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

TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 12. LOANS AND INVESTMENTS

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to Chapter 12 of Title 7 of the Texas Administrative Code, concerning loans and investments by state banks. Sections 12.2, 12.3, 12.6, 12.11, 12.12, and 12.33 are the affected sections. Amendments to §§12.3, 12.6, 12.11, and 12.33 are adopted without changes to the proposed text as published in the November 10, 2023, issue of the *Texas Register* (48 TexReg 6509). The amended rules will not be republished. Amendments to §12.2 and §12.12 are adopted with nonsubstantive changes and the rule will be republished.

The amendments conform these rules to changes in applicable Texas law, federal regulation, and accounting standards. The amendments do not materially change the requirements of the rules.

The department received no comments regarding the proposed amendments.

SUBCHAPTER A. LENDING LIMITS

7 TAC §§12.2, 12.3, 12.6, 12.11, 12.12

The amendments to Chapter 12, Subchapter A are adopted pursuant to Finance Code §11.301, which authorizes the commission to adopt rules applicable to state banks, and Finance Code, §31.003, which authorizes the commission to adopt rules necessary to preserve or protect the safety and soundness of state banks.

These amendments affect the statutes administered and enforced by the department's commissioner with respect to state banks, contained in Finance Code, Subtitle A. No other statutes are affected by this proposal.

§12.2. Definitions.

Definitions in the Finance Code, Title 3, Subtitles A and G, are incorporated herein by reference. As used in this subchapter and in Finance Code, Chapter 34, concerning investments and loans, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Borrower--A person who is named as a borrower, obligor, or debtor in a loan or extension of credit; a person to whom a state bank has credit exposure arising from a derivative transaction or a securities financing transaction, entered by the bank; or any other person, including but not limited to a drawer, endorser, or guarantor who is considered to be a borrower under the direct benefit, source of repayment, or common enterprise tests set forth in §12.9 of this title (relating to Aggregation and Attribution).

(2) Call report--The federal Consolidated Report of Condition and Income required by and filed under 12 U.S.C. §1817 (or under 12 U.S.C. §324 in the case of a bank that is a member of the Federal Reserve System), or a report of financial condition and results of operations of a state bank required by the banking commissioner under Finance Code, §31.108.

(3) Control--Control is presumed to exist when a person directly or indirectly, or acting through or together with one or more persons:

(A) owns, controls, or has the power to vote 25 percent or more of any class of voting securities of another person;

(B) controls, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(C) has the power to exercise a controlling influence over the management or policies of another person.

(4) Credit derivative--As defined in 12 C.F.R. §324.2 (or 12 C.F.R. §217.2 in the case of a bank that is a member of the Federal Reserve System).

(5) Derivative transaction--Includes any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets.

(6) Effective margining arrangement--A master legal agreement governing derivative transactions between a bank and a counterparty that requires the counterparty to post, on a daily basis, variation margin to fully collateralize that amount of the bank's net credit exposure to the counterparty that exceeds $25 million created by the derivative transactions covered by the agreement.

(7) Eligible credit derivative--A single-name credit derivative or a standard, non-tranched index credit derivative provided that:

(A) the derivative contract meets the requirements of an eligible guarantee, as defined in 12 C.F.R. §324.2 (or 12 C.F.R. §217.2 in the case of a bank that is a member of the Federal Reserve System), and has been confirmed by the protection purchaser and the protection provider;

(B) any assignment of the derivative contract has been confirmed by all relevant parties;

(C) if the credit derivative is a credit default swap, the derivative contract includes the following credit events:

(i) failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment

threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) bankruptcy, insolvency, restructuring (for obligors not subject to bankruptcy or insolvency), or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(D) the terms and conditions dictating the manner in which the derivative contract is to be settled are incorporated into the contract;

(E) if the derivative contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss with respect to the derivative reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(F) if the derivative contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provides that any required consent to transfer may not be unreasonably withheld; and

(G) if the credit derivative is a credit default swap, the derivative contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event.

