cost if it approximates market value.

(6) Separate account investment policy. The investment policy of a separate account operated by a domestic insurer filed under §4.1503(2)(C) [~~§3.803(2)(C)~~] of this title (relating to Qualifications [~~Qualification~~] of Insurer to Issue Variable Life Insurance) may not be changed without first filing such change with the commissioner.

(A) Any change filed under [~~pursuant to~~] this paragraph will be effective 60 days after the date it was filed with the commissioner, unless the commissioner notifies the insurer before the end of such 60-day period of the commissioner's disapproval of the proposed change. At any time, the commissioner may, after notice and public hearing, disapprove any change that has become effective under [~~pursuant to~~] this paragraph.

(B) The commissioner may disapprove the change if the commissioner determines that the change would be detrimental to the interests of the contract holders [~~contractholders~~] participating in such separate accounts.

(7) Charges against separate account. The insurer must disclose in writing, before [~~prior to~~] or contemporaneously with delivery of the contract, all charges that may be made against the separate account, including, but not limited to, the following:

(A) taxes or reserves for taxes attributable to investment gains and income of the separate account;

(B) actual cost of reasonable brokerage fees and similar direct acquisition and sale costs incurred in the purchase or sale of separate account assets;

(C) actuarially determined costs of insurance (tabular costs) and the release of separate account liabilities. The tabular costs of insurance may not exceed the mortality rate for the attained age of the insured in the table specified for the calculation of cash surrender values in Insurance Code Chapter 1105, concerning Standard Nonforfeiture Law for Life Insurance, provided, for insurance issued on a substandard basis, the charge for mortality may be the mortality rate for the attained age of the insured in such other table as may be specified by the company and approved by the Texas Department of Insurance;

(D) charges for administrative expenses and investment management expenses, including internal costs attributable to the investment management of assets of the separate account;

(E) a charge, at a rate specified in the contract, for mortality and expense guarantees;

(F) any amounts in excess of those required to be held in the separate accounts; and

(G) charges for incidental insurance benefits.

(8) Standards of conduct. Every insurer seeking approval to enter into the variable life insurance business in this state must adopt by formal action of its board of directors a written statement specifying the standards of conduct of the insurer, its officers, directors, employees, and affiliates with respect to the purchase or sale of investments of separate accounts. Such standards of conduct are binding on the insurer and those to whom it refers. A code of ethics meeting the requirements of 15 United States Code §80a-17, as amended, and applicable rules and regulations adopted under that section [~~thereunder~~] satisfies the provisions of this paragraph.

(9) Conflicts of interest. Rules under any provision of the Insurance Code or any regulation applicable to the officers and directors of insurance companies with respect to conflicts of interest also apply to members of any separate account's committee or other similar body.

(10) Investment advisory services to a separate account. An insurer may not enter into a contract under which any person undertakes, for a fee, to regularly furnish investment advice to such insurer with respect to its separate accounts maintained for variable life insurance contracts unless:

(A) the person providing such advice is registered as an investment advisor under 15 United States Code §§80b-1 - 80b-21, as amended;

(B) the person providing such advice is an investment manager under 29 United States Code §1001, et seq., as amended, with respect to the assets of each employee benefit plan allocated to the separate account; or

(C) the insurer has filed with the commissioner and continues to file annually the following information and statements concerning the proposed advisor:

(i) the name and form of the organization, and its principal place of business;

(ii) the names and addresses of its partners, officers, directors, and persons performing similar functions or, if such an investment advisor be an individual, of such individual;

(iii) a written standard of conduct complying in substance with requirements of paragraph (8) of this section that [~~which~~] has been adopted by the investment advisor and is applicable to the investment advisor, its officers, directors, and affiliates; and

(iv) a statement provided by the proposed advisor as to whether the advisor or any person associated therewith:

(I) has been convicted within 10 years of any felony or misdemeanor arising out of such person's conduct as an employee, salesman, officer or director of an insurance company, a banker, an insurance agent, a securities broker, or an investment advisor involving embezzlement, fraudulent conversion, or misappropriation of funds or securities, or involving the violation of 18 United States Codes §§1341, 1342, or 1343, as amended;

(II) has been permanently or temporarily enjoined by an order, judgment, or decree of any court of competent jurisdiction from acting as an investment advisor, underwriter, broker, or dealer, or as an affiliated person or as an employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity;

(III) has been found by federal or state regulatory authorities to have willfully violated or have acknowledged willful violation of any provision of federal or state securities laws or state insurance laws or of any rule or regulation under such laws; or

(IV) has been censored, denied an investment advisor registration, had a registration as an investment advisor revoked or suspended, or been barred or suspended from being associated with an investment advisor by order of federal or state regulatory authorities; and

(D) such investment advisory contract must be in writing and provide that it may be terminated by the insurer without penalty to the insurer or the separate account upon no more than 60 days' written notice to the investment advisor. The commissioner may, after notice and opportunity for hearing, by order require such investment advisory contract to be terminated if the commissioner deems continued operation under the contract [~~thereunder~~] to be hazardous to the public or the insurer's contract holders [~~contractholders~~].

§4.1507. Information Furnished to Applicants.

An insurer delivering or issuing for delivery in this state any variable life insurance contracts must [~~shall~~] deliver to the applicant for such contract[~~,~~] and obtain a written acknowledgment of receipt from such applicant coincident with or before [~~prior to~~] the execution of the application, the following information. The requirements of this section will [~~shall~~] be deemed to have been satisfied to the extent that a disclosure containing information required by this section is delivered, either in the form of a prospectus included in the requirements of 15 United States Code §77a, et seq., that [~~which~~] was declared effective by the Securities and Exchange Commission; or all information and reports required by 29 United States Code §1001 et seq., if the policies are exempted from the registration requirements of 15 United States Code §77a, et seq.:

(1) a summary explanation in nontechnical terms, of the principal features of the contract, including a description of how [~~the manner in which~~] the variable benefits will reflect the investment experience of the separate account and the factors that [~~which~~] affect such variation. Such explanation must include notices of the provision required by §4.1504(3)(A)(v) [~~§3.804(3)(A)(v)~~] and (3)(F) of this title (relating to Insurance Contract and Filing Requirements);

(2) a statement of the investment policy of the separate account, including:

(A) a description of the investment objectives intended for the separate account and the principal types of investments intended to be made; and

(B) any restrictions or limitations on how [~~the manner in which~~] the operations of the separate account are intended to be conducted;

(3) a statement of the net investment return of the separate account for each of the last 10 years or such lesser period as the separate account has been in existence;

(4) a statement of the charges levied against the separate account during the previous year;

(5) a summary of the method to be used in valuing assets held by the separate account;

(6) a summary of the federal income tax aspects of the contract applicable to the insured, the contract holder [~~contractholder~~], and the beneficiary;

(7) illustrations of benefits payable under the variable life insurance contract. Such illustrations must [~~shall~~] be prepared by the insurer and may [~~shall~~] not include projections of past investment experience into the future or attempted predictions of future investments

experience, provided that nothing contained herein prohibits use of hypothetical assumed rates of return to illustrate possible levels of benefits if it is made clear that such assumed rates are hypothetical only.

§4.1508. Application.

The application for a variable life contract must [~~shall~~] contain:

(1) a prominent statement that the death benefit may be variable or fixed under specified conditions;

(2) a prominent statement that cash values may increase or decrease in accordance with the experience of the separate account (subject to any specified minimum guarantees); and

(3) questions designed to elicit information that [~~which~~] enables the insurer to determine the suitability of variable life insurance for the applicant.

§4.1509. Reports to Contract Holders [~~Contractholders~~].

Any insurer delivering or issuing for delivery in this state any variable life contracts must [~~shall~~] mail to each variable life insurance contract holder [~~contractholder~~] at their [~~his or her~~] last known address the following reports.

(1) Within 30 days after each anniversary of the contract, a statement or statements of the cash surrender value, death benefit, any partial withdrawal or contract loan, any interest charge, any optional payments allowed under §4.1504(4) [~~pursuant to §3.804(4)~~] of this title (relating to Insurance Contract and Filing Requirements) under the contract computed as the contract anniversary date. Provided, however, that such statement may be furnished within 30 days after a specified date in each contract year so long as the information contained in the statement [~~therein~~] is computed as of a date not more than 60 days before [~~prior to~~] the mailing of such notice. This statement must [~~shall~~] state that, in accordance with the investment experience of the separate account, the cash surrender values and the variable death benefit may increase or [~~of~~] decrease, and must [~~shall~~] prominently identify any value described in the statement that [~~therein which~~] may be recomputed before [~~prior to~~] the next statement required by this section. If the contract guarantees that the variable death benefit on the next contract anniversary date will not be less than the variable death benefit specified in such statement, the statement must [~~shall~~] be modified to so indicate. For flexible premium contracts, the report must contain a reconciliation of the change since the previous report in contract value and cash surrender value, if different, because of payments made less deduction for expense charges, withdrawals, investment experience, insurance charges, and any other charges made against the contract value. In addition, the report must show the projected contract value and cash surrender value, if different, as of one year from the end of the period covered by the report assuming that:

(A) planned periodic premiums, if any, are paid as scheduled;

(B) guaranteed costs of insurance are deducted; and

(C) the net return is equal to the assumed rate or, in the absence of an assumed rate, is not greater than zero. If the projected value is less than zero, a warning message must be included that states that the contract may be in danger of terminating without value in the next 12 months unless additional premium is paid.

(2) Annually, a statement or statements including:

(A) a summary of the financial statement of the separate account based on the annual statement last filed with the commissioner;

(B) the net investment return of the separate account for the last year and, for each year after the first, a comparison of the investment rate of the separate account during the last year with the investment rate during prior years, up to a total of not less than five years when available;

(C) a list of investments held by the separate account as of a date not earlier than the end of the last year for which an annual statement was filed with the commissioner;

(D) any charges levied against the separate account during the previous year; and

(E) a statement of any change, since the last report, in the investment objective and orientation of the separate account, in any investment restriction or material quantitative or qualitative investment requirement applicable to the separate account or in the investment advisor of the separate account.

(3) For flexible premium contracts, a report must be sent to the contract holder [~~contractholder~~] if the amounts available under the contract on any contract processing day to pay the charges authorized by the contract are less than the amount necessary to keep the contract in force until the next following contract processing day. The report must indicate the minimum payment required under the terms of the contract to keep it in force and the length of the grace period for payment of such amount.

§4.1510. Separability.

If any provision of Subchapter O [~~§§3.801-3.811~~] of this chapter [~~title~~] (relating to Life - Variable Life Insurance) or the application of such provisions [~~thereof~~] to any person or circumstance is for any reason held to be invalid, the remainder of the sections and the application of such provision to other persons or circumstances will [~~shall~~] not be affected [~~thereby~~].

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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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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SUBCHAPTER P. REQUIRED REINSTATEMENT RELATING TO MENTAL INCAPACITY OF THE INSURED FOR INDIVIDUAL LIFE POLICIES WITHOUT NONFORFEITURE BENEFITS

28 TAC §§4.1602 - 4.1606, 4.1609 - 4.1613

STATUTORY AUTHORITY. TDI proposes amendments to §§4.1602 - 4.1606 and 4.1609 - 4.1613 under Insurance Code §1106.010 and §36.001.

Insurance Code §1106.010 provides the commissioner adopt reasonable rules to implement Insurance Code Chapter 1106.

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. Subchapter P affects Insurance Code §1106.009.

§4.1602. Applicability.

This subchapter applies to all individual life policies that [~~, which~~] do not provide nonforfeiture benefits issued to Texas residents by insurers licensed in this state, including stipulated premium companies and fraternal benefit societies, that [~~which~~] lapse due to the mental incapacity of the insured[~~,~~] and that [~~which~~] qualify for reinstatement under the eligibility requirements set forth in §4.1605 [~~§3.905~~] of this title (relating to Eligibility Requirements).

§4.1603. Severability.

Where any term or section of this subchapter is determined by a court of competent jurisdiction to be inconsistent with the statutes of this state or to be unconstitutional, the remaining terms and provisions of this subchapter [~~shall~~] remain in effect.

§4.1604. Definitions.

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

(1) Commissioner--The commissioner of insurance [~~Commissioner of Insurance~~].

(2) Department--The Texas Department of Insurance.

(3) Insured--The person whose life is insured under the policy. For purposes of this subchapter, the insured is the owner, unless the insured and owner are different parties as set forth in the policy.

(4) Mental incapacity [~~Incapacity~~]--Lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a decision regarding failure to pay a premium when due and the ability to reach an informed decision in the matter.

(5) Owner--The person who has all the rights and all the responsibilities of the policy.

(6) Policyholder--The owner of the policy.

(7) Proof of mental incapacity--The clinical diagnosis of a physician licensed in this state and qualified to make the diagnosis.

§4.1605. Eligibility Requirements.

An eligible policy that is subject to this subchapter must [~~shall~~] be reinstated, without evidence of insurability, on payment of past due premiums and interest if it meets the following requirements [~~set forth in paragraphs (1) - (4) of this subsection~~]:

(1) it has been in force continuously for at least five years immediately before [~~prior to~~] the date of lapse;

(2) all premiums have been paid during such period, or within the grace period;

(3) there is a subsequent unintentional default in premium payments caused by the mental incapacity of the insured; and

(4) proof and request for reinstatement are submitted within one year from the date of lapse.

§4.1606. Payment of Past Due Premiums.

The insurer may require, as a condition of reinstatement, payment of past due premiums, plus interest at a rate not to exceed 6.0% per year [~~annum~~].

§4.1609. Notification and Disclosure Requirements.

(a) The insurer is required to send notice of the conditions set forth in this subchapter under which the policy may qualify for reinstatement due to the mental incapacity of the insured. The notice must be sent to the owner of any individual life policy that [~~which~~] does not provide nonforfeiture benefits if the policy is in force, renewed, or issued on or after September 1, 1995. The notice required to be provided by this subsection must be provided within 90 days following lapse of an eligible policy.

(b) For all policies issued on or after September 1, 1995, disclosure of the conditions set forth in this subchapter under which the policy may qualify for reinstatement due to the mental incapacity of the insured may be made by incorporating the language of §4.1613 [~~§3.913~~] of this title (relating to Notice and Disclosure Form), either in the policy or in an endorsement attached to the policy, in lieu of the notice requirements set forth in subsection (a) of this section.

(c) The notice required to be provided by this subsection will be deemed to be in compliance if mailed by first class mail to the last known address of the policyholder or if contained in the policy or included as an endorsement to the policy [~~thereto~~].

(d) The notice required by this subsection must be provided in the form set forth in §4.1613 [~~§3.913~~] of this title [~~(relating to Notice and Disclosure Form)~~].

§4.1610. Reinstatement Procedures.

(a) The insurer must [~~shall~~] accept a request for reinstatement and proof of mental incapacity that is filed by:

(1) the insured, or the owner, if the insured and owner are not the same party;

(2) the legal guardian of the insured;

(3) other legal representative of the insured; or

(4) the legal representative of the estate of the insured.

(b) Proof of mental incapacity and the request for reinstatement must be submitted within one year after the date of lapse of the policy.

§4.1611. Reduced Benefits.

The insurer must [~~shall~~] pay the death benefit under an eligible policy if the insured dies within one year of the date of lapse and the requirements for submitting proof of mental incapacity and request for reinstatement are met. The insurer must [~~shall~~] reduce the death benefit under a policy that is eligible for reinstatement under this subchapter by the amount of premiums due and unpaid on the date of death, plus interest on such premiums at the reinstatement interest rate, if there is an uncontroverted claim for benefits that exceeds the amount of premiums and interest owed.

§4.1612. Form Filing Procedures.

(a) For all new forms subject to this subchapter filed on or after September 1, 1995, the insurer must include with the form filing written notification to the department specifying the method of notification as set forth in §4.1609 [~~§3.909~~] of this title (relating to Notification and Disclosure Requirements) by which the notice requirements of §4.1613 [~~§3.913~~] of this title (relating to Notice and Disclosure Form) will be met.

(b) For all forms subject to this subchapter approved or filed before September 1, 1995, the insurer must submit to the department a certification, signed by an officer of the company, specifying the method or methods of notification as set forth in §4.1609 [~~§3.909~~] of this title [~~(relating to Notification and Disclosure Requirements)~~]

by which the notice requirements of §4.1613 [§3.913] of this title [(relating to Notice and Disclosure Form)] will be met.

(c) All policies and endorsements are subject to the filing requirements of Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings) [chapter (relating to Requirements for Filing of Policy Forms, Riders, Amendments, and Endorsements for Life, Accident, and Health Insurance and Annuities)].

§4.1613. Notice and Disclosure Form.

(a) If the elected method of compliance is notification to all existing policyholders as described in §4.1609(b) [§3.902(a)(2)] of this title (relating to Notification and Disclosure Requirements), the notice required by this subchapter must [shall] be provided in the following manner:

Figure: 28 TAC §4.1613(a)

[Figure: 28 TAC §3.913(a)]

(b) If the elected method of compliance is notification within 90 days following the lapse of an eligible policy as described in §4.1609(a) [§3.909(a)(1)] of this title [(relating to Notification and Disclosure Requirements)], the notice required by this subchapter must [shall] be provided in the following manner:

Figure: 28 TAC §4.1613(b)

[Figure: 28 TAC §3.913(b)]

(c) If the elected method of compliance is incorporating the language of this section in the policy or in an endorsement, the insurer may incorporate the text of subsection (a) of this section, omitting the titles referencing "Notice" and substituting an appropriate prominent title, such as "Reinstatement Due to the Mental Incapacity of the Insured."

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

Filed with the Office of the Secretary of State on September 8, 2023.

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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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SUBCHAPTER Q. NONFORFEITURE STANDARDS FOR INDIVIDUAL LIFE INSURANCE IN EMPLOYER PENSION PLANS

28 TAC §§4.1702 - 4.1707

STATUTORY AUTHORITY. TDI proposes amendments to §§4.1702 - 4.1707 under Insurance Code §§36.004, 541.057, 541.401, 1105.055(h), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §541.057 prohibits unfair discrimination in the rates, dividends, or any other contract terms and conditions for individuals of the same class and life expectancy in life insurance and annuity contracts.

Insurance Code §541.401 provides that the commissioner may adopt and enforce reasonable rules necessary to accomplish the purposes of Insurance Code Chapter 541.

Insurance Code §1105.055(h) specifies that the commissioner may adopt by rule any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners.

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. Subchapter Q affects Insurance Code Chapters 425, 541, 543, and 1105.

§4.1702. Definitions.

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

(1) 1980 CET Table--That mortality table consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 National Association of Insurance Commissioners (NAIC) amendments to the Model Standard Valuation Law and Standard Nonforfeiture Law for Life Insurance, and referred to in those models as the Commissioners 1980 Extended Term Insurance Table.

(2) 1980 CET Table (F)--That mortality table consisting of the rates of mortality for female lives from the 1980 CET Table.

(3) 1908 CET Table (M)--That mortality table consisting of the rates of mortality for male lives from the 1980 CET Table.

(4) 1980 CSO Table, with or without Ten-Year Select Mortality Factors--That mortality table, consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 NAIC amendments to the Model Standard Valuation Law and Standard Nonforfeiture Law for Life Insurance, and referred to in those models as the Commissioners 1980 Standard Ordinary Mortality Table, with or without Ten-Year Select Mortality Factors.

(5) 1980 CSO Table (F), with or without Ten-Year Select Mortality Factors--That mortality table consisting of the rates of mortality for female lives from the 1980 CSO Table, with or without Ten-Year Select Mortality Factors.

(6) 1980 CSO Table (M), with or without Ten-Year Select Mortality Factors--That mortality table consisting of the rates of mortality for male lives from the 1980 CSO Table, with or without Ten-Year Select Mortality Factors.

(7) 1980 CSO and 1980 CET smoker and nonsmoker mortality tables--The mortality tables derived from the 1980 CSO and 1980 CET mortality tables by the Society of Actuaries Task Force on Smoker/Nonsmoker Mortality and adopted by the NAIC [National Association of Insurance Commissioners] in December 1983.

(8) *Norris* [Norris] decision--The decision of the United States Supreme Court in the case of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris* [Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris], 463 U.S. 1073 (1983).

§4.1703. Standard.

(a) For any policy of insurance on the life of either a male or female insured, delivered, or issued for delivery in this state after the operative date of former Insurance Code Article 3.44a, §8 (recodified in Insurance Code Chapter 1105, Subchapter B, [~~§§1105.051 - 1105.057~~] concerning Computation of Adjusted Premiums Using Nonforfeiture Net Level Premium Method), and before January 1, 2017, for that policy form, the following tables described in paragraphs (1) and (2) of this subsection may be used as specified in subsection (b) of this section in determining minimum cash surrender values, amounts of paid-up [~~paid up~~] nonforfeiture benefits, or benefits under extended term insurance provisions included in the policy. For policies issued on or after January 1, 2017, the valuation manual, adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, provides the tables to be used.

(1) A mortality table that [~~which~~] is a blend of the 1980 CSO Table (M) and 1980 CSO Table (F), with or without Ten-Year Select Mortality Factors, may, at the option of the company, be substituted for the 1980 CSO Table, with or without Ten-Year Select Mortality Factors.

(2) A mortality table that [~~which~~] is of the same blend as used in paragraph (1) of this subsection, but applied to form a blend of the 1980 CET Table (M) and the 1980 CET Table (F), may, at the option of the company, be substituted for the 1980 CET Table.

(b) The following tables are to be considered as the basis for acceptable tables:

(1) 100% male, 0% female for tables to be designated as the "1980 CSO-A" and "1980 CET-A" Tables;

(2) 80% male, 20% female for tables to be designated as the "1980 CSO-B" and "1980 CET-B" Tables;

(3) 60% male, 40% female for tables to be designated as the "1980 CSO-C" and "1980 CET-C" Tables;

(4) 50% male, 50% female for tables to be designated as the "1980 CSO-D" and "1980 CET-D" Tables;

(5) 40% male, 60% female for tables to be designated as the "1980 CSO-E" and "1980 CET-E" Tables;

(6) 20% male, 80% female for tables to be designated as the "1980 CSO-F" and "1980 CET-F" Tables; and

(7) 0% male, 100% female for tables to be designated as the "1980 CSO-G" and "1980 CET-G" Tables.

(c) Values of 1,000 qx for the blended tables as specified in subsection (b)(2) - (6) of this section can be found in "Proceedings of the NAIC," Volume 1, 1984, pages 396 - 400. "Proceedings of the NAIC," Volume 1, 1984, page 457, shows the method by which ten-year select mortality factors may be obtained. The tables specified in subsection (b)(1) of this section are the same as the 1980 CSO Table (M) or the 1980 CET Table (M), as applicable. The tables specified in subsection (b)(7) of this section are the same as the 1980 CSO Table (F) or the 1980 CET Table (F), as applicable. The tables specified in subsection (b)(2) - (6) of this section are adopted [~~herein~~] by reference. Copies of those tables may be obtained by contacting Life and Health Division, Life and Health Actuarial, MC: LH-ACT, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Life and Health Actuarial, MC-LH-ACT, P.O. Box 12030, Austin, Texas 78711-2030~~]. The tables in subsection (b)(1) and (7) of this section are already adopted by statutory law under alternate names.

(d) The tables specified in subsection (b)(1) and (7) of this section may not be used with respect to policies issued on or after January 1, 1985, except where the proportion of persons insured is anticipated to be 90% or more of one sex or the other or except for certain policies converted from group insurance. Such group conversions issued on or after January 1, 1986, must use mortality tables based on the blend of lives by sex expected for such policies if such group conversions are considered as extensions of the decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) [~~103 S. Ct. 3492 (1983)~~]. This consideration has not been clearly defined by court or legislative action in all jurisdictions, as of the date of promulgation of this section.

(e) Notwithstanding any other provision of this subchapter, an insurer may not use these blended tables unless the *Norris* decision is known to apply to the policies involved, or unless there exists a bona fide concern on the part of the insurer that the *Norris* decision might reasonably be construed to apply by a court having jurisdiction.

§4.1704. Alternate Rule.

(a) In determining minimum cash surrender value and amounts of paid-up nonforfeiture benefits for any policy of insurance on either a male or a female insured on a form of insurance with separate rates for smokers and nonsmokers delivered or issued for delivery in this state after the operative date of former Insurance Code Article 3.44a, §8 (recodified in Insurance Code Chapter 1105, Subchapter B, [~~§§1105.051 - 1105.057~~] concerning Computation of Adjusted Premiums Using Nonforfeiture Net Level Premium Method), and before January 1, 2017, for that policy form, in addition to the mortality tables that may be used according to §4.1703 [~~§3.1303~~] of this title (relating to Standard), the tables in paragraphs (1) and (2) of this subsection may be used. For policies issued on or after January 1, 2017, the valuation manual, adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, provides the tables to be used.

(1) A mortality table that [~~which~~] is a blend of the male and female rates of mortality according to the 1980 CSO Smoker Mortality Table, in the case of lives classified as smokers, or the 1980 CSO Nonsmoker Mortality Table, in the case of lives classified as nonsmokers, with or without 10-year select mortality factors, may, at the option of the company, be substituted for the 1908 CSO Table, with or without 10-year select mortality factors.

(2) A mortality table that [~~which~~] is of the same blend as used in paragraph (1) of this subsection but applied to form a blend of the male and female rates of mortality according to the corresponding 1980 CET Smoker Mortality Table or 1980 CET Nonsmoker Mortality Table or 1980 CET Nonsmoker Mortality Table may, at the option of the company, be substituted for the 1980 CET Table.

(b) The following blended mortality tables are considered as the basis for acceptable tables according to subsection (a) of this section:

(1) 100% male, 0% female for smoker tables to be designated as the 1980 CSO-SA and 1980 CET-SA Tables;

(2) 80% male, 20% female for smoker tables to be designated as the 1980 CSO-SB and 1980 CET-SB Tables;

(3) 60% male, 40% female for smoker tables to be designated as the 1980 CSO-SC and 1980 CET-SC Tables;

(4) 50% male, 50% female for smoker tables to be designated as the 1980 CSO-SD and 1980 CET-SD Tables;

(5) 40% male, 60% female for smoker tables to be designated as the 1980 CSO-SE and 1980 CET-SE Tables;

(6) 20% male, 80% female for smoker tables to be designated as the 1980 CSO-SF and 1980 CET-SF Tables;

(7) 0% male, 100% female for smoker tables to be designated as the 1980 CSO-SG and 1980 CET-SG Tables;

(8) 100% male, 0% female for nonsmoker tables to be designated as the 1980 CSO-NA and 1980 CET-NA Tables;

(9) 80% male, 20% female for nonsmoker tables to be designated as the 1980 CSO-NB and 1980 CET-NB Tables;

(10) 60% male, 40% female for nonsmoker tables to be designated as the 1980 CSO-NC and 1980 CET-NC Tables;

(11) 50% male, 50% female for nonsmoker tables to be designated as the 1980 CSO-ND and CET-ND Tables;

(12) 40% male, 60% female for nonsmoker tables to be designated as the 1980 CSO-NE and 1980 CET-NE Tables;

(13) 20% male, 80% female for nonsmoker tables to be designated as the 1980 CSO-NF and 1980 CET-NF Tables; and

(14) 0% male, 100% female for nonsmoker tables to be designated as the 1980 CSO-NG and 1980 CET-NG Tables.

(c) The Texas Department of Insurance adopts and incorporates into this subchapter by reference the tables to which subsection (b) of this section refers as tables to be used in conjunction with the section adopted under this subchapter. Copies of these tables can be obtained from the Life and Health Division, Life and Health Actuarial, MC: LH-ACT, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Life and Health Actuarial, MC-LH-ACT, P.O. Box 12030, Austin, Texas 78711-2030~~].

(d) The tables specified in subsection (b)(1), (7), (8), and (14) of this section may not be used except where the proportion of persons insured is anticipated to be 90% or more of one sex or the other.

(e) Notwithstanding any other provision of this subchapter, an insurer may not use the blended mortality tables in subsection (b) of this section unless the *Norris* decision is known to apply to the policies involved, or unless there exists a bona fide concern on the part of the insurer that the *Norris* decision might reasonably be construed to apply by a court having jurisdiction.

§4.1705. Unfair Discrimination.

It is not a violation of Insurance Code §541.057, concerning Unfair Discrimination in Life Insurance and Annuity Contracts, for an insurer to issue the same kind of policy of life insurance on both a sex-distinct and sex-neutral basis, as permitted by this subchapter.

§4.1706. Severability.

If any provision of these sections or the application of these provisions [~~thereof~~] to any person or circumstance is for any reason held to be invalid, the remainder of the provisions of this subchapter and the application of such provisions to other persons or circumstances will [~~shall~~] not be affected [~~thereby~~].

§4.1707. 2001 CSO Mortality Table.

The 2001 CSO Mortality Table must [~~shall~~] be used for purposes of this subchapter under [~~pursuant to~~] the requirements of Subchapter AA, Division 3 [~~§§3.9101 - 3.9106~~] of this chapter [~~title~~] (relating to 2001 CSO Mortality Table).

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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Texas Department of Insurance
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SUBCHAPTER U. VARIABLE ANNUITIES

28 TAC §§4.2102 - 4.2106

STATUTORY AUTHORITY. TDI proposes amendments to §§4.2102 - 4.2106 under Insurance Code §§1152.002, 1152.101, and 36.001.

Insurance Code §1152.002 specifies that the commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement Insurance Code Chapter 1152, including rules establishing requirements for agent licensing, standard policy provisions, and disclosure.

Insurance Code §1152.101 states that the commissioner has sole authority to regulate the issuance and sale of a variable contract under Insurance Code Chapter 1152 and rules adopted under Insurance Code §1152.002.

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. Subchapter U affects Insurance Code §1152.002 and §1152.101.

§4.2102. Definitions.

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

(1) Agent--Any person, corporation, partnership, or other legal entity that [~~which~~] is licensed as a life insurance agent.

(2) Commissioner--The commissioner of insurance of this state.

(3) Flexible premium contract--Any variable annuity contract other than a scheduled premium variable annuity contract.

(4) General account--All assets of the insurer other than assets in separate accounts established under [~~pursuant to~~] Insurance Code Chapter 1152, concerning Separate Accounts, Variable Contracts, and Related Products, or under [~~pursuant to~~] the corresponding section of the insurance laws of the state of domicile of a foreign or alien insurer, whether or not for variable annuities.

(5) Net investment return--The rate of investment return to be credited to the variable annuity contract in accordance with the terms of the contract after deductions for tax charges, if any, and for asset charges either at a rate not in excess of that stated in the contract, or in the case of a contract issued by a nonprofit corporation under which the contract holder [~~contractholder~~] participates fully in the investment, mortality, and expense experience of the account, in an amount not in excess of the actual expense not offset by other deductions. The net investment return to be credited to a contract must be determined at least monthly.

(6) Scheduled premium contract--Any variable contract under which both the timing and amount of premium payments are fixed.

(7) Separate account--A separate account established under [~~pursuant to~~] Insurance Code Chapter 1152, or under [~~pursuant to~~] the corresponding section of the insurance laws of the state of domicile of a foreign or alien insurer.

(8) Variable annuity contract--Any individual annuity contract or group annuity contract or certificate issued in connection with a group annuity master contract that [~~which~~] provides for benefits that [~~which~~] vary according to the investment experience of a separate account established and maintained by the insurer as to such contract, under [~~pursuant to~~] Insurance Code Chapter 1152. Annuity benefits may be payable in fixed or variable amounts or both.

§4.2103. Qualifications of Insurer to [~~To~~] Issue Variable Annuities.

The following requirements are applicable to all insurers either seeking authority to issue variable annuities in this state or having the authority to issue variable annuity products in this state.

(1) Licensing and approval to do business in this state. An insurer may [~~shall~~] not deliver or issue for delivery in this state any variable annuity unless:

(A) the insurer is licensed or organized to do a life insurance business in this state; and

(B) after notice and hearing, the commissioner has authorized, either as part of the insurer's original certificate of authority or by charter amendment, the insurer to issue, deliver, and use variable annuity contracts, and only after the commissioner [~~he or she~~] has considered, among other things, the following:

(i) whether the plan of operation for the issuance of variable annuity contracts is sound;

(ii) whether the general character, reputation, and experience of the management and those persons or firms proposed to supply consulting, investment, administrative, or custodial services to the insurer are such as to reasonably assure competent operation of the variable annuity business of the insurer in this state; and

(iii) whether the present and foreseeable future financial condition of the insurer and its method of operation in connection with the issuance of such contracts is likely to render its operation hazardous to the public or its contract holders in this state. The commissioner will [~~shall~~] consider, among other things:

(I) the history of operation and financial condition of the insurer;

(II) the qualifications, fitness, character, responsibility, reputation, and experience of the officers and directors and other management of the insurer and those persons or firms proposed to supply consulting, investment, administrative, or custodial services to the insurer;

(III) the applicable law and regulations under which the insurer is authorized in its state of domicile to issue variable annuity contracts. The state of entry of an alien insurer will [~~shall~~] be deemed its state of domicile for this purpose; and

(IV) if the insurer is a subsidiary of[~~,~~] or is affiliated by common management or ownership with another company, its relationship to such other company, and the degree to which the requesting insurer, as well as the other company, meets the standards specified in this subparagraph.

(2) Filing for approval to do business in this state. Before any insurer may [~~shall~~] deliver or issue for delivery any variable annuity contract in this state, it must file with the Department of Insurance [~~State Board of Insurance~~] the following information and any other information specifically requested, for the consideration of the commissioner, on making the determination required by paragraph (1)(B) of this section:

(A) copies of and a general description of the variable annuity contracts it intends to issue;

(B) a general description of the methods of operation of the variable annuity business of the insurer, including methods of distribution of contracts and the names of those persons or firms proposed to supply consulting, investment, administrative, custodial, or distributive services to the insurer;

(C) with respect to any separate account maintained by an insurer for any variable annuity, a statement of the investment policy the insurer intends to follow for the investment of the assets held in such separate account, and a statement of procedures for changing such investment policy. The statement of investment policy must [~~shall~~] include a description of the investment objectives intended for the separate account;

(D) a description of any investment advisory services contemplated as required by §4.2104 [~~§3.704~~] of this title (relating to Separate Accounts);

(E) a copy of the statutes and regulations of the state of domicile of a foreign or alien insurer under which it is authorized to issue variable annuity contracts;

(F) biographical data not previously filed with the commissioner with respect to officers and directors of the insurer on the appropriate biographical form used in Texas; and

(G) a statement of the insurer's actuary describing the mortality and expense risks that [~~which~~] the insurer will bear under the contract.

§4.2104. Separate Accounts.

(a) Establishment of separate account. Any domestic life insurance company issuing variable annuity contracts must establish one or more separate accounts under [~~pursuant to~~] Insurance Code Chapter 1152, concerning Separate Accounts, Variable Contracts, and Related Products.

(1) If no law or other regulation provides for the custody of separate account assets, and if such insurer is not the custodian of such separate account assets, all contracts for custody of such assets must be in writing, and the commissioner has authority to review and disapprove both the terms of any such contract and the proposed custodian before [~~prior to~~] the transfer of custody.

(2) In connection with the handling of separate account assets, such insurer may not, without prior written approval of the commissioner, employ in any material manner any person who:

(A) within the last 10 years has been convicted of any felony or a misdemeanor arising out of such person's conduct involving embezzlement, fraudulent conversion, or misappropriation of funds or securities or involving violation of 18 United States Code §§1341, 1342, or 1343, as amended; [~~or~~]

(B) within the last 10 years has been found by any state regulatory authority to have violated or has acknowledged violation of any provision of any state insurance law involving fraud, deceit, or knowing misrepresentation; or

(C) within the last 10 years has been found by federal or state regulatory authorities to have violated or has acknowledged violation of any provision of federal or state laws involving fraud, deceit, or knowing misrepresentation.

(3) All persons with access to the cash, securities, or other assets allocated to or held by the separate account must be under bond in the amount of not less than $100,000.

(b) Amounts in the separate account. The insurer must maintain in each separate account assets with a value at least equal to the valuation reserves for the variable portion of the variable annuity insurance contracts and other contractual liabilities.

(c) Investments by the separate account. No sale, exchange, or other transfer of assets may be made by an insurer or any of its affiliates between any of its separate accounts or between any other investment account and one or more of its separate accounts, unless:

(1) in case of a transfer into a separate account, such transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which the transfer is made; and

(2) such transfer, whether into or from a separate account, is made by a transfer of cash; but other assets may be transferred if approved by the commissioner in advance.

(d) Limitations on ownership.

(1) A separate account may not purchase or otherwise acquire the securities of any issuer, other than securities issued or guaranteed as to principal and interest by the United States, if immediately after such purchase or acquisition the value of such investment, together with prior investments of such account in such security valued as required by this subchapter, would exceed 10% of the value of the assets of the separate account. Upon appropriate documentation by the company, which evidences that a waiver of this limitation will not render the operation of the separate account hazardous to the public or the contract holders [~~contractholders~~] in this state, the commissioner may in writing waive this limitation.

(2) No separate account may purchase or otherwise acquire the voting securities of any issuer if, as a result of such acquisition, the insurer and its separate accounts in the aggregate will own more than 10% of the total issued and outstanding voting securities of such issuer. Upon appropriate documentation by the company, which evidences that a waiver of this limitation will not render the operation of the separate account hazardous to the public or the contract holders [~~contractholders~~] in this state, the commissioner may in writing waive this limitation.

(3) The percentage limitation specified in paragraph (1) of this subsection may not be construed to preclude the investment of the assets of separate accounts in shares of investment companies registered under [~~pursuant to~~] 15 United States Code §§80b-1 to 80b-21, as amended, or other pools of investment assets if the investments and investment policies of such investment companies or asset pools comply substantially with the provisions of subsection (c) of this section and other applicable portions of this regulation.

(e) Valuation of separate account assets. Investments of the separate account must be valued at their market value on the date of valuation, or at amortized cost if it approximates market value.

(f) Separate account investment policy. The investment policy of a separate account operated by a domestic insurer filed under §4.2103(2)(C) [~~§3.703(2)(c)~~] of this title (relating to Qualifications of Insurer to [~~To~~] Issue Variable Annuities) may not be changed without first filing such change with the commissioner.

(1) Any change filed under [~~pursuant to~~] this subsection will be effective 60 days after the date it was filed with the commissioner, unless the commissioner notifies the insurer before the end of such 60-day period of disapproval of the proposed change. At any time, the commissioner may, after notice and public hearing, disapprove any change that has become effective under [~~pursuant to~~] this subsection.

(2) The commissioner may disapprove the change if the commissioner determines that the change would be detrimental to the interest of the contract holders [~~contractholders~~] participating in such separate account.

(g) Charges against separate accounts. The insurer must disclose in writing, before [~~prior to~~] or contemporaneously with delivery of the contract, all charges that may be made against the separate account, including, but not limited to, the following:

(1) taxes or reserves for taxes attributable to investment gains and income of the separate account;

(2) actual cost of reasonable brokerage fees and similar direct acquisition and sale costs incurred in the purchase or sale of separate account assets;

(3) charges for administrative expenses and investment management expenses, including internal costs attributable to the investment management of assets of the separate account;

(4) a charge, at a rate specified in the policy, for any mortality and expense guarantees;

(5) any amounts in excess of those required to be held in the separate account; and

(6) charges for incidental insurance benefits.

(h) Standards of conduct. Every insurer seeking approval to enter into the variable annuity business in this state must adopt by formal action of its board of directors a written statement specifying the standards of conduct of the insurer, its officers, directors, employees, and affiliates with respect to the purchase or sale of investments of separate accounts. Such standards of conduct are binding on the insurer and those to whom it refers. A code of ethics meeting the requirements of 15 United States Code §80a-17, as amended, and applicable rules and regulations adopted under that section [~~thereunder~~] will satisfy the provisions of this subsection.

(i) Conflicts of interest. Rules adopted under any provisions of the Insurance Code or any regulation applicable to the officers and directors of insurance companies with respect to conflicts of interests also apply to members of any separate account's committee or other similar body.

(j) Investment advisory services to a separate account. An insurer may not enter into a contract under which any person undertakes, for a fee, to regularly furnish investment advice to such insurer with respect to its separate accounts maintained for variable annuity contracts unless:

(1) the person providing such advice is registered as an investment advisor under 15 United States Code §§80b-1 to 80b-21, as amended; [~~or~~]

(2) the person providing such advice is an investment manager under 29 United States Code §1001, et seq., as amended, with respect to the assets of each employee benefit plan allocated to the separate account; or

(3) the insurer has filed with the commissioner and continues to file annually the following information and statements concerning the proposed advisor:

(A) the name and form of organization, and its principal place of business;

(B) the names and addresses of its partners, officers, directors, and persons performing similar functions or, if such an investment advisor be an individual, the name and address of such individual;

(C) a written standard of conduct complying in substance with the requirements of subsection (h) of this section that [~~which~~] has been adopted by the investment advisor and is applicable to the investment advisor, its officers, directors, and affiliates; and

(D) a statement provided by the proposed advisor as to whether the advisor or any person associated therewith:

(i) has been convicted within 10 years of any felony or misdemeanor arising out of such person's conduct as an employee, salesman, officer, or director of an insurance company, a banker, an insurance agent, a securities broker, or an investment advisor involving embezzlement, fraudulent conversion, or misappropriation of funds or securities, or involving the violation of 18 United States Code §§1341, 1342, or 1343;

(ii) has been permanently or temporarily enjoined by an order, judgment, or decree of any court of competent jurisdiction from acting as an investment advisor, underwriter, broker, or dealer, or as an affiliated person or as an employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity;

(iii) has been found by federal or state regulatory authorities to have willfully violated or have acknowledged willful violation of any provision of federal or state securities laws or state insurance laws or of any rule or regulation under such laws; or

(iv) has been censored, denied an investment advisor registration, had a registration as an investment advisor revoked or suspended, or been barred or suspended from being associated with an investment advisor by order of federal or state regulatory authorities; and

(4) such investment advisory contract must be in writing and provide that it is subject to review and termination by the commissioner at any time, and that it may be terminated by the insurer without penalty to the insurer or the separate account upon no more than 60 days' written notice to the investment advisor. The commissioner may, after notice and opportunity for hearing, by order require such investment advisory contract to be terminated if the commissioner deems continued operation under the contract [~~thereunder~~] to be hazardous to the public or the insurer's contract holders [~~contractholders~~].

§4.2105. Contract Requirements.

Variable annuity contracts must conform to the requirements of this section in order to obtain the commissioner's approval.

(1) Filing of variable annuity contracts. All variable annuity contracts, all riders, endorsements, applications, and other documents that [~~which~~] are attached to and made a part of the contract and that [~~which~~] relate to the variable nature of the contract, must [~~shall~~] be filed with the commissioner and approved, as applicable, by the commissioner before [~~him or her prior to~~] delivery or issuance for delivery in this state.

(A) Each variable annuity contract and related forms must [~~shall~~] be filed according to Chapter 3, Subchapter A [~~(Board Order 40701)~~] of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings) [~~chapter (relating to Preparation and Submission of Individual Life Insurance and Annuity Forms)~~].

(B) The commissioner may approve variable annuity contracts and related forms with provisions the commissioner deems to be not less favorable to the contract holder, certificate holder, and the beneficiary than those required by these sections.

(2) Mandatory contract provisions. Every variable annuity contract must [~~shall~~] contain at least the following.

(A) The cover page or page corresponding to the cover page of each contract must [~~shall~~] contain:

(i) a prominent statement that the benefits under the contract are on a variable basis; and

(ii) a prominent statement that the dollar amounts will vary to reflect the investment experience of a separate account or separate accounts.

(B) A full description of the investment increment factors to be used in computing dollar amounts of variable benefits or variable contractual payments of values [~~thereunder~~], and may guarantee that expense and/or mortality results will [~~shall~~] not adversely affect such dollar amounts. In the case of an individual variable annuity contract under which the expense and mortality results may adversely affect the dollar amount of benefits, the expense and mortality factors must [~~shall~~] be stipulated in the contract. In computing the dollar amount of variable benefits or other contractual payments or values under an individual variable annuity contract:

(i) the annual net investment increment assumption may [~~shall~~] not exceed 5.0% except with the approval of the commissioner;

(ii) to the extent that the level of benefits may be affected by future mortality results, the mortality factor must [~~shall~~] be determined from the Annuity Mortality Table for 1949, Ultimate, or any modification of that table not having a higher mortality rate at any age, or, if approved by the commissioner, from another table.

(C) A provision designating the separate account to be used and stating that the portion of the assets of any such separate account equal to the reserves and other contract liabilities with respect to such account may [~~shall~~] not be chargeable with liabilities arising out of any other business the company may conduct.

(D) As appropriate, a provision for a grace period.

(i) For individual variable annuities that [~~which~~] provide for the payment of periodic stipulated payments, a grace period of 31 days within which any stipulated payment to the insurer falling due after the first may be made, during which period of grace the contract must [~~shall~~] continue in force. The contract may include a statement of the basis for determining the date that [~~as of which~~] any such payment received during the period of grace will [~~shall~~] be applied to produce the values under the contract arising therefrom.