(8) Eligible protection provider--An entity that is:

(A) a sovereign entity (a central government, including the U.S. government; an agency; department; ministry; or central bank);

(B) the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, or a multilateral development bank;

(C) a Federal Home Loan Bank;

(D) the Federal Agricultural Mortgage Corporation;

(E) a depository institution, as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. §1813(c);

(F) a bank holding company, as defined in section 2 of the Bank Holding Company Act, as amended, 12 U.S.C. §1841;

(G) a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act, 12 U.S.C. §1467a;

(H) a securities broker or dealer registered with the SEC under the Securities Exchange Act of 1934, 15 U.S.C. §§78o et seq.;

(I) an insurance company that is subject to the supervision of a State insurance regulator;

(J) a foreign banking organization;

(K) a non-U.S.-based securities firm or a non-U.S.-based insurance company that is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies; or

(L) a qualifying central counterparty.

(9) Qualifying central counterparty--As defined in 12 C.F.R. §324.2 (or 12 C.F.R. §217.2 in the case of a bank that is a member of the Federal Reserve System).

(10) Qualifying master netting agreement--As defined in 12 C.F.R. §324.2 (or 12 C.F.R. §217.2 in the case of a bank that is a member of the Federal Reserve System).

(11) Sale of federal funds--A transaction between depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at Federal Reserve Banks, or from credits to new or existing deposit balances due from a correspondent depository institution.

(12) Securities financing transaction--A repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction.

(13) Tier 1 capital--A state bank's unimpaired capital and surplus. A state bank's Tier 1 capital is calculated under 12 C.F.R. part 324 (or 12 C.F.R. part 217 in the case of a bank that is a member of the Federal Reserve System), is reported in the bank's most recent call report, and is periodically re-calculated as provided by §12.11 of this title (relating to Calculation of Lending Limit).

(14) Unimpaired capital and surplus--A state bank's core capital, equal to its Tier 1 capital calculated under 12 C.F.R. part 324 (or 12 C.F.R. part 217 in the case of a bank that is a member of the Federal Reserve System), and referred to as Tier 1 capital in this chapter.

§12.12. Credit Exposure Arising from Derivative and Securities Financing Transactions.

(a) Scope. This section sets forth the rules for calculating the credit exposure arising from a derivative transaction or a securities financing transaction entered into by a state bank for purposes of determining the bank's lending limit pursuant to Finance Code, §34.201, and this subchapter.

(b) Derivative transactions.

(1) Non-credit derivatives. Subject to paragraphs (2) - (4) of this subsection, a state bank shall calculate the credit exposure to a counterparty arising from a derivative transaction by one of the following methods. Subject to paragraphs (3) and (4) of this subsection, a bank shall use the same method for calculating counterparty credit exposure arising from all of its derivative transactions.

(A) Model method.

(i) Credit exposure. The credit exposure of a derivative transaction under the model method is equal to the sum of the current credit exposure of the derivative transaction and the potential future credit exposure of the derivative transaction.

(ii) Calculation of current credit exposure. A bank shall determine its current credit exposure by the mark-to-market value of the derivative contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market value is zero or negative, then the current credit exposure is zero.

(iii) Calculation of potential future credit exposure. A bank shall calculate its potential future credit exposure by using an internal model that has been approved in writing for purposes of 12 C.F.R. §324.132(d) (or 12 C.F.R. §217.132(d) in the case of a bank that is a member of the Federal Reserve System), provided that the bank notifies the commissioner prior to its use for purposes of this section, or another model approved by the department based on the views of the bank's primary federal banking regulatory agency and any third party testing and evaluation reports submitted to the commissioner. Any substantive revisions to an internal model made after the bank has provided notice of its use, or after the commissioner has approved the use of an alternate model, must be approved by the commissioner before a bank may use the revised model for purposes of this section.

(iv) Net credit exposure. A bank that calculates its credit exposure by using the model method pursuant to this subparagraph may net credit exposures of derivative transactions arising under the same qualifying master netting agreement.

(B) Conversion factor matrix method. The credit exposure arising from a derivative transaction under the conversion factor matrix method is equal to and will remain fixed at the potential future credit exposure of the derivative transaction, which equals the product of the notional amount of the derivative transaction and a fixed multiplicative factor determined by reference to Table 1 of this section.
Figure: 7 TAC §12.12(b)(1)(B) (No change.)

(C) Current exposure method. The credit exposure arising from a derivative transaction (other than a credit derivative transaction) under the current exposure method is calculated in the manner provided by 12 C.F.R. §324.34(b)-(c) (or 12 C.F.R. §217.34(b)-(c) in the case of a bank that is a member of the Federal Reserve System).

(2) Credit derivatives.

(A) Counterparty exposure.

(i) General rule. Notwithstanding paragraph (1) of this subsection and subject to clause (ii) of this subparagraph, a state bank that uses the conversion factor matrix method or the current exposure method, or that uses the model method without entering an effective margining arrangement as defined in §12.2 of this title (relating to Definitions), shall calculate the counterparty credit exposure arising from credit derivatives entered by the bank by adding the net notional value of all protection purchased from the counterparty on each reference entity.

(ii) Special rule for certain effective margining arrangements. A bank must add the effective margining arrangement threshold amount to the counterparty credit exposure arising from credit derivatives calculated under the model method. The effective margining arrangement threshold is the amount under an effective margining arrangement with respect to which the counterparty is not required to post variation margin to fully collateralize the amount of the bank's net credit exposure to the counterparty.

(B) Reference entity exposure. A state bank shall calculate the credit exposure to a reference entity arising from credit derivatives entered into by the bank by adding the net notional value of all protection sold on the reference entity. A bank may reduce its exposure to a reference entity by the amount of any eligible credit derivative purchased on that reference entity from an eligible protection provider.

(3) Special rule for central counterparties. In addition to amounts calculated under paragraphs (1) and (2) of this subsection, the measure of counterparty exposure to a central counterparty must also include the sum of the initial margin posted by the bank plus any contributions made by it to a guaranty fund at the time such contribution is made. However, this requirement does not apply to a bank that uses an internal model pursuant to paragraph (1)(A) of this subsection if such model reflects the initial margin and any contributions to a guaranty fund.

(4) Mandatory or alternative use of method. The commissioner may in the exercise of discretion require or permit a state bank to use a specific method or methods set forth in this subsection to calculate the credit exposure arising from all derivative transactions, from any category of derivative transactions, or from a specific derivatives transaction if the commissioner in the exercise of discretion finds that such method is consistent with the safety and soundness of the bank.

(c) Securities financing transactions.

(1) In general. Except as provided by paragraph (2) of this subsection, a state bank shall calculate the credit exposure arising from a securities financing transaction by one of the following methods. A state bank shall use the same method for calculating credit exposure arising from all of its securities financing transactions.

(A) Model method. A state bank may calculate the credit exposure of a securities financing transaction by using an internal model that has been approved in writing for purposes of 12 C.F.R. §324.132(b) (or 12 C.F.R. §217.132(b) in the case of a bank that is a member of the Federal Reserve System), provided that the bank notifies the commissioner prior to its use for purposes of this section, or another model approved by the department based on the views of the bank's primary federal banking regulatory agency and any third party testing and evaluation reports submitted to the commissioner. Any substantive revisions to an internal model made after the bank has provided notice of its use, or after the commissioner has approved the use of an alternate model, must be approved by the commissioner before a bank may use the revised model for purposes of this section.

(B) Basic method. A state bank may calculate the credit exposure of a securities financing transaction as follows:

(i) Repurchase agreement. The credit exposure arising from a repurchase agreement shall equal and remain fixed at the market value at execution of the transaction of the securities transferred to the other party less cash received.