(ii) For group variable annuities, a provision that the contract holder [~~contractholder~~] or premium payor is entitled to a grace period of 31 days for the payment of any premium due except the first, during which grace period the contract must [~~shall~~] continue in force, unless the contract holder [~~contractholder~~] or premium payor has [~~shall have~~] given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the contract. The contract may provide that the contract holder [~~contractholder~~] or premium payor will [~~shall~~] be liable to the insurer for the payment of pro rata premium for the time the contract was in force during such grace period.

(E) A provision that, at any time within two years from the date of default in making periodic stipulated payments to the insurer

during the life of the annuitant and unless the cash surrender value has been paid, the contract may be reinstated upon payment to the insurer of such overdue payments as required by contract, and of all indebtedness to the insurer on the contract, including interest. The contract may include a statement of the basis for determining the date that [~~as of which~~] the amount to cover such overdue payments and any indebtedness will [~~shall~~] be applied to produce the values under the contract arising therefrom.

(F) A unique definition of any cash surrender values available under the contract.

(G) A provision for nonforfeiture benefits as defined in paragraph (3) of this section.

(H) A provision defining the documents that [~~which~~] make up the entire contract.

(I) An identification of the owner of the contract.

(J) A provision stating that the company must [~~shall~~] mail to the individual contract holder [~~contractholder~~] or group contract holder [~~contractholder~~] at least once each year after the first at the contract holder's [~~his or her~~] last address known to the company a statement reporting the investments held in the separate account.

(K) For individual variable annuities, a provision that the company must [~~shall~~] mail to the contract holder [~~contractholder~~] at least once in each contract year, after the first at the contract holder's [~~his or her~~] last address known to the company, a statement reporting the status of the policy as of a date not more than four months before [~~previous to~~] the date of mailing. In the case of an annuity contract under which payments have not yet commenced, the statement must [~~shall~~] contain:

(i) the number of accumulation units credited to such contract and the dollar value of a unit; or

(ii) the value of the contract holder's account.

(3) Reserves and nonforfeiture benefits.

(A) The reserve liability for variable annuities must [~~shall~~] be established under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law [~~pursuant to the Insurance Code, Article 3.28~~], in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.

(B) The provisions of this paragraph relating to nonforfeiture benefits do [~~shall~~] not apply to any:

(i) reinsurance;

(ii) group annuity contract purchases in connection with one or more retirement plan or plans of deferred compensation established or maintained by or for one or more employers (including partnerships or sole proprietorships), employee organizations, or any combination thereof, or other plans providing individual retirement accounts or individual retirement annuities under [~~the~~] Internal Revenue Code[~~,~~] §408, as now or hereafter amended;

(iii) premium deposit fund;

(iv) investment annuity;

(v) immediate annuity;

(vi) deferred annuity contract after annuity payments have commenced;

(vii) reversionary annuity; or

(viii) to any contract that [~~which~~] is to be delivered outside this state through an agent or other representative of the company issuing the contract.

(C) To the extent that any variable annuity contract provides benefits that [~~which~~] do not vary in accordance with the investment performance of a separate account before the annuity commencement date, such contract must [~~shall~~] contain provisions that [~~which~~] satisfy the requirements of Insurance Code Chapter 1107, concerning Standard Nonforfeiture Law for Certain Annuities [~~the Insurance Code, Article 3.44b~~], and may [~~shall~~] not otherwise be subject to this section.

(D) No variable annuity contract, except as stated in subparagraphs [~~subparagraph~~] (B) and (C) of this paragraph, may [~~shall~~] be delivered or issued for delivery in this state unless it contains in substance the following provisions, or corresponding provisions that [~~which~~] in the opinion of the commissioner are at least as favorable to the contract holder [~~contractholder~~], upon cessation of payment of considerations under the contract.

(i) That upon cessation of payment of considerations under a contract, the company will grant a paid-up annuity benefit on a plan described in the contract that complies with subparagraph (H) of this paragraph. Such description must [~~shall~~] include a statement of the mortality table, if any, and guaranteed or assumed interest rates used in calculating annuity payments.

(ii) If a contract provides for a lump sum settlement at maturity, or at any other time, that upon surrender of the contract at or before [~~prior to~~] the commencement of any annuity payments, the company will pay in lieu of any paid-up annuity benefit a cash surrender benefit as described in the contract that complies with subparagraph (I) of this paragraph. The contract may provide that the company reserves the right, at its option, to defer the determination and payment of any cash surrender benefit for any period during which the New York Stock Exchange is closed for trading (except for normal holiday closing) or when the Securities and Exchange Commission has determined that a state of emergency exists that [~~which~~] may make such determination and payment impractical.

(iii) A statement that any paid-up annuity, cash surrender, or death benefits that may be available under the contract are not less than the minimum benefits required by any statute of the state in which the contract is delivered and an explanation of the manner in which such benefits are altered by the existence of any additional amounts credited by the company to the contract, any indebtedness to the company on the contract, or any prior withdrawals from or partial surrenders of the contract.

(E) The minimum values as specified in this section of any paid-up annuity, cash surrender, or death benefits available under a variable annuity contract must [~~shall~~] be based upon nonforfeiture amounts meeting the requirements of this paragraph. The minimum nonforfeiture amount on any date before [~~prior to~~] the annuity commencement date must [~~shall~~] be an amount equal to the percentages of net considerations (as specified in subparagraph (F) of this paragraph) increased (or decreased) by the net investment return allocated to the percentages of net considerations, that [~~which~~] amount must [~~shall~~] be reduced to reflect the effect of:

(i) any partial withdrawals from or partial surrenders of the contract;

(ii) the amount of any indebtedness on the contract, including interest due and accrued;

(iii) an annual contract charge not less than zero nor greater than $30 less the amount of any annual contract charge deducted

from any gross considerations credited to the contract during such contract year; and

(iv) a transaction charge of $10 for each transfer to another separate account or to another investment division within the same separate account.

(F) The percentages of net considerations used to define the minimum nonforfeiture amount in subparagraph (E) of this paragraph must [~~shall~~] meet the requirements of this subparagraph.

(i) With respect to contracts providing for periodic considerations, the net considerations for a given contract year used to define the minimum nonforfeiture amount must [~~shall~~] be an amount not less than zero and must [~~shall~~] be equal to the corresponding gross considerations credited to the contract during that contract year less an annual contract charge of $30 and less a collection charge of $1.25 per consideration credited to the contract during that contract year. The percentages of net considerations must [~~shall~~] be 65% for the first contract year and 87.5% for the second and later contract years. Notwithstanding the provisions of the preceding sentence, the percentage must [~~shall~~] be 65% of the portion of the total net consideration for any renewal contract year that [~~which~~] exceeds by not more than two times the sum of those portions of the net considerations in all prior contract years for which the percentage was 65%.

(ii) With respect to contracts providing for a single consideration, the net consideration used to define the minimum nonforfeiture amount must [~~shall~~] be the gross consideration less a contract charge of $75. The percentage of net consideration must [~~shall~~] be 90%.

(G) Demonstration that a contract's nonforfeiture amounts comply with this paragraph must [~~shall~~] be based on the following assumptions:

(i) values should be tested at the ends of each of the first 20 contract years;

(ii) a net investment return of 7.0% per year should be used;

(iii) if the contract provides for transfers to another separate account or to another investment division within the same separate account, one transfer per contract year should be assumed;

(iv) with respect to contracts providing for periodic considerations, monthly considerations of $100 should be assumed for each of the first 240 months;

(v) with respect to contracts providing for a single consideration, a $10,000 single consideration should be assumed; and

(vi) if the contract provides for allocation of considerations to both fixed and variable accounts, 100% of the considerations should be assumed to be allocated to the variable account.

(H) Any paid-up annuity benefit available under a variable annuity contract must [~~shall~~] be such that its present value on the annuity commencement date is at least equal to the minimum nonforfeiture amount on the date. Such present value must [~~shall~~] be computed using the mortality table, if any, and the guaranteed or assumed interest rates used in calculating the annuity payments.

(I) For variable annuity contracts that [~~which~~] provide cash surrender benefits, the cash surrender benefit at any time before [~~prior to~~] the annuity commencement date may [~~shall~~] not be less than the minimum nonforfeiture amount next computed after the request for surrender is received by the company. The death benefit under such contracts must [~~shall~~] be at least equal to the cash surrender benefit.

(J) Any variable annuity contract that [~~which~~] does not provide cash surrender benefits or does not provide death benefits at least equal to the minimum nonforfeiture amount before [~~prior to~~] the annuity commencement date must [~~shall~~] include a statement in a prominent place in the contract that such benefits are not provided.

(K) Notwithstanding the requirements of this section, a variable annuity contract may provide under the situations specified in clause (i) or clause (ii) of this subparagraph that the company, at its option, may cancel the annuity and pay the contract holder [~~contractholder~~] its accumulated value and by such payment be released of any further obligation under such contract:

(i) if at the time the annuity becomes payable the accumulated value is less than $2,000, or would provide an income the initial amount of which is less than $20 per month; or

(ii) if before [~~prior to~~] the time the annuity becomes payable under a periodic payment variable annuity contract no considerations have been received under the contract for a period of two full years, and both:

(I) the total considerations paid before [~~prior to~~] such period, reduced to reflect any partial withdrawals from or partial surrenders of the contract; and

(II) the accumulated value[~~,~~] amounts to less than $2,000.

(L) For any variable annuity contract that [~~which~~] provides, within the same contract by rider or supplemental contract provision, both annuity benefits and life insurance benefits that are in excess of the greater of cash surrender benefits or a return of the gross considerations with interest, the minimum nonforfeiture benefits must [~~shall~~] be equal to the sum of the minimum nonforfeiture benefits for the annuity portion and the minimum nonforfeiture benefits, if any, for the life insurance portion computed as if each portion were a separate contract. Notwithstanding the provisions of subparagraph (E) of this paragraph, additional benefits payable in the event of total and permanent disability, as reversionary annuity or deferred reversionary annuity benefits, or as other contract benefits additional to life insurance, endowment, and annuity benefits, must [~~shall~~] be disregarded in ascertaining the minimum nonforfeiture amounts, paid-up annuity, cash surrender, and death benefits required by this section. The inclusion of such additional benefits may [~~shall~~] not be required in any paid-up benefits, unless such additional benefits separately would require minimum nonforfeiture amounts, paid-up annuity, cash surrender, and death benefits.

(4) Applications. The application for a variable annuity contract must [~~shall~~] contain:

(A) a prominent statement that the benefits may increase or decrease in accordance with the experience of a separate account; and

(B) the portion of the premium allocable on the date of issue to any fixed dollar benefits and the portion allocable on the date of issue to the variable benefits.

§4.2106. Separability.

If any provision of these sections or the application of these sections [~~thereof~~] to any person or circumstance is for any reason held to be invalid, the remainder of these sections and the application of such provision to other persons or circumstances will [~~shall~~] not be affected [~~thereby~~].

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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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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SUBCHAPTER W. ANNUITY DISCLOSURES
DIVISION 1. ANNUITY CONTRACT DISCLOSURES

28 TAC §§4.2302, 4.2304, 4.2306 - 4.2312

STATUTORY AUTHORITY. TDI proposes amendments to §§4.2302, 4.2304, and 4.2306 - 4.2312 under Insurance Code §§31.002, 101.051, 1108.002, 1114.007, 1152.002, and 36.001.

Insurance Code §31.002 specifies that in addition to other required duties, TDI will regulate the business of insurance in this state; administer the workers' compensation system of this state as provided by Labor Code, Title 5; and ensure that the Insurance Code and other laws regarding insurance and insurance companies are executed.

Insurance Code §101.051 specifies that acts that constitute the business of insurance in this state include making or proposing to make, as an insurer, an insurance contract; taking or receiving an insurance application; or issuing or delivering an insurance contract to a resident of this state.

Insurance Code §1108.002 specifies that for the purpose of regulation under the Insurance Code, an annuity contract is considered an insurance policy or contract if the annuity contract is issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society, or if it is issued under an annuity or benefit plan used by an employer or individual.

Insurance Code §1114.007 authorizes the commissioner to adopt reasonable rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A, to accomplish and enforce the purpose of Insurance Code Chapter 1114.

Insurance Code §1152.002 authorizes the commissioner to adopt rules that are fair, reasonable, and appropriate to augment and implement Insurance Code Chapter 1152, including rules establishing requirements for agent licensing, standard policy provisions, and disclosure.

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. Subchapter W, Division 1 affects Insurance Code §§101.051(b)(1), 101.051(b)(3), 101.051(b)(5)(A), 1114.007, and 1152.002.

§4.2302. Applicability and Scope.

(a) This subchapter applies to all group and individual annuity contracts and certificates, except as provided by subsection (b) of this section.

(b) This subchapter does not apply to the following annuity products, except as provided in subsection (c) of this section:

(1) immediate and deferred annuities that contain no nonguaranteed elements;

(2) annuities used to fund:

(A) an employee pension plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.);

(B) a plan described by the Internal Revenue Code of 1986 §§401(a), 401(k), or 403(b), in which the plan, for purposes of the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), is established or maintained by an employer;

(C) a governmental or church plan as defined by the Internal Revenue Code of 1986 §414, or a deferred compensation plan of a state or local government or a tax-exempt organization under the Internal Revenue Code of 1986 §457;

(D) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(E) prepaid funeral benefits, as defined by [~~the~~] Finance Code Chapter 154, concerning Prepaid Funeral Services;

(3) a structured settlement annuity;

(4) a charitable gift annuity qualified under [~~the~~] Insurance Code Chapter 102, concerning Charitable Gift Annuities; or

(5) a funding agreement.

(c) Notwithstanding the exemptions specified in subsection (b) of this section, this subchapter applies to an annuity used to fund a plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, if the insurer has been notified that plan participants may choose from among two or more fixed annuity providers and there is a direct solicitation of an individual employee by an agent for the purchase of an annuity contract. As used in this subsection, "direct solicitation" does not include a meeting held by an agent solely for the purpose of educating or enrolling employees in the plan or arrangement.

§4.2304. Definitions.

(a) Words and terms defined in [~~the~~] Insurance Code Chapter 102, concerning Charitable Gift Annuities, [~~shall~~] have the same meaning when used in this subchapter.

(b) The following words and terms, when used in this subchapter, [~~shall~~] have the following meanings unless the context clearly indicates otherwise.

(1) Agent--An individual who holds a license under [~~the~~] Insurance Code Chapter 4054, concerning Life, Accident, and Health Agents, and who sells, solicits, or negotiates annuities in this state.

(2) Buyer's guide--A document specified as a buyer's guide and adopted by the National Association of Insurance Commissioners (NAIC) to be used in implementation of the NAIC Annuity Disclosure Model Regulation.

(3) Contract owner--The owner named in the annuity contract or, in the case of a group annuity contract, the certificate holder.

(4) Disclosure document--A document intended for consumers that provides information regarding the features and restrictions of a specific annuity product and that satisfies the requirements of §4.2309 [~~§3.9709~~] of this title [~~subchapter~~] (relating to Disclosure Document).

(5) Funding agreement--An agreement for an insurer to accept and accumulate funds and to make one or more payments at future dates in amounts that are not based on mortality or morbidity contingencies.

(6) Generic name--A short title descriptive of the annuity contract being illustrated or for which an applicant is applying, such as "single premium deferred annuity."

(7) Structured settlement annuity--A "qualified funding asset," as defined by the Internal Revenue Code of 1986 §130(d), or an annuity that would be a qualified funding asset but for the fact that the annuity is not owned by an assignee under a qualified assignment.

§4.2306. Guaranteed and Non-Guaranteed [~~Non-guaranteed~~] Elements.

(a) For the purposes of this subchapter, "guaranteed element" means an element listed in §4.2305(a)(1) - (7) [~~§3.9705(a)(1) - (7)~~] of this title [~~subchapter~~] (relating to Determinable Elements) that is guaranteed and determined at issue. An element is considered guaranteed if all of the underlying elements used in its computation are guaranteed.

(b) For the purposes of this subchapter, "non-guaranteed element" means an element listed in §4.2305(a)(1) - (7) [~~§3.9705(a)(1) - (7)~~] of this title [~~subchapter~~] that is subject to the insurer's discretion and is not guaranteed at issue. An element is considered non-guaranteed if any underlying element used in its computation is non-guaranteed.

§4.2307. Effect on Other Law.

Compliance with this subchapter is not a defense in any action brought by or for the department alleging a violation of the Insurance Code, or, except for this subchapter, any rule adopted under [~~pursuant to~~] the Insurance Code.

§4.2308. Required Consumer Notices.

(a) If an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant must [~~shall~~] be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §4.2310 [~~§3.9710~~] of this title [~~subchapter~~] (relating to Buyer's Guide).

(b) If the application is taken by means other than in a face-to-face meeting, the applicant must [~~shall~~] be sent, not later than the fifth business day after the date on which the completed application is received by the insurer, both a disclosure document and the appropriate buyer's guide specified in §4.2310 [~~§3.9710~~] of this title [~~subchapter~~].

(c) If the insurer receives the application as a result of a direct solicitation through the mail, the insurer's providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate satisfies the requirement in subsection (b) of this section that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(d) If the application is received through the internet [~~Internet~~], and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website and [~~which~~] are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document will [~~shall~~] be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(e) A solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide.

(f) Insurers receiving an application for private placement contracts as defined by [~~the~~] Insurance Code §1152.110(a), concerning Private Placement Contracts, are not required to provide the buyer's guide specified in §4.2310 [~~§3.9710~~] of this title [~~subchapter~~].

(g) This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §4.2311(a) [~~§3.9711(a)~~] of this title [~~subchapter~~] (relating to Free Look Period) before [~~prior to~~] the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §4.2311(a) [~~§3.9711(a)~~] of this title [~~subchapter~~].

§4.2309. Disclosure Document.

(a) At a minimum, the following information, if applicable, must be included in the disclosure document required to be provided under this subchapter:

(1) the generic name of the contract; the insurer product name, if different from the generic name; the product's form number; and a statement of the fact that the contract is an annuity;

(2) the insurer's name and address;

(3) a description of the contract and the benefits provided under the contract; the description must emphasize the long-term nature of the contract and include examples of the long-term nature as appropriate;

(4) the guaranteed, non-guaranteed, and determinable elements of the contract, any limitations of those elements, and an explanation of how those elements operate;

(5) an explanation of the initial crediting rate, specifying any bonus or introductory portion, the duration of the initial crediting rate, and the fact that rates may change from time to time and are not guaranteed;

(6) periodic income options, both on a guaranteed and non-guaranteed basis;

(7) any value reductions caused by withdrawals from or surrender of the contract;

(8) how values in the contract can be accessed;

(9) the death benefit, if available, and how the death benefit is computed;

(10) a summary of:

(A) the federal tax status of the contract; and

(B) any penalties applicable on withdrawal of values from the contract;

(11) the impact of any rider, such as a long-term care rider;

(12) a list of the specific dollar amount or percentage charges and fees, with an explanation of how those charges and fees apply; and

(13) information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.

(b) An insurer must [~~shall~~] define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed.

(c) A disclosure document that complies with the Financial Industry Regulatory Authority (FINRA) Conduct Rules and the United

States Securities and Exchange Commission (SEC) prospectus requirements satisfies the requirements of this section for disclosure documents. This subsection does not limit the commissioner's ability to enforce the other provisions of this section or require the use of a FINRA-approved disclosure document. This subsection provides a safe harbor under this subchapter for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

§4.2310. Buyer's Guide.

For the purposes of this subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the National Association of Insurance Commissioners (NAIC) [~~NAIC~~] that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. If the NAIC has not adopted a buyer's guide for equity-indexed annuities, then the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC. If the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which this subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which this subchapter becomes effective, then for purposes of this subchapter the appropriate buyer's guide is the latest version of the Securities and Exchange Commission (SEC) [~~SEC's~~] Office of Investor Education and Advocacy "Variable Annuities: What You Should Know,"[~~,~~] SEC Pub. 011.

§4.2311. Free Look Period.

(a) If the buyer's guide and the disclosure document required by this subchapter are not provided at or before the time of application, a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty.

(b) Notice of the free look period required under this section must be provided to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract. The notice must prominently disclose information concerning the 15-day free look period.

(c) The free look period must [~~shall~~] begin on the date the consumer receives the annuity contract and must [~~shall~~] run concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state.

(d) An unconditional refund without penalty for purposes of this section for variable or modified guaranteed annuity contracts means [~~shall mean~~] a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract.

(e) The refund and free look period requirements in this section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

§4.2312. Report to Contract Owners.

(a) For annuities in the payout period with changes in nonguaranteed elements and for the accumulation period of a deferred annuity, the insurer must [~~shall~~] provide each contract owner with a report, at least annually, on the status of the contract.

(b) The report must contain at least the following information:

(1) the beginning and ending dates of the current reporting period;

(2) the accumulation and cash surrender value, if any, at the end of:

(A) the previous reporting period; and

(B) the current reporting period;

(3) the total amounts, if any, that have been credited, charged to the contract or certificate value, or paid during the current reporting period; and

(4) the amount of any outstanding loans as of the end of the current reporting period.

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

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DIVISION 2. ANNUITY SUITABILITY DISCLOSURES

28 TAC §4.2322

STATUTORY AUTHORITY. TDI proposes amendments to §4.2322 under Insurance Code §§36.004, 1115.005, 1115.0514, 1115.0516, and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §1115.005 provides that the commissioner may adopt reasonable rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A, to accomplish and enforce the purpose of Chapter 1115.

Insurance Code §1115.0514 requires that an agent, before the recommendation or sale of an annuity, provide a disclosure to the consumer on a form prescribed by the commissioner by rule.

Insurance Code §1115.0516 requires agent use, at specified times, of disclosure forms prescribed by the commissioner by rule.

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 4.2322 affects Insurance Code §1115.0514 and §1115.0516.

§4.2322. Required Forms.

(a) Before the recommendation or sale of an annuity, an agent must provide to the consumer a form that meets the requirements of Insurance Code §1115.0514(b), concerning Disclosure Obligation. The agent must use:

(1) form FIN194 (07/21), which is adopted by reference and is available on the department's form website;

(2) the Insurance Agent (Producer) Disclosure for Annuities form, adopted by the National Association of Insurance Commissioners (NAIC) in the Suitability in Annuity Transactions Model Regulation; or

(3) another form that:

(A) meets the requirements of Insurance Code §1115.0514(b) and is substantially similar to the form specified in paragraph (2) of this subsection;

(B) is understandable to a person with an 8th-grade reading level; and

(C) is written in plain language, consistent with federal plain language recommendations from the Plain Language Action and Information Network.

(b) If, at the time of a recommendation or sale of an annuity, a consumer has not given an agent some or all of the information needed to decide whether the annuity effectively meets the consumer's needs, the agent must obtain a statement signed by the consumer on a form that meets the requirements of Insurance Code §1115.0516(2), concerning Documentation Obligation. The agent must use:

(1) form FIN195 (07/21), which is adopted by reference and is available on the department's form website;

(2) the Consumer Refusal to Provide Information form, adopted by the NAIC [~~National Association of Insurance Commissioners~~] in the Suitability in Annuity Transactions Model Regulation; or

(3) another form that:

(A) is substantially similar to the form specified in paragraph (2) of this subsection;

(B) is understandable to a person with an 8th-grade reading level; and

(C) is written in plain language, consistent with federal plain language recommendations from the Plain Language Action and Information Network.

(c) At the time of a recommendation or sale of an annuity, if a consumer decides to enter into an annuity transaction that is not based on the agent's recommendation, the agent must obtain a statement signed by the consumer that meets the requirements of [~~Texas~~] Insurance Code §1115.0516(3). The agent must use:

(1) form FIN196 (07/21), which is adopted by reference and is available on the department's form website;

(2) the Consumer Decision to Purchase an Annuity Not Based on a Recommendation form, adopted by the NAIC [~~National Association of Insurance Commissioners~~] in the Suitability in Annuity Transactions Model Regulation; or

(3) another form that:

(A) is substantially similar to the form specified in paragraph (2) of this subsection;

(B) is understandable to a person with an 8th-grade reading level; and

(C) is written in plain language, consistent with federal plain language recommendations from the Plain Language Action and Information Network.

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

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SUBCHAPTER AA. MORTALITY TABLES
DIVISION 1. ANNUITY MORTALITY TABLES

28 TAC §§4.2701, 4.2702, 4.2705, 4.2706

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter AA, Division 1, under Insurance Code §§36.004, 425.053, 425.059(d), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.053 authorizes TDI to annually value or cause to be valued the reserves for all outstanding annuity and pure endowment contracts before the operative date of the valuation manual required under Insurance Chapter 425.

Insurance Code §425.059(d) provides that the commissioner may approve by rule a mortality table adopted after 1980 by the National Association of Insurance Commissioners or a modification of one of the tables provided in the section.

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. Subchapter AA, Division 1 affects Insurance Code §425.053 and §425.059.

§4.2701. Purpose.

The purpose of this subchapter is to approve and adopt the following mortality tables and establish the effective dates of their use in determining the minimum standard of valuation for annuity and pure endowment contracts:

(1) the 1983 Table "a";
Figure: 28 TAC §4.2701(1)
[~~Figure: 28 TAC §3.1501(1)~~]

(2) the 1983 GAM Table;
Figure: 28 TAC §4.2701(2)
[~~Figure: 28 TAC §3.1501(2)~~]

(3) the Annuity 2000 Mortality Table;
Figure: 28 TAC §4.2701(3)
[~~Figure: 28 TAC §3.1501(3)~~]

(4) the 1994 GAR Table; and
Figure: 28 TAC §4.2701(4)
[~~Figure: 28 TAC §3.1501(4)~~]

(5) the 2012 Individual Annuity Reserving (2012 IAR) Table which, under §4.2706 [~~§3.1506~~] of this title (relating to Application of the 2012 IAR Mortality Table), is derived from the following tables:

(A) the 2012 Individual Annuity Mortality Period Life (2012 IAM Period) Table; and
Figure: 28 TAC §4.2701(5)(A)
[~~Figure: 28 TAC §3.1501(5)(A)~~]

(B) the Projection Scale G2 (Scale G2) table of annual rates.
Figure: 28 TAC §4.2701(5)(B)
[~~Figure: 28 TAC §3.1501(5)(B)~~]

§4.2702. Definitions.

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

(1) 1983 GAM Table--Mortality table developed by the Society of Actuaries [~~Actuaries'~~] Committee on Annuities and adopted as a recognized mortality table for annuities in December 1983, by the National Association of Insurance Commissioners (NAIC).

(2) 1983 Table "a"--Mortality table developed by the Society of Actuaries [~~Actuaries'~~] Committee to Recommend a New Mortality Basis for Individual Annuity Valuation and adopted as a recognized mortality table for annuities in June 1982, by the NAIC [~~National Association of Insurance Commissioners~~].

(3) 1994 GAR Table--The 1994 Group Annuity Reserving Table developed by the Society of Actuaries [~~Actuaries'~~] Group Annuity Valuation Table Task Force and adopted as a recognized mortality table for annuities on December 16, 1996, by the NAIC [~~National Association of Insurance Commissioners~~].

(4) Annuity 2000 Mortality Table--Mortality table developed by the Society of Actuaries [~~Actuaries'~~] Committee on Life Insurance Research and adopted as a recognized mortality table for annuities on December 16, 1996, by the NAIC [~~National Association of Insurance Commissioners~~].

(5) Period Table--Table of mortality rates applicable to a given calendar year.

(6) Generational Mortality Table--Mortality table containing a set of mortality rates that decrease for a given age from one year to the next based on a combination of a Period Table and a projection scale containing rates of mortality improvement.

(7) 2012 IAR Table--Generational mortality table developed by the Society of Actuaries [~~Actuaries'~~] Committee on Life Insurance Research and containing rates, q_x^{2012+n}, derived from a combination of the 2012 IAM Period Table and Projection Scale G2, using the methodology stated in §4.2706 [~~§3.1506~~] of this title (relating to Application of the 2012 IAR Mortality Table).

(8) 2012 Individual Annuity Mortality Period Life (2012 IAM Period) Table--The Period Table [~~table~~] containing loaded mortality rates for calendar year 2012. This table contains rates, q_x^{2012}, developed by the Society of Actuaries [~~Actuaries'~~] Committee on Life Insurance Research.

(9) Projection Scale G2 (Scale G2)--Table of annual rates, $G2_x$, of mortality improvement by age for projecting future mortality rates beyond calendar year 2012. The Society of Actuaries [~~Actuaries'~~] Committee on Life Insurance Research developed this table.

§4.2705. Application of the 1994 GAR Table.

In using the 1994 GAR Table, the mortality rate for a person age x in year (1994 + n) is calculated as follows:
Figure: 28 TAC §4.2705
[~~Figure: 28 TAC §3.1505~~]

§4.2706. Application of the 2012 IAR Mortality Table.

In using the 2012 IAR Mortality Table, the mortality rate for a person age x in year (2012 + n) is calculated as follows:
Figure: 28 TAC §4.2706
[~~Figure: 28 TAC §3.1506~~]

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

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DIVISION 2. SMOKER-NONSMOKER COMPOSITE MORTALITY TABLES

28 TAC §§4.2712 - 4.2716

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter AA, Division 2, under Insurance Code §§36.004, 541.057, 541.401, 1105.055(h), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §541.057 prohibits unfair discrimination in the rates, dividends, or any other contract terms and conditions for individuals of the same class and life expectancy in life insurance and annuity contracts.

Insurance Code §541.401 provides that the commissioner may adopt and enforce reasonable rules necessary to accomplish the purposes of Insurance Code Chapter 541.

Insurance Code §1105.055(h) specifies that the commissioner may adopt by rule any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners.

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-REFERENCES TO STATUTE. Subchapter AA, Division 2 affects Insurance Code §§541.057 and 1105.055 - 1105.057.

§4.2712. Definitions.

The following words and terms, when used in these sections, [~~shall~~] have the following meanings[~~,~~] unless the context clearly indicates otherwise.

(1) 1958 CET Table--That mortality table developed by the Society of Actuaries Special Committee on New Mortality Tables, incorporated in the National Association of Insurance Commissioners (NAIC) Model Standard Nonforfeiture Law for Life Insurance, and referred to in that model as the Commissioners 1958 Extended Term Insurance Table.

(2) 1980 CET Table--That mortality table consisting of separate rates of mortality for male and female lives, developed by

the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 NAIC amendments to the Model Standard Nonforfeiture Law for Life Insurance, and referred to in those models as the Commissioners 1980 Extended Term Insurance Table.

(3) 1958 CSO Table--That mortality table developed by the Society of Actuaries Special Committee on New Mortality Tables, incorporated in the NAIC Model Standard Nonforfeiture Law for Life Insurance, and referred to in that model as the Commissioners 1958 Standard Ordinary Mortality Table.

(4) 1980 CSO Table, with or without Ten-Year Select Mortality Factors--That mortality table, consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 NAIC amendments to the Model Standard Valuation Law and Standard Nonforfeiture Law for Life Insurance, and referred to in those models as the Commissioners 1980 Standard Ordinary Mortality Table, with or without Ten-Year Select Mortality Factors. The same select factors will be used for both smokers and nonsmokers tables.

(5) Composite mortality tables--The mortality tables previously defined in this section as they were originally published with rates of mortality that do not distinguish between smokers and nonsmokers.

(6) Smoker and nonsmoker mortality tables--The mortality tables with separate rates of mortality for smokers and nonsmokers derived from the tables defined elsewhere in this section, which were developed by the Society of Actuaries Task Force on Smoker/Nonsmoker Mortality and the California Insurance Department staff and recommended by the NAIC Technical Staff Actuarial Group.

§4.2713. Alternate Tables.

(a) For any policy of insurance delivered or issued for delivery in this state after the operative date of former Insurance Code Article 3.44a, §8 (recodified in Insurance Code Chapter 1105, Subchapter B, [~~§§1105.051 - 1105.057~~] concerning Computation of Adjusted Premiums Using Nonforfeiture Net Level Premium Method, for that policy form and before January 1, 1989, at the option of the company and subject to the conditions stated in §4.2714 [~~§3.1404~~] of this title (relating to Conditions):

(1) the 1958 CSO Smoker and Nonsmoker Mortality Tables may be substituted for the 1980 CSO Table, with or without Ten-Year Select Mortality Factors; and

(2) the 1958 CET Smoker and Nonsmoker Mortality Tables may be substituted for the 1980 CET Table.

(b) The tables specified in subsection (a) of this section must be used as described in subsection (a) of this section to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits, or benefits under any extended term insurance provision. Provided, however, that for any category of insurance issued on female lives with minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits, or benefits under any extended term insurance provision determined using 1958 CSO or 1958 CET Smoker and Nonsmoker Mortality Tables, such minimum values may be calculated according to an age not more than six years younger than the actual age of the insured. Provided further that the substitution of the 1958 CSO or CET Smoker and Nonsmoker Mortality Tables is available only if made for each policy of insurance on a policy form delivered or issued for delivery on or after the operative date for that policy form and before a date not later than January 1, 1989.

(c) For any policy of insurance delivered or issued for delivery in this state after the operative date of former Insurance Code Article 3.44a, §8 (recodified in Insurance Code Chapter 1105, Subchapter B[~~, §§1105.051 - 1105.057~~]), for the policy form, at the option of the company and subject to the conditions stated in §4.2714 [~~§3.1404~~] of this title [~~(relating to Conditions)~~]:

(1) the 1980 CSO Smoker and Nonsmoker Mortality Tables, with or without Ten-Year Select Mortality Factors, may be substituted for the 1980 CSO Table, with or without Ten-Year Select Mortality Factors; and

(2) the 1980 CET Smoker and Nonsmoker Mortality Tables may be substituted for the 1980 CET Table.

(d) The tables specified in subsection (c) of this section must be used as provided in subsection (c) of this section to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up [~~paid up~~] nonforfeiture benefits, or benefits under any extended term insurance provision.

(e) Values of 1,000 qx for the tables specified in this section can be found in "Proceedings of the NAIC," Volume I, 1984, pages 402 - 413. These tables are adopted [~~herein~~] by reference for use in an appropriate manner as described in this subchapter. Copies may be obtained by contacting the Life and Health Division, Life and Health Actuarial, MC: LH-ACT, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Life and Health Actuarial, MC-LH-ACT, P.O. Box 12030, Austin, Texas 78711-12030~~]. These tables are more particularly identified as follows:

(1) 1958 CSO Nonsmokers and Smokers Mortality Tables;

(2) 1958 CET Nonsmokers and Smokers Mortality Tables;

(3) 1980 CSO Female Nonsmokers and Smokers Mortality Tables;

(4) 1980 CSO Male Nonsmokers and Smokers Mortality Tables;

(5) 1980 CET Female Nonsmokers and Smokers Mortality Tables; and

(6) 1980 CET Male Nonsmokers and Smokers Mortality Tables.

§4.2714. Conditions.

For each plan of insurance with separate rates for smokers and nonsmokers, an insurer may:

(1) use composite mortality tables to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits or benefits under any extended term insurance provision;

(2) use smoker and nonsmoker mortality tables to determine the valuation net premiums and additional minimum reserves, if any, required by Insurance Code §425.068, concerning Reserve Computation: Gross Premium Charged Less Than Valuation Net Premium, and use composite mortality tables to determine the basic minimum reserves, minimum cash surrender values, and amounts of paid-up nonforfeiture benefits, or benefits under any extended term insurance provision; or

(3) use smoker and nonsmoker mortality tables to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits, or benefits under any extended term insurance provision.

§4.2715. Severability.

If any provision of these sections or the application of these sections [thereof] to any person or circumstance is for any reason held to be invalid, the remainder of the sections and the application of such provision to other persons or circumstances will [shall] not be affected [thereby].

§4.2716. 2001 CSO Mortality Table.

The 2001 CSO Mortality Table must [shall] be used for purposes of this subchapter under [pursuant to] the requirements of Subchapter AA, Division 3 [§§3.9101 - 3.9106] of this chapter [title] (relating to 2001 CSO Mortality Table).

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

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DIVISION 3. 2001 CSO MORTALITY TABLE

28 TAC §§4.2721 - 4.2726

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter AA, Division 3, under Insurance Code §§36.004, 425.058(c)(3), 1105.055(h), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.058(c)(3) specifies that for an ordinary life insurance policy issued on the standard basis, to which Insurance Code Chapter 1105, Subchapter B, applies, the applicable table is any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard values under Insurance Code Chapter 425, Subchapter B.

Insurance Code §1105.055(h) specifies that the commissioner may adopt by rule any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners.

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. Subchapter AA, Division 3 affects Insurance Code §§425.051 - 425.077 and 1105.055.

§4.2721. Purpose.

The purpose of this subchapter is to recognize, permit, and prescribe the use of the 2001 Commissioners Standard Ordinary (CSO) Mortality Table in accordance with Insurance Code §425.058(c)(3), concerning Computation of Minimum Standard: General Rule, and §1105.055(h), concerning Use of Mortality Tables and Interest Rates With Nonforfeiture Net Level Premium Method, and §4.2825 [§3.4505] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves). For policies issued on or after January 1, 2017, the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, provides applicable mortality tables.

§4.2722. Definitions.

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

(1) 2001 CSO Mortality Table--Mortality [mortality] tables, consisting of separate rates of mortality for male and female lives, developed by the American Academy of Actuaries CSO Task Force from the Valuation Basic Mortality Table developed by the Society of Actuaries Individual Life Insurance Valuation Mortality Task Force, and adopted by the National Association of Insurance Commissioners in December 2002. Unless the context indicates otherwise, the 2001 CSO Mortality Table includes both the ultimate form of that table, and the select and ultimate form of that table, and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables.

(2) 2001 CSO Mortality Table (F)--Mortality [mortality] table consisting of the rates of mortality for female lives from the 2001 CSO Mortality Table.

(3) 2001 CSO Mortality Table (M)--Mortality [mortality] table consisting of the rates of mortality for male lives from the 2001 CSO Mortality Table.

(4) Composite mortality tables--Mortality [mortality] tables with rates of mortality that do not distinguish between smokers and nonsmokers.

(5) Smoker and nonsmoker mortality tables--Mortality [mortality] tables with separate rates of mortality for smokers and nonsmokers.

§4.2723. 2001 CSO Mortality Table.

(a) At the election of the company for any one or more specified plans of insurance and subject to the conditions stated in this subchapter, the 2001 CSO Mortality Table may be used as the minimum standard for policies issued on or after May 1, 2003, and before the date specified in subsection (b) of this section to which Insurance Code §425.058(c)(3), concerning Computation of Minimum Standard: General Rule, and §1105.055(h), concerning Use of Mortality Tables and Interest Rates With Nonforfeiture Net Level Premium Method, and §4.2825 [§3.4505] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) are applicable. If the company elects to use the 2001 CSO Mortality Table, it must do so for both valuation and nonforfeiture purposes.

(b) Subject to the conditions stated in this subchapter, the 2001 CSO Mortality Table must be used in determining minimum standards for policies issued on and after January 1, 2009, and before January 1, 2017, to which Insurance Code §425.058(c) and §1105.055(h) [§1055.055(h)] and §4.2825 [§3.4505] of this title [(relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves)] are applicable, except as provided in Subchapter BB, Division 4 [§§3.9601 - 3.9606] of this chapter [title] (relating to Preneed Life Insurance Minimum Mortality Standards for Determining Reserve Liabilities and Nonforfeiture Values) for preneed life insurance policies and certificates. For policies issued on or after January 1, 2017, the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, provides applicable mortality tables.

(c) The minimum basis for computation of values related to extended term benefits will be the 2001 CSO Mortality Table under [~~pursuant to~~] the requirements of this subchapter.

(d) The commissioner [~~Commissioner of Insurance~~] adopts by reference the 2001 CSO Mortality Table. The table is available from the Financial Regulation Division, Actuarial Office, MC: FRD, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Financial Regulation Division, Actuarial Office, MC-FRD, P.O. Box 12030, Austin, Texas 78711-2030~~] or on the internet by accessing the department's website at www.tdi.texas.gov/rules/2003/ficso.html [~~www.tdi.texas.gov/reports/life/ficso.html~~].

§4.2724. Conditions.

(a) For each plan of insurance with separate rates for smokers and nonsmokers, an insurer may use:

(1) composite [~~Composite~~] mortality tables to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits;

(2) smoker [~~Smoker~~] and nonsmoker mortality tables to determine the valuation net premiums and additional minimum reserves, if any, required by Insurance Code §425.068, Reserve Computation: Gross Premium Charged Less Than Valuation Net Premium, and use composite mortality tables to determine the basic minimum reserves, minimum cash surrender values, and amounts of paid-up nonforfeiture benefits; or

(3) smoker [~~Smoker~~] and nonsmoker mortality tables to determine minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits.

(b) For plans of insurance without separate rates for smokers and nonsmokers, the composite mortality tables must be used.

(c) For the purpose of determining minimum reserve liabilities and minimum cash surrender values and amounts of paid-up nonforfeiture benefits, the 2001 CSO Mortality Table may, at the option of the company for each plan of insurance, be used in its ultimate or select and ultimate form, subject to the restrictions of §4.2725 [~~§3.9105~~] of this title (relating to Applicability of the 2001 CSO Mortality Table to Chapter 4, Subchapter BB, Division 3 [~~Chapter 3, Subchapter EE~~] of this Title) relative to use of the select and ultimate form.

§4.2725. Applicability of the 2001 CSO Mortality Table to Chapter 4, Subchapter BB, Division 3 [~~Chapter 3, Subchapter EE~~] of this Title.

(a) The 2001 CSO Mortality Table may be used in applying Chapter 4, Subchapter BB, Division 3 [~~Chapter 3, Subchapter EE~~] of this title (relating to Valuation of Life Insurance Policies) in the following manner, subject to the transition dates for use of the 2001 CSO Mortality Table in §4.2723 [~~§3.9103~~] of this title (relating to 2001 CSO Mortality Table).[~~:~~]

(1) Section 4.2823(1)(B)(ii) [~~3.4503(1)(B)(ii)~~] of this title (relating to Applicability): The net level reserve premium is based on the ultimate mortality rates in the 2001 CSO Mortality Table.

(2) Section 4.2824(2) [~~3.4504(2)~~] of this title (relating to Definitions). All calculations are made using the 2001 CSO Mortality Rate, and, if elected, the optional minimum mortality standard for deficiency reserves stipulated in paragraph (4) of this subsection. The value of "qx+k+t-1" is the valuation mortality rate for deficiency reserves in policy year k+t, but using the unmodified select mortality rates if modified select mortality rates are used in the computation of deficiency reserves.

(3) Section 4.2825(a) [~~3.4505(a)~~] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves). The 2001 CSO Mortality Table is the minimum standard for basic reserves.

(4) Section 4.2825(b) [~~3.4505(b)~~] of this title. The 2001 CSO Mortality Table is the minimum standard for deficiency reserves. If select mortality rates are used, they may be multiplied by X percent for durations in the first segment, subject to the conditions specified in §4.2825(b)(3)(A) [~~§3.4505(b)(3)(A)~~] to (I) of this title. In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant Actuarial Standards of Practice.

(5) Section 4.2826(c) [~~3.4506(c)~~] of this title (relating to Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums or Guaranteed Nonlevel Benefits (Other than Universal Life Policies)). The valuation mortality table used in determining the tabular cost of insurance is [~~shall be~~] the ultimate mortality rates in the 2001 CSO Mortality Table.

(6) Section 4.2826(e)(4) [~~3.4506(e)(4)~~] of this title. The calculations specified in §4.2826(e) [~~§3.4506(e)~~] of this title [~~shall~~] use the ultimate mortality rates in the 2001 CSO Mortality Table.

(7) Section 4.2826(f)(4) [~~3.4506(f)(4)~~] of this title. The calculations specified in §4.2826(f) [~~§3.4506(f)~~] of this title [~~shall~~] use the ultimate mortality rates in the 2001 CSO Mortality Table.

(8) Section 4.2826(g)(2) [~~3.4506(g)(2)~~] of this title. The calculations specified in §4.2826(g) [~~§3.4506(g)~~] of this title [~~shall~~] use the ultimate mortality rates in the 2001 CSO Mortality Table.

(9) Section 4.2827(a)(1)(B) [~~3.4507(a)(1)(B)~~] of this title (relating to Calculation of Minimum Valuation Standard for Flexible Premium and Fixed Premium Universal Life Insurance Policies That Contain Provisions Resulting in the Ability of a Policyowner to Keep a Policy in Force Over a Second Guarantee Period). The one-year valuation premium is [~~shall be~~] calculated using the ultimate mortality rates in the 2001 CSO Mortality Table.

(b) Nothing in this section may [~~shall~~] be construed to expand the applicability of Chapter 4, Subchapter BB, Division 3 of this title [~~Chapter 3, Subchapter EE~~] to include life insurance policies exempted under §4.2823(1) [~~§3.4503(1)~~] of this title.

§4.2726. Gender-Blended Tables.