(ii) Securities lending.

(I) Cash collateral transactions. The credit exposure arising from a securities lending transaction where the collateral is cash shall equal and remain fixed at the market value at execution of the transaction of securities transferred less cash received.

(II) Non-cash collateral transactions. The credit exposure arising from a securities lending transaction where the collateral is other securities shall equal and remain fixed as the product of the higher of the two haircuts associated with the two securities, as determined by reference to Table 2 of this section, and the higher of the two par values of the securities. Where more than one security is provided as collateral, the applicable haircut is the higher of the haircut associated with the security lent and the notional-weighted average of the haircuts associated with the securities provided as collateral.

(iii) Reverse repurchase agreements. The credit exposure arising from a reverse repurchase agreement shall equal and remain fixed as the product of the haircut associated with the collateral received, as determined by reference to Table 2 of this section, and the amount of cash transferred.

(iv) Securities borrowing.

(I) Cash collateral transactions. The credit exposure arising from a securities borrowed transaction where the collateral is cash shall equal and remain fixed as the product of the haircut on the collateral received, as determined by reference to Table 2 of this section, and the amount of cash transferred to the other party.

(II) Non-cash collateral transactions. The credit exposure arising from a securities borrowed transaction where the collateral is other securities shall equal and remain fixed as the product of the higher of the two haircuts associated with the two securities, as determined by reference to Table 2 of this section, and the higher of the two par values of the securities. Where more than one security is provided as collateral, the applicable haircut is the higher of the haircut associated with the security borrowed and the notional-weighted average of the haircuts associated with the securities provided as collateral.
Figure: 7 TAC §12.12(c)(1)(B)(iv)(II) (No change.)

(C) Basel collateral haircut method. A state bank may calculate the credit exposure of a securities financing transaction in the manner provided by 12 C.F.R. §324.132(b)(2)(i) and (ii) (or 12 C.F.R. §217.132(b)(2)(i) and (ii) in the case of a bank that is a member of the Federal Reserve System).

(2) Mandatory or alternative use of method. The commissioner may in the exercise of discretion require or permit a state bank to use a specific method or methods set forth in this subsection to calculate the credit exposure arising from all securities financing transactions, from any category of securities financing transactions, or from a specific derivatives transaction if the commissioner finds in the exercise of discretion that such method is consistent with the safety and soundness of the bank.

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

Filed with the Office of the Secretary of State on December 15, 2023.

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Robert K. Nichols, III
General Counsel
Texas Department of Banking
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Proposal publication date: November 10, 2023
For further information, please call: (512) 475-1382

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SUBCHAPTER B. LOANS

7 TAC §12.33

The amendments to Chapter 12, Subchapter B are adopted pursuant to Finance Code §11.301, which authorizes the commission to adopt rules applicable to state banks, and Finance Code, §31.003, which authorizes the commission to adopt rules necessary to preserve or protect the safety and soundness of state banks.

These amendments affect the statutes administered and enforced by the department's commissioner with respect to state banks, contained in Finance Code, Subtitle A. No other statutes are affected by this proposal.

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

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

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Robert K. Nichols, III
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1382

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.707 - 84.709

The Finance Commission of Texas (commission) adopts amendments to §84.707 (relating to Files and Records Required (Retail Sellers Assigning Retail Installment Sales Contracts)), §84.708 (relating to Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts)), and §84.709 (relating to Files and Records Required (Holders Taking Assignment of Retail Installment Sales Contracts)) in 7 TAC Chapter 84, concerning Motor Vehicle Installment Sales.

The commission adopts the amendments to §§84.707, 84.708, and 84.709 without changes to the proposed text as published in the November 10, 2023, issue of the *Texas Register* (48 TexReg 6519). The rules will not be republished.

The commission received no official comments on the proposed amendments.