(a) For any ordinary life insurance policy delivered or issued for delivery in this state on and after May 1, 2003, that utilizes the same premium rates and charges for male and female lives or is issued in circumstances where applicable law does not permit distinctions on the basis of gender, a mortality table that is a blend of the 2001 CSO Mortality Table (M) and the 2001 CSO Mortality Table (F) may, at the option of the company for each plan of insurance, be substituted for the 2001 CSO Mortality Table for use in determining minimum cash surrender values and amounts of paid-up nonforfeiture benefits. No change in minimum valuation standards is implied by this subsection. For any ordinary life insurance policy delivered or issued for delivery in Texas on or after January 1, 2017, the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, provides the applicable mortality tables.

(b) The company may choose from among the blended tables developed by the American Academy of Actuaries CSO Task Force and adopted by the National Association of Insurance Commissioners in December 2002. These blended tables are available from the Financial Regulation Division, Actuarial Office, MC: FRD, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Actuarial Of-~~

fice, Financial Regulation Division, MC-FRD, P.O. Box 12030, Austin, Texas 78711-2030] or on the internet by accessing the department's website at www.tdi.texas.gov/rules/2003/ficso.html [www.tdi.texas.gov/reports/life/ficso.html].

(c) It is not, in and of itself, a violation of Insurance Code Chapter 541, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices, for an insurer to issue the same kind of policy of life insurance on both a sex-distinct and sex-neutral basis.

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

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DIVISION 4. PREFERRED MORTALITY TABLES

28 TAC §§4.2731 - 4.2734

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter AA, Division 4, under Insurance Code §§36.004, 425.058(c)(3), 1105.055(h), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.058(c)(3) specifies that for an ordinary life insurance policy issued on the standard basis, to which Insurance Code Chapter 1105, Subchapter B, applies, the applicable table is any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard values under Insurance Code Chapter 425, Subchapter B.

Insurance Code §1105.055(h) specifies that the commissioner may adopt by rule any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners.

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. Subchapter AA, Division 4 affects Insurance Code §425.058.

§4.2731. Purpose.

The purpose of this subchapter is to recognize and permit the use of mortality tables that reflect differences in mortality between preferred and standard lives in determining minimum reserve liabilities in accordance with Insurance Code §425.058(c)(3), concerning Computation of Minimum Standards: General Rule, and §4.2825 [§3.4505] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves). Policies issued on or after January 1, 2017, must follow the applicable mortality table requirements provided by the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law.

§4.2732. Definitions.

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

(1) 2001 CSO Mortality Table--Mortality tables, consisting of separate rates of mortality for male and female lives, developed by the American Academy of Actuaries CSO Task Force from the Valuation Basic Mortality Table developed by the Society of Actuaries Individual Life Insurance Valuation Mortality Task Force, and adopted by the National Association of Insurance Commissioners (NAIC) in December 2002. The 2001 CSO Mortality Table is included in the Proceedings of the NAIC (2nd Quarter 2002) and supplemented by the 2001 CSO Preferred Class Structure Mortality Table defined below. Unless the context indicates otherwise, the 2001 CSO Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables. Mortality tables in the 2001 CSO Mortality Table include the following.[:]

(A) 2001 CSO Mortality Table (F)--Mortality table consisting of the rates of mortality for female lives from the 2001 CSO Mortality Table.

(B) 2001 CSO Mortality Table (M)--Mortality table consisting of the rates of mortality for male lives from the 2001 CSO Mortality Table.

(C) Composite mortality tables--Mortality tables with rates of mortality that do not distinguish between smokers and nonsmokers.

(D) Smoker and nonsmoker mortality tables--Mortality tables with separate rates of mortality for smokers and nonsmokers.

(2) 2001 CSO Preferred Class Structure Mortality Table--Mortality tables with separate rates of mortality for super preferred nonsmokers, preferred nonsmokers, residual standard nonsmokers, preferred smokers, and residual standard smoker splits of the 2001 CSO Nonsmoker and Smoker tables as adopted by the NAIC at the September 2006 national meeting and published in the Proceedings of the NAIC (3rd Quarter 2006). Unless the context indicates otherwise, the 2001 CSO Preferred Class Structure Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table. It includes both the smoker and nonsmoker mortality tables. It includes both the male and female mortality tables and the gender composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality table.

(3) Statistical agent--An entity with proven systems for protecting the confidentiality of individual insured and insurer information, demonstrated resources for and history of ongoing electronic communications and data transfer ensuring data integrity with insurers, which are its members or subscribers, and a history of and means for aggregation of data and accurate promulgation of the experience modifications in a timely manner.

§4.2733. 2001 CSO Preferred Class Structure Table.

(a) Policies issued on or after January 1, 2007, and before January 1, 2017. At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in this subchapter, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of

the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard for policies issued on or after January 1, 2007. Policies issued on or after January 1, 2017, must follow the mortality table requirements provided by the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law.

(b) Policies issued on or after May 1, 2003, and before [~~prior to~~] January 1, 2007. At the election of the insurer and with the consent of the commissioner, for policies issued on or after May 1, 2003, and before [~~prior to~~] January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard subject to the conditions of §4.2734 [~~§3.9404~~] of this title (relating to Conditions). In determining such consent, the commissioner may rely on the consent of the commissioner of the insurer's state of domicile.

(c) Requirement to make election. No election in subsection (a) or (b) of this section may be made until the insurer demonstrates that at least 20% of the business to be valued on this table is in one or more of the preferred classes.

(d) 2001 CSO Preferred Class Structure Mortality Table Treatment. A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, under [~~pursuant to~~] the requirements of this subchapter, will be treated as part of the 2001 CSO Mortality Table only for purposes of reserve valuation under [~~pursuant to~~] the requirements of Subchapter AA, Division 3 [~~§§3.9101 - 3.9106~~] of this title (relating to 2001 CSO Mortality Table).

(e) Adoption by reference. The commissioner adopts by reference the 2001 CSO Preferred Class Structure Mortality Table. The table is available from the Financial Regulation Division, Actuarial Office, MC: FRD, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Financial Regulation Division, Actuarial Office, MC-FRD, P.O. Box 12030, Austin, Texas 78711-2030~~] or on the internet by accessing the department's website at www.tdi.texas.gov/rules/2003/ficso.html [~~www.tdi.texas.gov/reports/life/ficso.html~~].

§4.2734. Conditions.

(a) For each plan of insurance with separate rates for preferred and standard nonsmoker lives, an insurer may use the super preferred nonsmoker, preferred nonsmoker, and residual standard nonsmoker tables to substitute for the nonsmoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, except for business valued under the residual standard nonsmoker table, the appointed actuary must [~~shall~~] certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class.

(b) For each plan of insurance with separate rates for preferred and standard smoker lives, an insurer may use the preferred smoker and residual standard smoker tables to substitute for the smoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, for business valued under the preferred smoker table, the appointed actuary must [~~shall~~] certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table.

(c) Unless exempted by the commissioner, every insurer using the 2001 CSO Preferred Class Structure Table must [~~shall~~] annually file with the commissioner, with the National Association of Insurance Commissioners (NAIC) [~~NAIC~~], or with a statistical agent designated by the NAIC and acceptable to the commissioner, statistical reports showing mortality and such other information as the commissioner may deem necessary or expedient for the administration of the provisions of this regulation. The form of the reports will [~~shall~~] be established by the commissioner, or the commissioner may require the use of a form established by the NAIC or by a statistical agent designated by the NAIC and acceptable to the commissioner. The form of the statistical reports will [~~shall~~] be promulgated by rule. Insurers are not required to file such statistical reports until such rule has been adopted by the commissioner. At the commissioner's discretion, the commissioner may request mortality experience and other information at any time.

(d) The use of the 2001 CSO Preferred Class Structure Table for the valuation of policies issued before [~~prior to~~] January 1, 2007, will [~~shall~~] not be permitted in any statutory financial statement in which a company reports, with respect to any policy or portion of a policy coinsured, either of the following.[~~:~~]

(1) In cases where the mode of payment of the reinsurance premium is less frequent than the mode of payment of the policy premium, a reserve credit that exceeds, by more than the amount specified in this paragraph as Y, the gross reserve calculated before reinsurance. Y is the amount of the gross reinsurance premium that:

(A) provides coverage for the period from the next policy period premium due date to the earlier of the end of the policy year and the next reinsurance premium due date; and

(B) would be refunded to the ceding entity upon the termination of the policy.

(2) In cases where the mode of payment of the reinsurance premium is more frequent than the mode of payment of the policy premium, a reserve credit that is less than the gross reserve, calculated before reinsurance, by an amount that is less than the amount specified in this paragraph as Z. Z is the amount of gross reinsurance premium that the ceding entity would need to pay the assuming company to provide reinsurance coverage from the period of the next reinsurance premium due date to the next policy premium due date minus any liability established for the proportionate amount not remitted to the reinsurer.

(3) For purposes of the conditions stated in paragraphs (1) and (2) of this subsection, the reserve for the mean reserve method will [~~shall~~] be defined as the mean reserve minus the deferred premium asset, and for the mid-terminal reserve method must [~~shall~~] include the unearned premium reserve. A company may estimate and adjust its accounting on an aggregate basis in order to meet the conditions to use the 2001 CSO Preferred Class Structure Table.

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

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SUBCHAPTER BB. LIFE AND ANNUITY RESERVES

DIVISION 1. ACTUARIAL OPINION AND MEMORANDUM REGULATION

28 TAC §§4.2801 - 4.2808

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter BB, Division 1, under Insurance Code §§36.004, 425.054, and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.054 provides that the commissioner specify by rule the requirements of an actuarial opinion under §425.064(b), including any matters considered necessary to the opinion's scope.

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. Subchapter BB, Division 1 affects Insurance Code §§425.054 - 425.057.

§4.2801. Purpose.

The purpose of this subchapter is to prescribe guidelines and standards for the following activities [~~described in paragraphs (1) - (3) of this section~~]:

(1) the submission of a statement of actuarial opinion in accordance with Insurance Code §425.054, concerning Annual Valuation of Reserves for Policies and Contracts Issued on or After Operative Date of Valuation Manual, and for memoranda in support of such opinion;

(2) the appointment of an appointed actuary; and

(3) guidance as to the meaning of "adequacy of reserves."

§4.2802. Scope and Applicability.

(a) This subchapter applies [~~shall apply~~] to all life insurance companies doing business in this state and to all life insurance companies that [~~which~~] are authorized to reinsure life insurance, annuities, or accident and health insurance business in this state.

(b) This subchapter must [~~shall~~] be applied in a manner that allows the appointed actuary to utilize their [~~his or her~~] professional judgment in performing the asset analysis and developing the actuarial opinion and supporting memoranda, consistent with relevant actuarial standards of practice; however, the commissioner has [~~shall have~~] the authority to specify specific methods of actuarial analysis and actuarial assumptions when, in the commissioner's judgment, these specifications are necessary for an acceptable opinion to be rendered relative to the adequacy of reserves and related items.

(c) This subchapter applies to the actuarial opinion for the 2005 valuation through the 2016 valuation. The requirements of the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, apply to actuarial opinions for valuations on or after January 1, 2017.

(d) A statement of opinion on the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with §4.2806 [~~§3.1606~~] of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis), and a memorandum in support of the statement of opinion [~~thereof~~] in accordance with §4.2807 [~~§3.1607~~] of this title (relating to Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary), is [~~shall be~~] required each year, unless exempt under §4.2808 [~~§3.1608~~] of this title (relating to Asset Adequacy Analysis Exemption).

§4.2803. Commissioner Discretion.

The commissioner may require any company, otherwise exempt from asset adequacy analysis requirements in this subchapter, to provide an actuarial opinion and actuarial memorandum that [~~which~~] complies with the asset adequacy analysis requirements in this subchapter including requirements in §4.2806 [~~§3.1606~~] of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) and in §4.2807 [~~§3.1607~~] of this title (relating to Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary) if, in the opinion of the commissioner, an asset adequacy analysis is necessary with respect to the company.

§4.2804. Definitions.

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

(1) AVR--Asset valuation reserve.

(2) Actuarial opinion--The opinion of an appointed actuary regarding the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with §4.2806 [~~§3.1606~~] of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) and with applicable Actuarial Standards of Practice.

(3) Actuarial Standards Board--The board established by the American Academy of Actuaries to develop and promulgate standards of actuarial practice.

(4) Annual statement--That financial statement as of December 31st of the preceding year required to be filed annually by the company with the Texas Department of Insurance.

(5) Appointed actuary--A qualified actuary who is appointed or retained to prepare the statement of actuarial opinion required by this subchapter, either directly by or by the authority of the board of directors through an executive officer of the company other than the qualified actuary.

(6) Asset adequacy analysis--An analysis that meets the standards and other requirements referred to in §4.2805(c) [~~§3.1605(c)~~] of this title (relating to General Requirements).

(7) Company--A life insurance company or reinsurer subject to the provisions of this subchapter including [~~which includes~~] a stipulated premium insurance company insuring or assuming risk for coverages under Insurance Code §884.307, concerning Issuance of Annuity Contract, or §884.402, concerning Additional Coverage.

(8) IMR--Interest maintenance reserve.

(9) Qualified actuary--An individual who:

(A) is a member in good standing of the American Academy of Actuaries;

(B) is qualified to sign statements of actuarial opinion for life and health insurance company annual statements in accordance with the American Academy of Actuaries qualification standards for actuaries signing such statements;

(C) is familiar with the valuation requirements applicable to life and health insurance companies;

(D) has not been found by the commissioner (or, if so found, has subsequently been reinstated as a qualified actuary), following appropriate notice and opportunity for hearing, to have:

(i) violated any provision of, or any obligation imposed by, the Insurance Code or other law in the course of their [~~his or her~~] dealings as a qualified actuary;

(ii) been found guilty of fraudulent or dishonest practices;

(iii) demonstrated their [~~his or her~~] incompetency, lack of cooperation, or untrustworthiness to act as a qualified actuary;

(iv) submitted to the commissioner during the past five years, under [~~pursuant to~~] this subchapter, an actuarial opinion or memorandum that the commissioner rejected because it did not meet the provisions of this subchapter including standards set by the Actuarial Standards Board; or

(v) resigned or been removed as an actuary within the past five years as a result of acts or omissions indicated in any adverse report on examination or as a result of failure to adhere to generally acceptable actuarial standards; and

(E) has not failed to notify the commissioner of any action taken by any commissioner of any other state similar to that under subparagraph (D) of this paragraph.

§4.2805. General Requirements.

(a) Submission of statement of actuarial opinion. Any statement of actuarial opinion required by this subchapter must be submitted in accordance with paragraphs (1) and (2) of this subsection.

(1) There is to be included on or attached to page one of the annual statement for each year beginning with the year in which this subchapter becomes effective the statement of an appointed actuary, entitled "Statement of Actuarial Opinion," setting forth an opinion relating to reserves and related actuarial items held in support of policies and contracts, in accordance with §4.2806 [~~§3.1606~~] of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis).

(2) Upon written request by the company, the commissioner may grant an extension of the date for submission of the statement of actuarial opinion.

(b) Appointment of actuary. The company must give the commissioner timely written notice of the name, title (and, in the case of a consulting actuary, the name of the firm), and manner of appointment or retention of each person appointed or retained by the company as an appointed actuary and must state in the notice that the person is a qualified actuary. Once notice is furnished, no further notice is required with respect to this person, provided that the company gives the commissioner timely written notice in the event the actuary ceases to be appointed or retained as an appointed actuary or to meet the requirements for a qualified actuary. If any person appointed or retained as an appointed actuary replaces a previously appointed actuary, the notice must so state and give the reasons for replacement.

(c) Standards for asset adequacy analysis. The asset adequacy analysis required by this subchapter must:

(1) conform to the Standards of Practice as promulgated from time to time by the Actuarial Standards Board and any additional standards set forth in this subchapter, which standards are to form the basis of the statement of actuarial opinion in accordance with this subchapter; and

(2) be based on methods of analysis as are deemed appropriate for such purposes by the Actuarial Standards Board.

(d) Liabilities to be covered. The liabilities to be covered will be in accordance with paragraphs (1) - (3) of this subsection.

(1) Under authority of Insurance Code §425.054, concerning Actuarial Opinion of Reserves Issued Before Operative Date of Valuation Manual, the statement of actuarial opinion applies to all in-force business on the statement date, whether directly issued or assumed, regardless of when or where issued; for example, annual statement reserves in Exhibits 5, 6, and 7, and claim liabilities in Exhibit 8, Part 1 and equivalent items in the separate account statement or statements.

(2) If the appointed actuary determines as the result of asset adequacy analysis that a reserve should be held in addition to the aggregate reserve held by the company and calculated in accordance with methods set forth in Insurance Code §§425.064, concerning Commissioners Reserve Valuation Method For Life Insurance and Endowment Benefits; 425.065, concerning Commissioners Annuity Reserve Valuation Method For Annuity and Pure Endowment Benefits; 425.068, concerning Reserve Computation: Gross Premium Charged Less Than Valuation Net Premium; and 425.069, concerning Reserve Computation: Indeterminate Premium Plans and Certain Other Plans; and other applicable Insurance Code provisions, the company must establish the additional reserve.

(3) Additional reserves established under paragraph (2) of this subsection and deemed not necessary in subsequent years may be released. Any amounts released must be disclosed in the actuarial opinion for the applicable year. The release of such reserves would not be deemed an adoption of a lower standard of valuation.

§4.2806. Statement of Actuarial Opinion Based on an Asset Adequacy Analysis.

(a) General description. The statement of actuarial opinion required by this section must consist of the following paragraphs:

(1) a paragraph identifying the appointed actuary and their [~~his or her~~] qualifications, recommended language is provided in subsection (b)(1) of this section;

(2) a scope paragraph (recommended language is provided in subsection (b)(2) of this section) identifying the subjects on which an opinion is to be expressed and describing the scope of the appointed actuary's work, including a tabulation delineating the reserves and related actuarial items that have been analyzed for asset adequacy and the method of analysis, and identifying the reserves and related actuarial items covered by the opinion that have not been so analyzed;

(3) a reliance paragraph (recommended language is provided in subsection (b)(3) of this section) describing those areas, if any, where the appointed actuary has deferred to other experts in developing data, procedures, or assumptions (e.g., anticipated cash flows from currently owned assets, including variation in cash flows according to economic scenarios), supported by a statement of each such expert with the information prescribed by subsection (e) of this section; and

(4) an opinion paragraph expressing the appointed actuary's opinion with respect to the adequacy of the supporting assets to mature the liabilities (recommended language is provided in subsection (b)(6) of this section).

(5) One or more additional paragraphs will be needed in individual company cases as follows:

(A) if the appointed actuary considers it necessary to state a qualification of their [~~his or her~~] opinion;

(B) if the appointed actuary must disclose an inconsistency in the method of analysis or basis of asset allocation used at the prior opinion date with that used for this opinion;

(C) if the appointed actuary must disclose whether additional reserves as of the prior opinion date are released as of this opinion date, and the extent of the release; or

(D) if the appointed actuary chooses to add a paragraph briefly describing the assumptions that form the basis for the actuarial opinion.

(b) Recommended language. The following paragraphs are to be included in the statement of actuarial opinion in accordance with this section. The language is what [~~that which~~] should be included in typical circumstances in a statement of actuarial opinion. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language that [~~which~~] clearly expresses their [~~his or her~~] professional judgment. Regardless of the language used, the opinion must retain all pertinent aspects of the language provided in this section.

(1) The opening paragraph should generally indicate the appointed actuary's relationship to the company and the appointed actuary's [~~his or her~~] qualifications to sign the opinion.

(A) For a company actuary, the opening paragraph of the actuarial opinion should include a statement such as:
Figure: 28 TAC §4.2806(b)(1)(A)
[~~Figure: 28 TAC §3.1606(b)(1)(A)~~]

(B) For a consulting actuary, the opening paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(1)(B)
[~~Figure: 28 TAC §3.1606(b)(1)(B)~~]

(2) The scope paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(2)
[~~Figure: 28 TAC §3.1606(b)(2)~~]

(3) If the appointed actuary has relied on other experts to develop certain portions of the analysis, the reliance paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(3)
[~~Figure: 28 TAC §3.1606(b)(3)~~]

(4) If the appointed actuary has examined the underlying asset and liability records, the reliance paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(4)
[~~Figure: 28 TAC §3.1606(b)(4)~~]

(5) If the appointed actuary has not examined the underlying records, but has relied upon data (e.g., listings and summaries of policies in force or asset records) prepared by the company, the reliance paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(5)
[~~Figure: 28 TAC §3.1606(b)(5)~~]

(6) The opinion paragraph should include a statement such as:
Figure: 28 TAC §4.2806(b)(6)
[~~Figure: 28 TAC §3.1606(b)(6)~~]

(c) Assumptions for new issues. The adoption for new issues or new claims or other new liabilities of an actuarial assumption that differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this section.

(d) Adverse opinions. If the appointed actuary is unable to form an opinion, then the appointed actuary [~~he or she~~] must refuse to issue a statement of actuarial opinion. If the appointed actuary's opinion is adverse or qualified, then the appointed actuary [~~he or she~~] must issue an adverse or qualified actuarial opinion explicitly stating the reasons for the opinion. This statement should follow the scope paragraph and precede the opinion paragraph.

(e) Reliance on information furnished by other persons. If the appointed actuary relies on the certification of others on matters concerning the accuracy or completeness of any data underlying the actuarial opinion, or the appropriateness of any other information used by the appointed actuary in forming the actuarial opinion, the actuarial opinion should so indicate the persons the actuary is relying upon and a precise identification of the items subject to reliance. In addition, the persons on whom the appointed actuary relies must provide a certification that precisely identifies the items on which the person is providing information and a statement as to the accuracy, completeness, or reasonableness, as applicable, of the items. This certification must include the signature, title, company, address, email address, and telephone number of the person rendering the certification, as well as the date on which it is signed.

(f) Alternate option.

(1) Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, gives the commissioner broad authority to accept the valuation of a foreign insurer when that valuation meets the requirements applicable to a company domiciled in this state in the aggregate. As an alternative to the requirements of subsection (b)(6) of this section, the commissioner may make one or more of the following additional approaches available to the opining actuary.[:]

(A) A [~~a~~] statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and the formal written standards and conditions of this state for filing an opinion based on the law of the state of domicile." If the commissioner chooses to allow this alternative, a formal written list of standards and conditions must be made available. If a company chooses to use this alternative, the standards and conditions in effect on July 1 of a calendar year apply to statements for that calendar year and remain in effect until they are revised or revoked. If no list is available, this alternative is not available.

(B) A [~~a~~] statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and I have verified that the company's request to file an opinion based on the law of the state of domicile has been approved and that any conditions required by the commissioner for approval of that request have been met." If the commissioner chooses to allow this al-

ternative, a formal written statement of such allowance must be issued no later than March 31 of the year it is first effective. It will remain valid until rescinded or modified by the commissioner. The rescission or modifications must be issued no later than March 31 of the year they are first effective. Before [~~Subsequent to~~] that statement may be [~~being~~] issued, if a company chooses to use this alternative, the company must file a request to do so, along with justification for its use, no later than April 30 of the year of the opinion to be filed. The request will be deemed approved on October 1 of that year if the commissioner has not denied the request by that date.

(C) A [a] statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and I have submitted the required comparison as specified by this state."

(i) If the commissioner chooses to allow this alternative, a formal written list of products (to be added to the table in Figure: 28 TAC §4.2806(f)(1)(C)(ii)) [~~§3.1606(f)(1)(C)(ii))~~] for which the required comparison must be provided will be published. If a company chooses to use this alternative, the list in effect on July 1 of a calendar year applies to statements for that calendar year and remains in effect until it is revised or revoked. If no list is available, this alternative is not available.

(ii) If a company desires to use this alternative, the appointed actuary must provide a comparison of the gross nationwide reserves held to the gross nationwide reserves that would be held under §7.18 of this title (relating to National Association of Insurance Commissioners [~~NAIC~~] Accounting Practices and Procedures Manual). Gross nationwide reserves are the total reserves calculated for the total company in force business directly sold and assumed, indifferent to the state in which the risk resides, without reduction for reinsurance ceded. The information provided must include the following [~~be at least~~]:

Figure: 28 TAC §4.2806(f)(1)(C)(ii)

[~~Figure: 28 TAC §3.1606(f)(1)(C)(ii)~~]

(iii) The information listed must include all products identified by either the state of filing or any other states subscribing to this alternative.

(iv) If there is no codification standard for the type of product or risk in force or if the codification standard does not directly address the type of product or risk in force, the appointed actuary must provide detailed disclosure of the specific method and assumptions used in determining the reserves held.

(2) The commissioner may reject an opinion based on the laws and regulations of the state of domicile and require an opinion based on the laws of this state. If a company is unable to provide the opinion within 60 days of the request or such other period of time determined by the commissioner after consultation with the company, the commissioner may contract with an independent actuary at the company's expense to prepare and file the opinion.

§4.2807. Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary.

(a) General. Any actuarial memorandum required by the provisions of this subchapter must be prepared in accordance with and subject to the provisions and qualifications of paragraphs (1) - (5) of this subsection.

(1) In accordance with Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law [§§~~425.054 - 425.057~~], the appointed actuary must prepare a memorandum to the company describing the analysis done in support of the appointed actuary's [~~his or her~~] opinion regarding the reserves under the opinion. The memorandum must be made available for examination by the commissioner upon the commissioner's request.

(2) In preparing the memorandum, the appointed actuary may rely on, and include as a part of the appointed actuary's [~~his or her~~] own memorandum, memoranda prepared and signed by other actuaries who are qualified within the meaning of §4.2804 [~~§3.1604~~] of this title (relating to Definitions), with respect to the areas covered in such memoranda, and so state in the other actuaries' [~~their~~] memoranda.

(3) If the commissioner requests a memorandum and no such memorandum exists or if the commissioner finds that the analysis described in the memorandum fails to meet the standards of the Actuarial Standards Board as required by §4.2805 [~~§3.1605~~] of this title (relating to General Requirements), or the standards and requirements of this subchapter, the commissioner may designate a qualified actuary to review the opinion and prepare such supporting memorandum as is required for review. The reasonable and necessary expense of the independent review must be paid by the company but will be directed and controlled by the commissioner.

(4) The reviewing actuary will have the same status as an examiner for purposes of obtaining data from the company, and the work papers and documentation of the reviewing actuary will be retained by the commissioner. The reviewing actuary may not be an employee of a consulting firm involved with the preparation of any prior memorandum or opinion for the insurer required by this subchapter for any one of the current year or the preceding three years.

(5) In accordance with Insurance Code Chapter 425, Subchapter B [§§~~425.054 - 425.057~~], the appointed actuary must prepare a regulatory asset adequacy issues summary, the contents of which are specified in subsection (c) of this section. Texas domestic companies must submit the regulatory asset adequacy issues summary by email to ActuarialDivision@tdi.texas.gov or by paper copy to the Financial Regulation Division, MC: FRD, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030 [~~Texas Department of Insurance, Financial Regulation Division, MC-FRD, P.O. Box 12030, Austin, Texas 78711-2030~~] no later than March 15 of the year following the year for which a statement of actuarial opinion based on asset adequacy is required. Nondomestic companies must submit the regulatory asset adequacy issues summary when requested by the commissioner.

(b) Details of the memorandum section documenting asset adequacy analysis. When an actuarial opinion under §4.2806 [~~§3.1606~~] of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) is provided, the memorandum must demonstrate that the analysis has been done in accordance with the standards for asset adequacy referred to in §4.2805(c) [~~§3.1605(c)~~] of this title and any additional standards under this subchapter. The documentation of the assumptions used in paragraphs (1) and (2) of this subsection must be such that an actuary reviewing the actuarial memorandum could form a conclusion as to the reasonableness of the assumptions. The memorandum must specify:

(1) for reserves:

(A) product descriptions including market description, underwriting and other aspects of a risk profile and the specific risks the appointed actuary deems significant;

(B) source of liability in force;

(C) reserve method and basis;

(D) investment reserves;

(E) reinsurance arrangements;

(F) identification of any explicit or implied guarantees made by the general account in support of benefits provided through a separate account or under a separate account policy or contract and the methods used by the appointed actuary to provide for the guarantees in the asset adequacy analysis;

(G) documentation of assumptions to test reserves for the following:

(i) lapse rates (both base and excess);

(ii) interest crediting rate strategy;

(iii) mortality;

(iv) policyholder dividend strategy;

(v) competitor or market interest rate;

(vi) annuitization rates;

(vii) commissions and expenses; and

(viii) morbidity.

(2) For assets:

(A) portfolio descriptions, including a risk profile disclosing the quality, distribution, and types of assets;

(B) investment and disinvestment assumptions;

(C) source of asset data;

(D) asset valuation bases; and

(E) documentation of assumptions made for:

(i) default costs;

(ii) bond call function;

(iii) mortgage prepayment function;

(iv) determining market value for assets sold due to disinvestment strategy; and

(v) determining yield on assets acquired through the investment strategy.

(3) For the analysis basis:

(A) methodology;

(B) rationale for inclusion or exclusion of different blocks of business and how pertinent risks were analyzed;

(C) rationale for degree of rigor in analyzing different blocks of business (including the level of "materiality" that was used in determining how rigorously to analyze different blocks of business);

(D) criteria for determining asset adequacy (including the precise basis for determining if assets are adequate to cover reserves under "moderately adverse conditions" or other conditions as specified in relevant actuarial standards of practice); and

(E) whether the impact of federal income taxes was considered and the method of treating reinsurance in the asset adequacy analysis;

(4) summary of material changes in methods, procedures, or assumptions from prior year's asset adequacy analysis;

(5) summary of results; and

(6) conclusions.

(c) Details of the regulatory asset adequacy issues summary.

(1) The regulatory asset adequacy issues summary must include the following.[:]

(A) Descriptions [~~descriptions~~] of the scenarios tested (including whether those scenarios are stochastic or deterministic) and the sensitivity testing done relative to those scenarios. If negative ending surplus results under certain tests in the aggregate, the actuary should describe those tests and the amount of additional reserve as of the valuation date that [~~which~~], if held, would eliminate the negative aggregate surplus values. Ending surplus values must be determined by either extending the projection period until the in force and associated assets and liabilities at the end of the projection period are immaterial or by adjusting the surplus amount at the end of the projection period by an amount that appropriately estimates the value that can reasonably be expected to arise from the assets and liabilities remaining in force.

(B) The [~~the~~] extent to which the appointed actuary uses assumptions in the asset adequacy analysis that are materially different than the assumptions used in the previous asset adequacy analysis.

(C) The [~~the~~] amount of reserves and the identity of the product lines that had been subjected to asset adequacy analysis in the prior opinion but were not subject to analysis for the current opinion.

(D) Comments [~~comments~~] on any interim results that may be of significant concern to the appointed actuary. For example, the comments must describe the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods.

(E) The [~~the~~] methods used by the actuary to recognize the impact of reinsurance on the company's cash flows, including both assets and liabilities, under each of the scenarios tested.

(F) Whether [~~whether~~] the actuary has been satisfied that all options whether explicit or embedded, in any asset or liability (including, but not limited to, those affecting cash flows embedded in fixed income securities) and equity-like features in any investments have been appropriately considered in the asset adequacy analysis.

(2) The regulatory asset adequacy issues summary must contain the name of the company for which the regulatory asset adequacy issues summary is being supplied and be signed and dated by the appointed actuary rendering the actuarial opinion.

(3) The regulatory asset adequacy issues summary will be used to examine the company's financial condition and ability to meet its liabilities. It will be considered information obtained during the course of an examination under [~~the~~] Insurance Code Chapter 401, concerning Audits and Examinations, and treated as confidential.

(d) Conformity to standards of practice. The memorandum must include a statement with wording substantially similar to that of this subsection as follows: "Actuarial methods, considerations, and analyses used in the preparation of this memorandum conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis for this memorandum."

(e) Use of assets supporting the IMR and the AVR. An appropriate allocation of assets in the amount of the IMR, whether positive or negative, must be used in any asset adequacy analysis. Analysis of risks regarding asset default may include an appropriate allocation of assets supporting the AVR; these AVR assets may not be applied for any other risks with respect to reserve adequacy. Analysis of these and other risks may include assets supporting other mandatory or voluntary reserves available to the extent not used for risk analysis and reserve support. The amount of the assets used for the AVR must be disclosed in the table of reserves and liabilities of the opinion and in the mem-

orandum. The method used for selecting particular assets or allocated portions of assets must be disclosed in the memorandum.

(f) Documentation retention. The appointed actuary must retain on file, for at least seven years, sufficient documentation so that it will be possible to determine the procedures followed, the analyses performed, the bases for assumptions, and the results obtained.

§4.2808. Asset Adequacy Analysis Exemption.

(a) Companies that do business only in Texas and no other state are not required to perform the asset adequacy analysis required by §4.2805 [~~§3.1605~~] of this title (relating to General Requirements) unless required by the commissioner under §4.2803 [~~pursuant to §3.1603~~] of this title (relating to Commissioner [~~commissioner~~] Discretion).

(b) Companies exempted under subsection (a) of this section must [~~shall~~] submit with the annual statement an actuarial opinion under [~~pursuant to~~] this subchapter but not based on an asset adequacy analysis.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Jessica Barta
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 676-6555

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DIVISION 2. STRENGTHENED RESERVES PURSUANT TO INSURANCE CODE §425.067

28 TAC §4.2811

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter BB, Division 2, under Insurance Code §425.067 and §36.001.

Insurance Code §425.067 authorizes the commissioner to establish categories of necessary reserves for certain policies, benefits, or contracts issued by life insurance companies.

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. Subchapter BB, Division 2, affects Insurance Code §425.067.

§4.2811. Strengthened Reserves Under [~~Pursuant to~~] Insurance Code §425.067.

A life insurance company may increase the amount of its reserve liabilities by changing the basis of computation as provided in Insurance Code §425.067, concerning Optional Reserve Computations. The insurer may establish a higher reserving basis by reporting an increase in reserve in Exhibit 5A of its annual statement. Thereafter the insurer must continue to report on the higher basis. An insurer may, with the approval of the Texas Department of Insurance, as provided in Insurance Code §425.067, adopt a lower standard of valuation, but not lower than the minimum standard provided in Insurance Code §425.053, concerning Annual Valuation of Reserves for Policies and Contracts Issued Before Operative Date of Valuation Manual.

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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Jessica Barta
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 676-6555

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DIVISION 3. VALUATION OF LIFE INSURANCE POLICIES

28 TAC §§4.2821 - 4.2827, 4.2829

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter BB, Division 3, under Insurance Code §§36.004, 425.058(c)(3), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.058(c)(3) specifies that for an ordinary life insurance policy issued on the standard basis, to which Insurance Code Chapter 1105, Subchapter B, applies, the applicable table is any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard values under Insurance Code Chapter 425, Subchapter B.

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. Subchapter BB, Division 3, affects Insurance Code §§425.054, 425.0545, and 425.058(c)(3).

§4.2821. Purpose.

(a) The purpose of this subchapter is to provide:

(1) tables [~~Tables~~] of select mortality factors and rules for their use;

(2) rules [~~Rules~~] concerning a minimum standard for the valuation of plans with nonlevel premiums or benefits; and

(3) rules [~~Rules~~] concerning a minimum standard for the valuation of plans with secondary guarantees.

(b) The method for calculating basic reserves defined in this subchapter will constitute the Commissioners' Reserve Valuation Method for policies to which this subchapter is applicable.

§4.2822. Adoption of Tables of Select Mortality Factors.

The six tables of select mortality factors adopted in this section are from the NAIC model regulation titled "Valuation of Life Insurance Policies Model Regulation" that [~~which~~] was adopted by the NAIC

on March 8, 1999. The six tables of base select mortality factors include: male aggregate, male nonsmokers, male smoker, female aggregate, female nonsmoker, and female smoker. These tables apply to both age-last-birthday [~~age last birthday~~] and age-nearest-birthday [~~age nearest birthday~~] mortality tables.
Figure: 28 TAC §4.2822
[~~Figure: 28 TAC §4.4502~~]

§4.2823. Applicability.

This subchapter applies to all life insurance policies, with or without nonforfeiture values, issued on or after January 1, 2000, and before January 1, 2017, subject to the following exceptions in paragraph (1) of this section and conditions in paragraph (2) of this section. For all life insurance policies, with or without nonforfeiture values, issued on or after January 1, 2017, the requirements of the valuation manual adopted under Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law, apply.

(1) Exceptions.

(A) This subchapter does [~~shall~~] not apply to any individual life insurance policy issued on or after the effective date of this subchapter if the policy is issued in accordance with, and as a result of, the exercise of a reentry provision contained in the original life insurance policy of the same or greater face amount, issued before the effective date of this subchapter, that guarantees the premium rates of the new policy. This subchapter also does [~~shall~~] not apply to subsequent policies issued as a result of the exercise of such a provision, or a derivation of the provision, in the new policy.

(B) This subchapter does [~~shall~~] not apply to any universal life policy that meets all the following requirements:

(i) secondary guarantee period, if any, is five years or less;

(ii) specified premium for the secondary guarantee period is not less than the net level reserve premium for the secondary guarantee period based on the 1980 CSO valuation tables and the applicable valuation interest rate; and

(iii) the initial surrender charge is not less than 100% of the first year annualized specified premium for the secondary guarantee period.

(C) This subchapter does [~~shall~~] not apply to any variable life insurance policy that provides for life insurance, the amount or duration of which varies according to the investment experience of any separate account or accounts.

(D) This subchapter does [~~shall~~] not apply to any variable universal life insurance policy that provides for life insurance, the amount or duration of which varies according to the investment experience of any separate account or accounts.

(E) This subchapter does [~~shall~~] not apply to a group life insurance certificate unless the certificate provides for a stated or implied schedule of maximum gross premiums required in order to continue coverage in force for a period in excess of one year.

(2) Conditions.

(A) Calculation of the minimum valuation standard for policies with guaranteed nonlevel [~~Nonlevel~~] gross premiums or guaranteed nonlevel benefits (other than universal life policies), or both, must [~~shall~~] be in accordance with the provisions of §4.2826 [~~§3.4506~~] of this title (relating to Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums or Guaranteed Nonlevel Benefits (Other than Universal Life Policies)).

(B) Calculation of the minimum valuation standard for flexible premium and fixed premium universal life insurance policies, that contain provisions resulting in the ability of a policyholder to keep a policy in force over a secondary guarantee period, must [~~shall~~] be in accordance with the provisions of §4.2827 [~~§3.4507~~] of this title (relating to Calculation of Minimum Valuation Standard for Flexible Premium and Fixed Premium Universal Life Insurance Policies That Contain Provisions Resulting in the Ability of a Policyowner to Keep a Policy in Force Over a Secondary Guarantee Period).

§4.2824. Definitions.

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

(1) Basic reserves--Reserves [~~reserves~~] calculated in accordance with the principles of [~~the~~] Insurance Code §425.064, concerning Commissioners Reserve Valuation Method for Life Insurance and Endowment Benefits.

(2) Contract segmentation method--The [~~the~~] method of dividing the period from issue to mandatory expiration of a policy into successive segments, with the length of each segment being defined as the period from the end of the prior segment (from policy inception, for the first segment) to the end of the latest policy year as determined below. All calculations are made using the 1980 CSO valuation tables, as defined in this section, (or any other valuation mortality table adopted by the NAIC after the effective date of this subchapter and promulgated by regulation by the commissioner for this purpose), and, if elected, the optional minimum mortality standard for deficiency reserves stipulated in §4.2825(b) [~~§3.4505(b)~~] of this title [~~subchapter~~] (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves).
Figure: 28 TAC §4.2824(2)
[~~Figure: 28 TAC §3.4504(2)~~]

(3) Deficiency reserves--The [~~the~~] excess, if greater than zero, of the minimum reserves calculated in accordance with the principles of [~~the~~] Insurance Code §425.068, concerning Reserve Computation: Gross Premium Charged Less Than Valuation Net Premium, over the basic reserves.

(4) Guaranteed gross premiums--The [~~the~~] premiums under a policy of life insurance that are guaranteed and determined at issue.

(5) Maximum valuation interest rates--The [~~the~~] interest rates defined in [~~the~~] Insurance Code §425.061, concerning Computation of [~~Minimum Standard by~~] Calendar Year Statutory Valuation Interest Rate: General Rule [~~of Issue~~], that are to be used in determining the minimum standard for the valuation of life insurance policies.

(6) NAIC--National Association of Insurance Commissioners.

(7) 1980 CSO valuation tables--The [~~the~~] Commissioners' 1980 Standard Ordinary Mortality Table (1980 CSO Table) without ten-year selection factors, incorporated into the 1980 amendments to the NAIC Standard Valuation Law, and variations of the 1980 CSO Table approved by the NAIC, such as the smoker and nonsmoker versions approved in December 1983.

(8) Scheduled gross premium--The [~~the~~] smallest illustrated gross premium at issue for other than universal life insurance policies. For universal life insurance policies, scheduled gross premium means the smallest specified premium described in §4.2827(a)(3) [~~§3.4507(a)(3)~~] of this title [~~subchapter~~] (relating to Calculation of Minimum Valuation Standard for Flexible Premium and Fixed Premium Universal Life Insurance Policies That Contain

Provisions Resulting in the Ability of a Policyowner to Keep a Policy in Force Over a Secondary Guarantee Period) if any, or else the minimum premium described in §4.2827(a)(4) [~~§3.4507(a)(4)~~] of this title [~~subchapter~~].

(9) Segmented reserves--Reserves [~~reserves~~], calculated using segments produced by the contract segmentation method, equal to the present value of all future guaranteed benefits less the present value of all future net premiums to the mandatory expiration of a policy, where the net premiums within each segment are a uniform percentage of the respective guaranteed gross premiums within the segment. The length of each segment is determined by the "contract segmentation method," as defined in this section. The interest rates used in the present value calculations for any policy may not exceed the maximum valuation interest rate, determined with a guarantee duration equal to the sum of the lengths of all segments of the policy. For both basic reserves and deficiency reserves computed by the segmented method, present values must include future benefits and net premiums in the current segment and in all subsequent segments. The uniform percentage for each segment is such that, at the beginning of the segment, the present value of the net premiums within the segment equals:

(A) the present value of the death benefits and endowment benefits within the segment, plus

(B) the present value of any unusual guaranteed cash value (see §4.2826(d) [~~§3.4506(d)~~] of this title [~~subchapter~~] (relating to Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums or Guaranteed Nonlevel Benefits (Other than Universal Life Policies)) occurring at the end of the segment, less

(C) any unusual guaranteed cash value occurring at the start of the segment, plus

(D) for the first segment only, the excess of clause (i) of this paragraph over clause (ii) of this paragraph, as follows.[~~:~~]

(i) A [~~a~~] net level annual premium equal to the present value, at the date of issue, of the benefits provided for in the first segment after the first policy year, divided by the present value, at the date of issue, of an annuity of one per year payable on the first and each subsequent anniversary within the first segment on which a premium falls due. However, the net level annual premium may [~~shall~~] not exceed the net level annual premium on the nineteen-year premium whole life plan of insurance of the same renewal year equivalent level amount at an age one year higher than the age at issue of the policy.

(ii) A [~~a~~] net one year term premium for the benefits provided for in the first policy year.

(10) Tabular cost of insurance--The [~~the~~] net single premium at the beginning of a policy year for one-year term insurance in the amount of the guaranteed death benefit in that policy year.

(11) Ten-year select factors--The [~~the~~] select factors in [~~the~~] Insurance Code Chapter 425, Subchapter B, concerning [~~The~~] Standard Valuation Law.

(12) Unitary reserves--The [~~the~~] present value of all future guaranteed benefits less the present value of all future modified net premiums, where:

(A) guaranteed benefits and modified net premiums are considered to the mandatory expiration of the policy; and

(B) modified net premiums are a uniform percentage of the respective guaranteed gross premiums, where the uniform percentage is such that, at issue, the present value of the net premiums equals the present value of all death benefits and pure endowments, plus the excess of clause (i) of this subparagraph over clause (ii) of this subparagraph, as follows.[~~:~~]

(i) A [~~a~~] net level annual premium equal to the present value, at the date of issue, of the benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one per year payable on the first and each subsequent anniversary of the policy on which a premium falls due. However, the net level annual premium may [~~shall~~] not exceed the net level annual premium on the nineteen-year premium whole life plan of insurance of the same renewal year equivalent level amount at an age one year higher than the age at issue of the policy.

(ii) A [~~a~~] net one-year [~~one year~~] term premium for the benefits provided for in the first policy year.

(C) The interest rates used in the present value calculations for any policy may not exceed the maximum valuation interest rate, determined with a guarantee duration equal to the length from issue to the mandatory expiration of the policy.

(13) Universal life insurance policy--Any [~~any~~] individual life insurance policy under the provisions of which separately identified interest credits (other than in connection with dividend accumulations, premium deposit funds, or other supplementary accounts) and mortality or expense charges are made to the policy.

§4.2825. General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves.

(a) At the election of the company for any one or more specified plans of life insurance, the minimum mortality standard for basic reserves may be calculated using the 1980 CSO valuation tables with select mortality factors (or any other valuation mortality table adopted by the NAIC after the effective date of this subchapter and promulgated by regulation by the commissioner for this purpose). If select mortality factors are elected, they may be:

(1) the ten-year select mortality factors incorporated in [~~the~~] Insurance Code Chapter 425, Subchapter B, concerning [~~The~~] Standard Valuation Law;

(2) the select mortality factors adopted in §4.2822 [~~§3.4502~~] of this title [~~subchapter~~] (relating to Adoption of Tables of Select Mortality Factors); or

(3) any other table of select mortality factors adopted by the NAIC after the effective date of this regulation and promulgated by regulation by the commissioner for the purpose of calculating basic reserves.