The rules in 7 TAC Chapter 84 govern motor vehicle retail installment transactions. In general, the purposes of the adopted rule changes to 7 TAC Chapter 84 are: (1) to implement changes relating to recordkeeping for debt cancellation agreements under HB 2746 (2023), and (2) to make technical corrections and updates.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder meeting and webinar regarding the rule changes. The OCCC received one informal precomment on the rule text draft, discussed later in this preamble. The OCCC appreciates the thoughtful input provided by stakeholders.

Amendments to §84.707 update recordkeeping requirements for retail sellers that assign motor vehicle retail installment contracts to another holder. Amendments at §84.707(d)(2)(A)(iv) remove a reference to the Tax Collector's Receipt for Texas Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS). Based on information from the Texas Department of Motor Vehicles (TxDMV), the OCCC understands that this form is obsolete for motor vehicle dealer sales. An amendment removes current §84.707(d)(2)(E), which requires retail sellers to maintain the County of Title Issuance form (Form VTR-136). The OCCC understands that this form is now obsolete and is no longer used, following the passage of SB 876 (2021) and amendments to Texas Transportation Code, Chapter 501. Other amendments throughout §84.707 renumber provisions to be consistent with these amendments and make technical corrections.

Amendments at §84.707(d)(2)(I) update recordkeeping requirements for motor vehicle debt cancellation agreements. Under Texas Finance Code, §354.007, a buyer is entitled to a refund of a debt cancellation agreement fee when the agreement terminates due to prepayment of the retail installment contract. The OCCC has identified failure to provide these refunds as a recurring issue in its examinations of licensees. In examinations conducted between 2016 and 2023, the OCCC instructed licensees to provide more than $26 million in refunds to consumers as

a result of this issue. In the 2023 regular legislative session, the Texas Legislature passed HB 2746, which amended requirements for debt cancellation agreement refunds. In particular, HB 2746 amended Texas Finance Code, §354.007 to specify: (1) that retail sellers and third-party administrators are responsible for providing refunds upon cancellation or termination of a debt cancellation agreement (based on the portion of the debt cancellation agreement fee that the retail seller and administrator received), (2) that holders must either refund a debt cancellation agreement fee or provide written instruction to the administrator and retail seller to make the refund, and (3) that administrators and retail sellers are responsible for maintaining records of a refund. The amendments to §84.707(d)(2)(I) specify that retail sellers must maintain documentation of the disbursement of the debt cancellation agreement fee, any written instruction from a holder to make a refund, and documentation of any refund. These amendments will help ensure that retail sellers maintain records to show compliance with Texas Finance Code, §354.007, as amended by HB 2746. Licensees must maintain these records to document that consumers are receiving legally required refunds.

In an informal precomment, an attorney representing an association of motor vehicle dealers asked two questions regarding the proposed amendments to §84.707. First, the attorney asked: "With respect to the required 'written instruction' from a holder and the documentation of any refund of the DCA, if the written instructions are sent electronically, may the written instructions be maintained electronically by the retail seller?" Second, the attorney asked: "With the recognition that the DCA is to be maintained in each retail installment transaction file or a copy of any page of the DCA with a signature, transaction-specific term, the cost of the DCA and any blank spaces completed and a master copy of each DCA maintained as required, do the written instructions and refund documents have to be maintained in each retail buyer's file, or may they be maintained collectively?" These issues are addressed in the current rule's introductory text to §84.707(d)(2), which states: "A licensee must maintain a paper or imaged copy of a retail installment sales transaction file for each individual retail installment sales contract or be able to produce the same information within a reasonable amount of time." The introductory text also states: "If a substantially equivalent electronic record for any of the following records exists, a paper copy of the record does not have to be included in the retail installment sales transaction file if the electronic record can be accessed upon request." These two sentences apply to the records that are normally part of the retail installment transaction file, and these sentences are not being changed in this adoption. As described in these two sentences, a retail seller could maintain an electronic record that is not included in the transaction file, as long as the electronic record can be accessed on request within a reasonable amount of time.