(b) Deficiency reserves, if any, are calculated for each policy as the excess, if greater than zero, of the quantity A over the basic reserve. The quantity A is obtained by recalculating the basic reserve for the policy using guaranteed gross premiums instead of net premiums when the guaranteed gross premiums are less than the corresponding net premiums. At the election of the company for any one or more specified plans of insurance, the quantity A and the corresponding net premiums used in the determination of quantity A may be based upon the 1980 CSO valuation tables with select mortality factors (or any other valuation mortality table adopted by the NAIC after the effective date of this regulation and promulgated by regulation by the commissioner). If select mortality factors are elected, they may be:

(1) the ten-year select mortality factors in [~~the~~] Insurance Code Chapter 425, Subchapter B [~~, the Standard Valuation Law~~];

(2) the select mortality factors adopted in §4.2822 [~~§3.4502~~] of this title [~~subchapter~~];

(3) for [For] durations in the first segment, X percent of the select mortality factors adopted in §4.2822 [§3.4502] of this title [subchapter], subject to the following:

(A) X may vary by policy year, policy form, underwriting classification, issue age, or any other policy factor expected to affect mortality experience;

(B) X is such that, when using the valuation interest rate used for basic reserves, clause (i) of this subparagraph is greater than or equal to clause (ii) of this subparagraph:

(i) the [The] actuarial present value of future death benefits, calculated using the mortality rates resulting from the application of X;

(ii) the [The] actuarial present value of future death benefits calculated using anticipated mortality experience without recognition of mortality improvement beyond the valuation date;

(C) X is such that the mortality rates resulting from the application of X are at least as great as the anticipated mortality experience, without recognition of mortality improvement beyond the valuation date, in each of the first five years after the valuation date;

(D) the [The] appointed actuary must [shall] increase X at any valuation date where it is necessary to continue to meet all the requirements of paragraph (3) of this subsection;

(E) the [The] appointed actuary may decrease X at any valuation date as long as X continues to meet all the requirements of paragraph (3) of this subsection; and

(F) the [The] appointed actuary must [shall] specifically take into account the adverse effect on expected mortality and lapsation of any anticipated or actual increase in gross premiums.

(G) If X is less than 100% [100 percent] at any duration for any policy, the following requirements must [shall] be met:

(i) the [The] appointed actuary must [shall] annually prepare an actuarial opinion and memorandum for the company in conformance with the requirements of §4.2807 [§3.1607] of this title [chapter] (relating to Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary);

(ii) in [In] the regulatory asset adequacy issues summary prescribed under §4.2807 [§3.1607] of this title [chapter], the appointed actuary must [shall] disclose the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods; and

(iii) the [The] appointed actuary must [shall] annually opine for all policies subject to this regulation as to whether the mortality rates resulting from the application of X meet the requirements of paragraph (3) of this subsection. This opinion must [shall] be supported by an actuarial report, subject to appropriate Actuarial Standards of Practice promulgated by the Actuarial Standards Board of the American Academy of Actuaries. The X factors must [shall] reflect anticipated future mortality, without recognition of mortality improvement beyond the valuation date, taking into account relevant emerging experience; or [.]

(4) any [Any] other table of select mortality factors adopted by the NAIC after the effective date of this regulation and promulgated by regulation by the commissioner for the purpose of calculating deficiency reserves.

(c) This subsection applies to both basic reserves and deficiency reserves. Any set of select mortality factors may be used only for the first segment. However, if the first segment is less than ten years, the appropriate ten-year select mortality factors may be used thereafter through the tenth policy year from the date of issue.

(d) In determining basic reserves or deficiency reserves, guaranteed gross premiums without policy fees may be used where the calculation involves the guaranteed gross premium but only if the policy fee is a level dollar amount after the first policy year. In determining deficiency reserves, policy fees may be included in guaranteed gross premiums even if not included in the actual calculation of basic reserves.

(e) Reserves for policies that have changes to guaranteed gross premiums, guaranteed benefits, guaranteed charges, or guaranteed credits that are unilaterally made by the insurer after issue and that are effective for more than one year after the date of the change must [shall] be the greatest of the following:

(1) reserves calculated ignoring the guarantee;[,]

(2) reserves assuming the guarantee was made at issue;[,] and

(3) reserves assuming that the policy was issued on the date of the guarantee.

(f) The commissioner may require that the company document the extent of the adequacy of reserves for specified blocks, including but not limited to policies issued before [prior to] the effective date of this subchapter. This documentation may include a demonstration of the extent to which aggregation with other non-specified blocks of business is relied upon in the formation of the appointed actuary opinion pursuant to and consistent with the requirements of §4.2807 [§3.1607] of this title [chapter].

§4.2826. Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums or Guaranteed Nonlevel Benefits (Other than Universal Life Policies).

(a) Basic reserves. Basic reserves must be calculated as the greater of the segmented reserves and the unitary reserves. Both the segmented reserves and the unitary reserves for any policy must use the same valuation mortality table and selection factors. At the option of the insurer, in calculating segmented reserves and net premiums, either one of the two adjustments described in paragraphs (1) or (2) of this subsection may be made.

(1) An insurer may use the adjustments described in this paragraph.

(A) Treat the unitary reserve, if greater than zero, applicable at the end of each segment as a pure endowment; and

(B) subtract the unitary reserve, if greater than zero, applicable at the beginning of each segment from the present value of guaranteed life insurance and endowment benefits for each segment.

(2) An insurer may use the adjustments described in this paragraph.

(A) Treat the guaranteed cash surrender value, if greater than zero, applicable at the end of each segment as a pure endowment; and

(B) subtract the guaranteed cash surrender value, if greater than zero, applicable at the beginning of each segment from the present value of guaranteed life insurance and endowment benefits for each segment.

(b) Deficiency reserves.

(1) The deficiency reserve at any duration must be calculated:

(A) on a unitary basis if the corresponding basic reserve determined by subsection (a) of this section is unitary;

(B) on a segmented basis if the corresponding basic reserve determined by subsection (a) of this section is segmented; or

(C) on the segmented basis if the corresponding basic reserve determined by subsection (a) of this section is equal to both the segmented reserve and the unitary reserve.

(2) This subsection applies to any policy for which the guaranteed gross premium at any duration is less than the corresponding modified net premium calculated by the method used in determining the basic reserves, but using the minimum valuation standards of mortality specified in §4.2825(b) [~~§3.4505(b)~~] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) and rate of interest.

(3) Deficiency reserves, if any, must be calculated for each policy as the excess if greater than zero, for the current and all remaining periods, of the quantity A over the basic reserve, where A is obtained as indicated in §4.2825(b) [~~§3.4505(b)~~] of this title [~~(relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves)~~].

(4) For deficiency reserves determined on a segmented basis, the quantity A is determined using segment lengths equal to those determined for segmented basic reserves.

(c) Minimum value. Basic reserves may not be less than the tabular cost of insurance for the balance of the policy year, if mean reserves are used. Basic reserves may not be less than the tabular cost of insurance for the balance of the current modal period or to the paid-to-date, if later, but not beyond the next policy anniversary, if mid-terminal reserves are used. The tabular cost of insurance must use the same valuation mortality table and interest rates as that used for the calculation of the segmented reserves. However, if the select mortality factors are used, they must be the ten-year select factors incorporated into Insurance Code Chapter 425, Subchapter B, concerning Standard Valuation Law. In no case may total reserves (including basic reserves, deficiency reserves and any reserves held for supplemental benefits that would expire upon contract termination) be less than the amount that the policyowner would receive (including the cash surrender value of the supplemental benefits, if any, referred to above), exclusive of any deduction for policy loans, upon termination of the policy.

(d) Unusual pattern of guaranteed cash surrender values.

(1) For any policy with an unusual pattern of guaranteed cash surrender values, the reserves actually held before [~~prior to~~] the first unusual guaranteed cash surrender value must not be less than the reserves calculated by treating the first unusual guaranteed cash surrender value as a pure endowment and treating the policy as an n year policy providing term insurance plus a pure endowment equal to the unusual cash surrender value, where n is the number of years from the date of issue to the date the unusual cash surrender value is scheduled.

(2) The reserves actually held after [~~subsequent to~~] any unusual guaranteed cash surrender value must not be less than the reserves calculated by treating the policy as an n year policy providing term insurance plus a pure endowment equal to the next unusual guaranteed cash surrender value, and treating any unusual guaranteed cash surrender value at the end of the prior segment as a net single premium, where:

(A) n is the number of years from the date of the last unusual guaranteed cash surrender value before [~~prior to~~] the valuation date to the earlier of:

(i) the date of the next unusual guaranteed cash surrender value, if any, that is scheduled after the valuation date; or

(ii) the mandatory expiration date of the policy; and

(B) the net premium for a given year during the n year period is equal to the product of the net to gross ratio and the respective gross premium; and

(C) the net to gross ratio is equal to clause (i) of this subparagraph divided by clause (ii) of this subparagraph as follows:

(i) the present value, at the beginning of the n year period, of death benefits payable during the n year period plus the present value, at the beginning of the n year period, of the next unusual guaranteed cash surrender value, if any, minus the amount of the last unusual guaranteed cash surrender value, if any, scheduled at the beginning of the n year period;

(ii) the present value, at the beginning of the n year period, of the scheduled gross premiums payable during the n year period.

(3) For purposes of this subsection, a policy is considered to have an unusual pattern of guaranteed cash surrender values if any future guaranteed cash surrender value exceeds the prior year's guaranteed cash surrender value by more than the sum of:

(A) 110% of the scheduled gross premium for that year;

(B) 110% of one year's accrued interest on the sum of the prior year's guaranteed cash surrender value and the scheduled gross premium using the nonforfeiture interest rate used for calculating policy guaranteed cash surrender values; and

(C) 5% of the first policy year surrender charge, if any.

(e) Optional exemption for yearly renewable term (YRT) reinsurance. At the option of the company, the following approach for reserves on YRT reinsurance may be used.[~~:~~]

(1) Calculate the valuation net premium for each future policy year as the tabular cost of insurance for that future year.

(2) Basic reserves must never be less than the tabular cost of insurance for the appropriate period, as defined in subsection (c) of this section.

(3) Deficiency reserves.

(A) For each policy year, calculate the excess, if greater than zero, of the valuation net premium over the respective maximum guaranteed gross premium.

(B) Deficiency reserves must never be less than the sum of the present values, at the date of valuation, of the excesses determined in accordance with subparagraph (A) of this paragraph.

(4) For purposes of this subsection, the calculations use the maximum valuation interest rate and the 1980 CSO mortality tables with or without ten-year select mortality factors, or any other table adopted after the effective date of this regulation by the NAIC and promulgated by regulation by the commissioner for this purpose.

(5) A reinsurance agreement will be considered YRT reinsurance for purposes of this subsection if only the mortality risk is reinsured.

(6) If the assuming company chooses this optional exemption, the ceding company's reinsurance reserve credit will be limited to the amount of reserve held by the assuming company for the affected policies.

(f) Optional exemption for attained-age-based yearly renewable term life insurance policies. At the option of the company, the approach described in this subsection for reserves for attained-age-based YRT life insurance policies may be used.

(1) Calculate the valuation net premium for each future policy year as the tabular cost of insurance for that future year.

(2) Basic reserves may never be less than the tabular cost of insurance for the appropriate period, as defined in subsection (c) of this section.

(3) Deficiency reserves.

(A) For each policy year, calculate the excess, if greater than zero, of the valuation net premium over the respective maximum guaranteed gross premium.

(B) Deficiency reserves may never be less than the sum of the present values, at the date of valuation, of the excesses determined in accordance with subparagraph (A) of this paragraph.

(4) For purposes of this subsection, the calculations use the maximum valuation interest rate and the 1980 CSO valuation tables with or without ten-year select mortality factors, or any other table adopted after the effective date of this regulation by the NAIC and promulgated by regulation by the commissioner for this purpose.

(5) A policy will be considered an attained-age-based YRT life insurance policy for purposes of this subsection if:

(A) the premium rates (on both the initial current premium scale and the guaranteed maximum premium scale) are based upon the attained age of the insured such that the rate for any given policy at a given attained age of the insured is independent of the year the policy was issued; and

(B) the premium rates (on both the initial current premium scale and the guaranteed maximum premium scale) are the same as the premium rates for policies covering all insureds of the same sex, risk class, plan of insurance, and attained age.

(6) For policies that become attained-age-based YRT policies after an initial period of coverage, the approach of this subsection may be used after the initial period if:

(A) the initial period is constant for all insureds of the same sex, risk class, and plan of insurance; or

(B) the initial period runs to a common attained age for all insureds of the same sex, risk class, and plan of insurance; and

(C) after the initial period of coverage, the policy meets the conditions of paragraph (5) of this subsection.

(7) If this election is made, this approach must be applied in determining reserves for all attained-age-based YRT life insurance policies issued on or after the effective date of this subchapter.

(g) Exemption from unitary reserves for certain n-year renewable term life insurance policies. Unitary basic reserves and unitary deficiency reserves need not be calculated for a policy if the conditions described in paragraphs (1) - (3) of this subsection are met.

(1) The policy consists of a series of n-year periods, including the first period and all renewal periods, where n is the same for each period, except for the final renewal period, n may be truncated or extended to reach the expiry age, provided that this final renewal period is less than ten years and less than twice the size of the earlier n-year periods, and for each period, the premium rates on both the initial current premium scale and the guaranteed maximum premium scale are level;

(2) the guaranteed gross premiums in all n-year periods are not less than the corresponding net premiums based upon the 1980 CSO Table with or without the ten-year select mortality factors; and

(3) there are no cash surrender values in any policy year.

(h) Exemption from unitary reserves for certain juvenile policies. Unitary basic reserves and unitary deficiency reserves need not be calculated for a policy if the conditions described in paragraphs (1) - (3) of this subsection are met, based upon the initial current premium scale at issue.

(1) At issue, the insured is age 24 [~~twenty-four~~] or younger;

(2) until the insured reaches the end of the juvenile period, which must occur at or before age 25 [~~twenty-five~~], the gross premiums and death benefits are level, and there are no cash surrender values; and

(3) after the end of the juvenile period, gross premiums are level for the remainder of the premium paying period, and death benefits are level for the remainder of the life of the policy.

§4.2827. Calculation of Minimum Valuation Standard for Flexible Premium and Fixed Premium Universal Life Insurance Policies That Contain Provisions Resulting in the Ability of a Policyowner to Keep a Policy in Force Over a Secondary Guarantee Period.

(a) General.

(1) Policies with a secondary guarantee include:

(A) a policy with a guarantee that the policy will remain in force at the original schedule of benefits, [~~benefits ,~~] subject only to the payment of specified premiums;

(B) a policy in which the minimum premium at any duration is less than the corresponding one-year [~~one year~~] valuation premium, calculated using the maximum valuation interest rate and the 1980 CSO valuation tables with or without ten-year select mortality factors, or any other table adopted after the effective date of this regulation by the NAIC and promulgated by regulation by the commissioner for this purpose; or

(C) a policy with any combination of subparagraphs (A) and (B) of this paragraph.

(2) A secondary guarantee period is the period for which the policy is guaranteed to remain in force subject only to a secondary guarantee. When a policy contains more than one secondary guarantee, the minimum reserve must [~~shall~~] be the greatest of the respective minimum reserves at that valuation date of each unexpired secondary guarantee, ignoring all other secondary guarantees. Secondary guarantees that are unilaterally changed by the insurer after issue must [~~shall~~] be considered to have been made at issue. Reserves described in subsections (b) and (c) of this section must be recalculated from issue to reflect these changes.

(3) Specified premiums mean the premiums specified in the policy, the payment of which guarantees that the policy will remain in force at the original schedule of benefits, but that [~~which~~] otherwise would be insufficient to keep the policy in force in the absence of the guarantee if maximum mortality and expense charges and minimum interest credits were made and any applicable surrender charges were assessed.

(4) For purposes of this section, the minimum premium for any policy year is the premium that, when paid into a policy with a zero account value at the beginning of the policy year, produces a zero account value at the end of the policy year. The minimum premium calculation must use the policy cost factors (including mortality charges, loads, and expense charges) and the interest crediting rate, which are all guaranteed at issue.

(5) The one-year valuation premium means the net one-year premium based upon the original schedule of benefits for a given policy year. The one-year valuation premiums for all policy years are calculated at issue. The select mortality factors defined in §4.2825(b)(2) - (4) [~~§3.4505(b)(2),(3) and (4)~~] of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) may not be used to calculate the one-year valuation premiums.

(6) The one-year valuation premium should reflect the frequency of fund processing, as well as the distribution of deaths assumption employed in the calculation of the monthly mortality charges to the fund.

(b) Basic Reserves for the Secondary Guarantees. Basic reserves for the secondary guarantees must [~~shall~~] be the segmented reserves for the secondary guarantee period. In calculating the segments and the segmented reserves, the gross premiums must [~~shall~~] be set equal to the specified premiums, if any, or otherwise to the minimum premiums, that keep the policy in force and the segments will be determined according to the contract segmentation method as defined in §4.2824 [§3.4504] of this title (relating to Definitions).

(c) Deficiency Reserves for the Secondary Guarantees. Deficiency reserves, if any, for the secondary guarantees must [~~shall~~] be calculated for the secondary guarantee period in the same manner as described in §4.2826(b) [~~§3.4506(b)~~] of this title (Relating to Calculation of Minimum Valuation Standard for Policies with Guaranteed Nonlevel Gross Premiums or Guaranteed Nonlevel Benefits (Other Than Universal Life Policies)) with gross premiums set equal to the specified premiums, if any, or otherwise to the minimum premiums that keep the policy in force.

(d) Minimum Reserves. The minimum reserves during the secondary guarantee period are the greater of:

(1) the [~~The~~] basic reserves for the secondary guarantee plus the deficiency reserve, if any, for the secondary guarantees; or

(2) the [~~The~~] minimum reserves required by other rules or subchapters governing universal life plans.

§4.2829. 2001 CSO Mortality Table.

The 2001 CSO Mortality Table must [~~shall~~] be used for purposes of this subchapter under [~~pursuant to~~] the requirements of Subchapter AA, Division 3 [~~§§3.9101 - 3.9106~~] of this chapter [~~title~~] (relating to 2001 CSO Mortality Table).

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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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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DIVISION 4. PRENEED LIFE INSURANCE MINIMUM MORTALITY STANDARDS FOR DETERMINING RESERVE LIABILITIES AND NONFORFEITURE VALUES

28 TAC §§4.2831 - 4.2836

STATUTORY AUTHORITY. TDI proposes amendments to Subchapter BB, Division 4, under Insurance Code §§36.004, 425.058(c)(3), 1105.055(h), and 36.001.

Insurance Code §36.004 provides that the commissioner may adopt a rule to require compliance with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners if certain statutory requirements are met.

Insurance Code §425.058(c)(3) specifies that for an ordinary life insurance policy issued on the standard basis, to which Insurance Code Chapter 1105, Subchapter B, applies, the applicable table is any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard values under Insurance Code Chapter 425, Subchapter B.

Insurance Code §1105.055(h) specifies that the commissioner may adopt by rule any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners.

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. Subchapter BB, Division 4, affects Insurance Code §425.058 and §1105.055.

§4.2831. Purpose and Applicability.

(a) The purpose of this subchapter is to establish the minimum mortality standards for reserves and nonforfeiture values for preneed life insurance policies or certificates, and to recognize, permit, and prescribe the use of the Ultimate 1980 CSO in determining the minimum standard of valuation of reserves and the minimum standard nonforfeiture values for preneed life insurance policies or certificates in accordance with Insurance Code §425.058(c), concerning Computation of Minimum Standard: General Rule, and §1105.055, concerning Use of Mortality Tables and Interest Rates with Nonforfeiture Net Level Premium Method, [~~of the Insurance Code~~] and §4.2825(a) [~~§3.4505(a)~~] of this title [~~chapter~~] (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves).

(b) This subchapter applies to all preneed life insurance policies and certificates issued on or after January 1, 2009.

§4.2832. Definitions.

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

(1) 2001 CSO Mortality Table--Mortality tables, consisting of separate rates of mortality for male and female lives, developed by the American Academy of Actuaries CSO Task Force from the Valuation Basic Mortality Table developed by the Society of Actuaries Individual Life Insurance Valuation Mortality Task Force, and adopted by the NAIC in December 2002. The 2001 CSO Mortality Table is included in the 2nd Quarter 2002 *Proceedings of the NAIC.* Unless the context indicates otherwise, the 2001 CSO Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables.

(2) Department--The Texas Department of Insurance.

(3) NAIC--National Association of Insurance Commissioners.

(4) Prepaid funeral benefits--As defined in [~~the~~] Finance Code §154.002(9), concerning Definitions.

(5) Prepaid funeral benefits contract--A contract or agreement for prepaid funeral benefits subject to the requirements of [~~the~~] Finance Code Chapter 154, concerning Prepaid Funeral Services.

(6) Preneed life insurance--A life insurance policy or certificate that is approved by the department, issued by an insurance company licensed by the department, issued in conjunction with an insurance-funded prepaid funeral benefits contract, and that [~~which~~], whether by assignment or otherwise, has the purpose of funding prepaid funeral benefits to be provided at the time of, or immediately following, the death of the insured. For purposes of this subchapter, the definition of preneed life insurance does not include an annuity contract or policy.

(7) Ultimate 1980 CSO--The Commissioners 1980 Standard Ordinary Mortality Table without 10-year selection factors, incorporated into the 1980 amendments to the NAIC Standard Valuation Law approved in December 1983.

§4.2833. Minimum Valuation Mortality Standards.

Except as provided by §4.2836 [~~§3.9606~~] of this title [~~subchapter~~] (relating to Transitional Use of the 2001 CSO Mortality Table), the Ultimate 1980 CSO is [~~shall be~~] the minimum mortality standard for determining reserve liabilities and nonforfeiture values for both male and female insureds for preneed life insurance policies issued on or after January 1, 2009.

§4.2834. Minimum Valuation Interest Rate Standards.

(a) The interest rates used in determining the minimum standard for valuation of preneed life insurance are [~~shall be~~] the calendar year statutory valuation rates as defined in [~~the~~] Insurance Code Chapter 425, Subchapter B, concerning [~~(~~]Standard Valuation Law[~~)~~].