Amendments to §84.708 update recordkeeping requirements for retail sellers that collect payments on motor vehicle retail installment contracts. The amendments to §84.708 are substantially similar to the amendments to §84.707 described in the previous two paragraphs. In particular, the amendments delete a reference to Form 31-RTS, delete a reference to Form VTR-136, make technical corrections, and require sellers to maintain records of debt cancellation agreement refunds to ensure consistency with HB 2746.

Amendments to §84.709 update recordkeeping requirements for holders that take assignment of motor vehicle retail installment contracts. Specifically, amendments to §84.709(e)(2)(D) explain that holders must maintain any written instruction to another person to make a refund, and must maintain any other refunding documentation that comes into their possession. Amendments to §84.709(e)(2)(F) specify that holders must maintain documents relating to the cancellation or termination of a debt cancellation agreement that come into their possession, and must cooperate in obtaining related documents. These amendments are consistent with a holder's current responsibility under §84.709(e)(2)(F) to maintain (and cooperate in obtaining) documents relating to a debt cancellation agreement claim. It is important that licensees maintain these records to document that consumers are receiving legally required refunds.

The rule amendments are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules necessary to supervise the OCCC and ensure compliance with Texas Finance Code, Title 4. In addition, Texas Finance Code, §348.513 authorizes the commission to adopt rules to enforce Texas Finance Code, Chapter 348.

The statutory provisions affected by the adoption are contained in Texas Finance Code, Chapters 348 and 354.

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

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Matthew Nance
General Counsel
Office of Consumer Credit Commissioner
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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE

10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§ 13.1 - 13.13 without changes to the proposed text as published in the November 10, 2023, issue of the *Texas Register* (48 TexReg 6549). The purpose of the repeal is to provide for clarification of the existing rule through new rulemaking action.

The Department has analyzed this 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 repeal would be in effect, the repeal does not create or eliminate a government program,

but relates to the repeal, and simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

4. The repeal does 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 action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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 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 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 repealed section would be increased clarity and improved access to the Multifamily Direct Loan funds. 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.

SUMMARY OF PUBLIC COMMENT. The public comment period was held from November 1 to December 1, 2023, to receive input on the proposed repealed section. No comments on the repeal were received.

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

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

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

Filed with the Office of the Secretary of State on December 13, 2023.

TRD-202304728
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 2, 2024
Proposal publication date: November 10, 2023
For further information, please call: (512) 475-3959

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10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§ 13.1 - 13.13 with changes to the text as published in the November 10, 2023, issue of the *Texas Register* (48 TexReg 6550). The rules will be republished. The purpose of the new sections is to provide compliance with Tex. Gov't Code §2306.111 and to update the rule to: clarify program requirements in multiple sections, codify in rule practices of the division, and change citations to align with changes to other multifamily rules. In general, most changes are corrective in nature, intended to gain consistency with state or federal rules, delete duplicative language or provisions, correct or update rule references, and clarify language or processes to more adequately communicate the language or process. Additional changes were undertaken in order to simplify the rule, and to allow greater flexibility in implement the programs which it covers.

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

The Department has analyzed this 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 new rule would be in effect:

1. The rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, administration of the Multifamily Direct Loan Program.

2. The 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 rule changes do not require additional future legislative appropriations.

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

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

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

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

8. The 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 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 §2306.111.

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 for multifamily direct loan applications and award through various Department fund sources. Other than in the case of a small or micro-business that is an applicant for such a loan product, no small or micro-businesses are subject to the rule. It is estimated that approximately 200 small or micro-businesses are such applicants; for those entities the new rule provides for a more clear, transparent process for applying for funds and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the rule because this rule is applicable only to direct loan applicants for development of properties, which are not generally municipalities. The fee for applying for a Multifamily Direct Loan product is $1,000, unless the Applicant is a nonprofit that provides supportive services or the Applicant is applying for Housing Tax Credits in conjunction with Multifamily Direct Loan funds, in which case the application fee may be waived. These 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.