(b) The interest rates used in determining the minimum standard for nonforfeiture values for preneed life insurance are [~~shall be~~] the calendar year statutory nonforfeiture interest rates as defined in [~~the~~] Insurance Code Chapter 1105, concerning [~~(~~]Standard Nonforfeiture Law for Life Insurance[~~)~~].

§4.2835. Minimum Valuation Method Standards.

(a) The method used in determining the standard for the minimum valuation of reserves for preneed life insurance is [~~shall be~~] the method defined in [~~the~~] Insurance Code Chapter 425, Subchapter B, concerning [~~(~~]Standard Valuation Law[~~)~~].

(b) The method used in determining the standard for the minimum nonforfeiture values for preneed life insurance is [~~shall be~~] be the method defined in [~~the~~] Insurance Code Chapter 1105, concerning [~~(~~]Standard Nonforfeiture Law for Life Insurance[~~)~~].

§4.2836. Transitional Use of the 2001 CSO Mortality Table.

(a) For preneed life insurance policies or certificates issued on or after January 1, 2009, and before January 1, 2012, the 2001 CSO Mortality Table may be used as the minimum standard for reserves and minimum standard for nonforfeiture benefits for both male and female insureds in accordance with the requirements of Subchapter AA, Division 3, [~~§§3.9101 - 3.9106~~] of this chapter (relating to 2001 CSO Mortality Table).

(b) If a company elects to use the 2001 CSO Mortality Table as a minimum standard for any preneed life insurance policy or certificate issued on or after the effective date of this subsection and before January 1, 2012, the company must [~~shall~~] provide, as a part of the actuarial opinion memorandum submitted in support of the company's asset adequacy analysis, an annual written notification to the domiciliary commissioner. The notification must [~~shall~~] include:

(1) a complete list of all preneed life insurance policy and certificate forms that use the 2001 CSO Mortality Table as a minimum standard;

(2) a certification signed by the appointed actuary stating that the reserve methodology, employed by the company in determining reserves for the preneed life insurance policies or certificates issued after the effective date of this subchapter and using the 2001 CSO Mortality Table as a minimum standard, develops adequate reserves (for the purposes of this certification, the preneed life insurance policies or certificates using the 2001 CSO Mortality Table as a minimum standard cannot be aggregated with any other policies); and

(3) supporting information regarding the adequacy of reserves for preneed life insurance policies or certificates issued after the effective date of this subchapter and using the 2001 CSO Mortality Table as a minimum standard for reserves.

(c) Preneed life insurance policies or certificates issued on or after January 1, 2012, must use the Ultimate 1980 CSO in the calculation of minimum nonforfeiture values and minimum reserves.

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

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

SUBCHAPTER C. TECHNICAL STANDARDS

30 TAC §334.48

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the amendment to §334.48.

Background and Summary of the Factual Basis for the Proposed Rules

Since the beginning of Texas' underground storage tank (UST) program in 1989, the commission's rules have required that effective manual or automatic inventory control procedures be conducted for all underground storage tank systems at "retail service stations," as defined in 30 Texas Administrative Code (TAC) §334.2(102). This requirement applies regardless of which release detection method is selected by an owner or operator under 30 TAC §334.50. Because newer technologies have been

developed, and interstitial monitoring is required for all UST systems installed after January 1, 2009, it is unnecessary for all retail service stations to employ both inventory control procedures and the selected release detection method.

Section by Section Discussion

§334.48(c), Inventory Control.

The commission proposes to amend §334.48(c) to remove the requirement for all retail service stations to conduct inventory control procedures. Inventory control must still be performed as a necessary component of a release detection method under 30 TAC §334.50(d)(4) and (d)(9) (*i.e.,* combination of inventory control plus automatic tank gauging or a combination of inventory control plus statistical inventory reconciliation).

Fiscal Note: Costs to State and Local Government

Kyle Girten of the Budget and Planning Division has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the benefit is a reduction of redundancy within commission rules and increased consistency with current technologies used by regulated entities. The proposed rulemaking is not anticipated to result in adverse fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirements to prepare a Regulatory Impact Analysis.

A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed amendment to §334.48(c) is to remove a duplicate requirement of inventory control where USTs are utilizing another release detection method.

Due to the development of newer technologies, and the requirement of utilizing interstitial monitoring for all UST systems installed after January 1, 2009, the requirement that all retail service stations employ inventory control procedures in addition to the selected release detection method, has become unnecessary. Inventory control must still be performed as a component of a release detection method under 30 TAC §334.50(d)(4) and (d)(9). The proposed rulemaking remains consistent with federal regulations, as it removes a Texas rule that is more stringent than federal regulations with the result being just as stringent as federal regulations.

Because the amendment places no involuntary requirements on the regulated community, the rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Also, the amendment does not place additional financial burdens on the regulated community beyond what is already required by state regulations relating to release detection.

In addition, a regulatory impact analysis is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally,

this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state or federal program.

The commission will receive public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rules and performed an analysis of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The commission's assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to amend 30 TAC §334.48(c) to remove the requirement for all retail service stations to conduct inventory control procedures.

Inventory control must still be performed at facilities who conduct release detection under 30 TAC §334.50(d)(4) or (d)(9).

Promulgation and enforcement of the proposed rules would not be a statutory or a constitutional taking of private real property. These rules are not burdensome, restrictive, or limiting of rights to private real property because the proposed rules do not affect a landowner's rights in private real property. These rules do not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §29.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to this rulemaking are: to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests. (31 TAC §26.12(1), (2), (4), (5)).

The CMP policy applicable to this proposed rulemaking is the Nonpoint Source Water Pollution which requires under Texas Water Code, Chapter 26, Subchapter I (governing underground storage tanks) that underground storage tanks be located, designed, operated, inspected, and maintained so as to prevent releases of pollutants that may adversely affect coastal waters (31 TAC §26.22(c)). The proposed rulemaking is consistent with federal regulations relating to release detection and will be just as stringent. Retail service stations will continue to utilize a release detection method in accordance with 30 TAC §334.50. Therefore, in accordance with 31 TAC §29.22(a), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies, and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a hold a hybrid virtual and in-person public hearing on this proposal in Austin on Thursday, October 19, 2023, at 10:00 a.m. in Building F, Room 2210A at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal in the 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Tuesday, October 17, 2023. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Wednesday, October 18, 2023, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_NDVmMDFlMmMtN2Q5Yy00OGU0LTkxN-WMtMGY0MWQ1YzczNzZj%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3atrue%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Candice Slater, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: https://tceq.commentinput.com/comment/search. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-115-334-CE. The comment period closes on October 23, 2023. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Zachary King, Program Support and Environmental Assistance Division, at zachary.king@tceq.texas.gov or (512) 239-1931.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC) §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amended section is also proposed under TWC §26.348, which provides the commission authority to develop standards and methods of leak detection.

The proposed amendment implements TWC §26.348.

§334.48. General Operating and Management Requirements.

(a) Prevention of releases. All owners and operators of underground storage tank (UST) systems shall ensure that the systems are operated, maintained, and managed in a manner that will prevent releases of regulated substances from such systems.

(b) UST system management. UST systems shall be operated, maintained, and managed in accordance with accepted industry practices.

(c) Inventory control. [~~On or after September 29, 1989, regardless of which method of release detection is used for compliance with §334.50 of this title (relating to Release Detection), effective manual or automatic inventory control procedures shall be conducted for all UST systems at retail service stations as defined in §334.2 of this title (relating to Definitions). Such inventory~~] Inventory control procedures shall be in accordance with §334.50(d)(1)(B) of this title. Complete and accurate inventory records shall be maintained in accordance with §334.10 of this title (relating to Reporting and Recordkeeping).

(d) Spill and overfill control. All owners and operators shall ensure that spills and overfills of regulated substances do not occur and that all spill and overfill prevention equipment is properly operated and maintained in accordance with §334.51 of this title (relating to Spill and Overfill Prevention and Control).

(e) Operational requirements for release detection equipment. Owners and operators of all new and existing UST systems shall ensure that all release detection equipment installed as part of a UST system pursuant to §334.50 of this title is maintained in good operating condition and electronic and mechanical components are tested for proper operation in accordance with one of the following: manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or requirements determined by the executive director to be no less protective of human health and the environment than listed in this subsection.

(1) Beginning on January 1, 2021, a test of the proper operation of release detection equipment must be performed at least annually and, at a minimum, as applicable to the facility, cover the following components and criteria:

(A) automatic tank gauge and other controllers: test alarm, verify system configuration, and test battery backup;

(B) probes and sensors: inspect for residual buildup, ensure floats move freely, ensure shaft is not damaged; ensure cables are free of kinks and breaks, and test alarm operability and communication with controller;

(C) automatic line leak detector: test operation to meet criteria in §334.50(b)(2)(A)(i) of this title by simulating a leak;

(D) vacuum pumps and pressure gauges: ensure proper communication with sensors and controller; and

(E) hand-held electronic sampling equipment associated with groundwater and vapor monitoring: ensure proper operation.

(2) The code of practice that may be used to comply with paragraph (1) of this subsection is: Petroleum Equipment Institute (PEI) Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities."

(f) Operation requirements for corrosion protection systems. All owners and operators of UST systems shall ensure that all required UST system components are continuously protected from corrosion, and that all corrosion protection systems are inspected and tested, in accordance with the applicable provisions of §334.49 of this title (relating to Corrosion Protection).

(g) Periodic testing of spill prevention equipment and containment sumps used for interstitial monitoring of piping and periodic inspection of overfill prevention equipment.

(1) Owners and operators of UST systems with spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping must meet these requirements to ensure the equipment is operating properly and will prevent releases to the environment:

(A) Spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device) and containment sumps used for interstitial monitoring of piping must prevent releases to the environment by meeting one of the following:

(i) The equipment is double-walled and the integrity of both walls is periodically monitored at a frequency not less than the frequency of the walkthrough inspections described in subsection (h) of this section. Owners and operators must begin meeting the requirements in clause (ii) of this subparagraph and conduct a test within 30 days of discontinuing periodic monitoring of this equipment; or

(ii) The spill prevention equipment and containment sumps used for interstitial monitoring of piping (when interstitial monitoring is the primary release detection method) are tested at least once every three years to ensure the equipment is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(I) requirements developed by the manufacturer;

(II) code of practice developed by a nationally recognized association or independent testing laboratory; or

(III) low liquid level test method - the sump may be tested by filling the sump with liquid to a level that is three inches higher than the activation point of the sensor provided the following conditions are met:

(-a-) the sensor is mounted and maintained at the lowest point of the sump in accordance with the requirements in §334.45(d)(1)(E)(vi) of this title (relating to Technical Standards for New Underground Storage Tank Systems);

(-b-) the sensor is annually tested for functionality in accordance with the requirements in subsection (e)(1)(B) of this section;

(-c-) the sensor will trigger a positive shutdown of:

(-1-) the individual dispenser associated with that sump; or

(-2-) submersible turbine pump associated with that sump; and

(-d-) all on-site operators are trained to immediately notify the appropriate A or B level operator of the shutdown; or

(IV) requirements determined by the executive director to be no less protective of human health and the environment than the requirements listed in subclauses (I) - (III) of this clause.

(iii) Liquids that are used for testing as described in clause (ii) of this subparagraph may be reused for further liquid testing in other sumps, either at the same facility or at other facilities. The discharge must be made in compliance with the applicable wastewater discharge requirements or be disposed of in accordance with Chapters 330 or 335 of this title (relating to Municipal Solid Waste and Industrial Solid Waste and Municipal Hazardous Waste).

(B) Overfill prevention equipment must be inspected at least once every three years. At a minimum, the inspection must ensure that overfill prevention equipment is set to activate at the correct level specified in §334.51(b)(2)(C) of this title and will activate when a regulated substance reaches that level.

(C) Codes of practice. The following code of practice may be used to comply with subparagraphs (A)(ii)(II) and (B) of this paragraph: PEI Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities."

(2) Implementation dates. Owners and operators shall meet these requirements:

(A) UST systems in use before September 1, 2018:

(i) The requirements listed in paragraph (1) of this subsection shall apply on January 1, 2021.

(ii) Initial spill prevention equipment and containment sump testing, and overfill prevention inspections (relating to the requirements in paragraph (1) of this subsection) shall be conducted by January 1, 2021.

(B) UST systems brought into use on or after September 1, 2018.

(i) The requirements listed in paragraph (1) of this subsection shall apply on the date the UST system was brought into use.

(ii) Initial spill prevention equipment and containment sump testing, and overfill prevention inspections shall be conducted by the date the UST system was brought into use.

(3) Owners and operators shall maintain records as follows (in accordance with §334.10(b)(2)(B) of this title) for spill prevention equipment, containment sumps used for interstitial monitoring of piping, and overfill prevention equipment.

(A) All records of testing and inspection must be maintained for five years.

(B) For spill prevention equipment and containment sumps used for interstitial monitoring of piping not tested every three years, documentation showing that the prevention equipment is double-walled and the integrity of both walls is periodically monitored must be maintained for as long as the equipment is periodically monitored.

(h) Periodic operation and maintenance walkthrough inspections. To properly operate and maintain UST systems, not later than January 1, 2021, owners and operators must meet one of the following.

(1) Conduct a walkthrough inspection that, at a minimum, checks the following equipment as specified in the following subparagraphs.

(A) Every 30 days.

(i) Spill prevention equipment. Visually check for damage; remove any liquid or debris found within 96 hours and properly dispose of the liquid or debris; check for and remove obstructions in the fill pipe; check the fill cap to make sure it is securely on the fill pipe; and, for double-walled spill prevention equipment with interstitial monitoring, check for leaks in the interstitial area. For purposes of this requirement, UST systems receiving deliveries at intervals greater than every 30 days may check spill prevention equipment prior to each delivery.

(ii) Release detection equipment. Check to make sure the release detection equipment is operating with no release detection alarms or other unusual operating conditions (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or the unexplained presence of water in the tank) and ensure records of release detection testing are reviewed and current.

(B) Annually.

(i) Any containment sump installed on or after January 1, 2009, and any containment sump used for interstitial monitoring. Visually check for damage, leaks to the containment area, or releases to the environment; remove liquid or debris found in the containment sump within 96 hours of discovery and properly dispose of the liquid or debris; and, for double walled sumps with interstitial monitoring, check for a leak in the interstitial area.

(ii) Containment sumps installed before January 1, 2009, and are not used for interstitial monitoring of piping. Visually check for damage to equipment within the sump, visually check for regulated substance releases in the containment sump and to the environment, visually check for the presence of cathodic protection if the sump contains water that is in contact with metal components that routinely contain product, and remove any debris.

(iii) Submersible turbine pump and under dispenser areas that do not have containment sumps. Visually check for damage to the equipment within the area, visually check for regulated substance releases to the environment, visually check for the presence of cathodic

protection if any metal components that routinely contain product are in contact with soil or water, and remove any debris.

(iv) Hand held release detection equipment. Check devices, such as tank gauge sticks or groundwater bailers, for operability and serviceability.

(2) Conduct operation and maintenance walkthrough inspections according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that checks equipment in the same manner and frequency as requirements in paragraph (1) of this subsection. The following code of practice may be used to comply with this subsection: PEI Recommended Practice RP 900, "Recommended Practices for the Inspection and Maintenance of UST Systems."

(i) Airport hydrant systems. In addition to the periodic walkthrough inspection requirements in subsection (h) of this section, owners and operators must inspect the following areas at least once every 30 days if confined space entry according to the Occupational Safety and Health Administration (see 29 Code of Federal Regulations §1910) is not required or at least annually if confined space entry is required and keep documentation of the inspection in accordance with §334.10(b) of this title.

(1) Hydrant pits. Visually check for any damage, remove any liquid or debris, and check for any leaks; and

(2) Hydrant piping vaults. Check for any hydrant piping leaks.

(3) Implementation dates. Owners and operators shall meet these requirements:

(A) Airport hydrant systems in use before September 1, 2018. The requirements listed in paragraphs (1) and (2) of this subsection shall apply on January 1, 2021.

(B) Airport hydrant systems brought into use on or after September 1, 2018. The requirements listed in paragraph (1) of this subsection shall apply on the date the airport hydrant system was brought into use.

(j) Operation and maintenance records. Owners and operators shall maintain records relating to the operation and maintenance of a UST system (including records related to inspection, servicing, testing, and inventory control) as prescribed in this section for at least five years, and such records shall be maintained in accordance with §334.10(b) of this title. Inspection records must include a list of each area checked, whether each area checked was acceptable or needed action taken, a description of actions taken to correct an issue, and delivery records if spill prevention equipment is checked less frequently than every 30 days due to infrequent deliveries.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303287
Gitanjali Yadav
Deputy Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 239-2678

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 147. HEARINGS

SUBCHAPTER A. GENERAL RULES FOR HEARINGS

37 TAC §§147.1 , 147.3, 147.5, 147.6

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC Chapter 147, Subchapter A, §§147.1, 147.3, 147.5, and 147.6 concerning general rules for hearings. The amendments are proposed to provide edits for uniformity and consistency throughout the rules, correct grammatical errors, delineate prohibited acts in ex parte communications, and clarify the hearing officer's responsibility regarding written testimony.

David Gutiérrez, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Mr. Gutiérrez also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures in the parole process. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed. The amendments will not create or eliminate a government program; will not require the creation or elimination of 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; does not create a new regulation; does not expand, limit, or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on micro-businesses, small businesses, or rural communities as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie L. Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701, or by e-mail to bettie.wells@tdcj.texas.gov. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rules are proposed under §§508.0441, 508.045, 508.281, and 508.283, Government Code. Section 508.0441 relates to the board member and parole commissioners release and revocation duties. Section 508.045 provides parole panels with the authority to grant, deny, revoke parole, or revoke mandatory supervision. Section 508.281 and §508.283 relate to hearings to determine violations of the releasee's parole or mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§147.1. Public Hearings.

(a) All hearings on matters not confidential or privileged by law, or both, shall be open to the public.

(b) Appropriate federal and state constitutional provisions, statutes, regulations, and judicial precedent establishing the confidential or privileged nature of information presented shall be given effect by the Hearing Officer.

(c) To effect this provision, the Hearing Officer shall have the authority to close the hearing to the extent necessary to protect against the improper disclosure of confidential and/or privileged information.

(d) If the Hearing Officer closes the hearing pursuant to this section, in no event shall the Hearing Officer exclude from the hearing a party as defined by § [~~Section~~] 141.111 of this title (relating to Definition and Terms) and includes:

(1) the releasee;

(2) the releasee's attorney;

(3) the releasee's interpreter;

(4) Board Member or Board employee;

(5) TDCJ employee;

(6) County jail employee; and

(7) Prosecuting attorney.

(e) When the Hearing Officer closes the hearing, the Hearing Officer shall announce on the record that the hearing will be closed to the public to protect the confidential or [~~and/or~~] privileged information being introduced into evidence. After the confidential or [~~and/or~~] privileged evidence is obtained, the Hearing Officer shall open the hearing to the public and announce the same on the record.

§147.3. Ex Parte Consultations.

Unless required for the disposition of matters authorized by law, Hearing Officers, Board Members and Parole Commissioners assigned to render a decision or to make findings of fact and conclusions of law in an individual case shall not [~~may not communicate~~], directly or indirectly, initiate, permit, nor consider communications concerning [~~in connection with~~] any issue of fact or law with any party, except on notice and opportunity for all parties to participate.

§147.5. Witnesses.

(a) The Hearing Officer may determine whether a witness may be excused under the rule that excludes witnesses from the hearing.

(1) In no event shall the Hearing Officer exclude from the hearing a party under the authority of this section. For these purposes, the term "party" means the definition in § [~~Section~~] 141.111 of this title (relating to Definition of Terms) and includes:

(A) the releasee;

(B) the releasee's attorney; and

(C) no more than one representative of the TDCJ Parole Division who has acted or served in the capacity of supervising, advising, or agent officer in the case.

(2) In the event [~~that~~] it appears to the satisfaction of the Hearing Officer that an individual who is present at the hearing and intended to be called by a party as a witness has no relevant, probative, noncumulative testimony to offer on any material issue of fact or law, then the Hearing Officer, in his sound discretion, may determine that such individual should not be placed under the rule and excluded from the hearing.

(b) All witnesses who testify in person are subject to cross-examination unless the Hearing Officer specifically finds good cause for lack of confrontation and cross-examination.

(c) Witnesses personally served with a subpoena and who fail to appear at the hearing, [~~and upon good cause determined by the Hearing Officer,~~] may present testimony by written statement, upon a favorable good cause determination by the Hearing Officer.

§147.6. Record.

(a) The record in any case includes all pleadings, motions, and rulings; evidence received or considered; matters officially noticed; questions and offers of proof, objections, and rulings on them; all relevant [~~TDCJ Parole~~] Division documents, staff memoranda or reports submitted to or considered by the Hearing Officer involved in making the decision, and any decision, opinion, or report by the Hearing Officer presiding at the hearing.

(b) All hearings shall be electronically recorded in their entirety.

(c) The hearing record is made [~~a~~] part of the official parole record maintained by the [~~TDCJ Parole~~] Division. All requests for copies of the hearing report or hearing recording shall be addressed to the [~~TDCJ Parole~~] Division.

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

Filed with the Office of the Secretary of State on September 8, 2023.

TRD-202303296
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 22, 2023
For further information, please call: (512) 406-5478

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SUBCHAPTER B. EVIDENCE

37 TAC §147.24, §147.26

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC Chapter 147, Subchapter B, §147.24 and §147.26 concerning evidence. The amendments are proposed to provide edits for uniformity and consistency throughout the rules and to correct grammatical errors.

David Gutiérrez, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Mr. Gutiérrez also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures in the parole process. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed. The amendments will not create or eliminate a government program; will not require the creation or elimination of 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; does not create a new regulation; does not ex-

pand, limit, or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on micro-businesses, small businesses, or rural communities as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie L. Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701, or by e-mail to bettie.wells@tdcj.texas.gov. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rules are proposed under §§508.0441, 508.045, 508.281, and 508.283, Government Code. Section 508.0441 relates to the board member and parole commissioners release and revocation duties. Section 508.045 provides parole panels with the authority to grant, deny, revoke parole, or revoke mandatory supervision. Section 508.281 and §508.283 relate to hearings to determine violations of the releasee's parole or mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§147.24. Relevant Testimony.

Testimony shall be confined to the subject of the pending matter. In the event any party at a hearing shall pursue a line of questioning that is, in the [~~opinion of the~~] Hearing Officer's opinion [~~Officer~~], irrelevant, incompetent, unduly repetitious, or immaterial, such questioning shall be terminated.

§147.26. Stipulation.

Evidence may be stipulated to by agreement of all parties.

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

Filed with the Office of the Secretary of State on September 8, 2023.

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Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 22, 2023
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