There are 1,296 rural communities potentially subject to the rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 13 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 MFDL resources that are located in rural areas is approximately fifteen. In those cases, a rural community securing a loan will experience an economic benefit, including, potentially, increased property tax revenue from a multifamily Development.

3. The Department has determined that because there are rural MFDL 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 MFDL 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 rule 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 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 rule may provide a possible positive economic effect on local employment in association with this rule since MFDL Developments, layered with housing tax credits, often involve a typical minimum investment of $10 million in capital, and more commonly an investment from $20 million to $30 million. Such a capital investment has 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 predict during rulemaking where these 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 MFDL awards and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

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 MFDL Development layered with LIHTC 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. If anything, positive effects will ensue in those communities where developers receive MFDL 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 sections are in effect, the public benefit anticipated as a result of the new sections will be improved clarity of program requirements in multiple sections, codification in rule practices of the division, and change citations to align with changes to other multifamily rules. There will not be any economic cost to any individuals required to comply with the new sections because this rule does not have any new requirements that would cause additional costs to applicants.

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 new sections does not have any foreseeable implications related to costs or revenues of the state or local governments because it does not have any new requirements that would cause additional costs to applicants.

SUMMARY OF PUBLIC COMMENT. The public comment period was held from November 1, to December 1, 2023, to receive input on the proposed new sections. Comment was received from: BETCO Housing Lab (Commenter 1) and Foundation Communities (Commenter 2). A summary of comments pertinent to the proposed rule and the Department's response is provided.

13.3 General Loan Requirements.

COMMENT SUMMARY: Commenter 1 requests that interest on construction loans be removed from §13.3(e), related to Ineligible Costs. The commenter notes that interest on construction loans is eligible federally, and therefore should also be eligible in this rule.

STAFF RESPONSE: Both NHTF and HOME federal regulations limit repayment of construction, bridge financing, or guaranteed loans, including the interest on those loans. For both programs, in order for the repayment of these loans to be eligible, the loan must have been used for eligible costs under the specific program in question, and the HOME or NHTF assistance is required to have been part of the original financing for the project. For NHTF, these costs could not have occurred before the Department enters into the Contract with the Owner. In addition, repayment of these loans or the interest on them would require that the Department review all costs paid out of those loans to ensure that all are eligible under the relevant program. Given the Department's current workload related to these funds, staff is unable to assume the additional responsibility of these reviews. Accordingly, no change is recommended related to this comment.

13.4 Set-Asides, Regional Allocation, and NOFA Priorities

COMMENT SUMMARY: Commenter 1 requests that "NOFA Priorities" be removed from this section, and elsewhere in the rule, as those priorities are now established in each Notice of Funding Availability.

STAFF RESPONSE: NOFA Priorities are still addressed at §13.4(c), which establishes that the priorities will be established in each NOFA. Staff recognizes that this is significantly abbreviated from what has previously been covered in the rule concerning NOFA priorities, but believes that it is important to make this small section of the rule easy to locate for people who may be reading the rule for the first time. Staff recommends leaving the title as is.

COMMENT SUMMARY: Commenter 2 notes that a sentence in §13.4(a) is confusing, and could be read to prohibit layering MFDL funds with other Department sources. Commenter 2 also requests that §13.4(a)(A)(i) be modified to include a provision from 24 CFR 93.302 concerning layering of project-based subsidies onto NHTF units.

STAFF RESPONSE: Concerning the unclear sentence noted by the Commenter, staff agrees and has deleted this sentence from the rule. Any prohibited layering can be addressed in a NOFA, as has been done in the past. Regarding the federal provision that the Commenter would like referenced in the rule, the rule currently cites the exact section of 24 CFR, and therefore staff believes the rule currently accomplishes what is being asked.

13.5 Application and Award Process

COMMENT SUMMARY: Commenter 1 requests clarity as to whether the experience requirement of having previously placed 50 units in service is limited to affordable or market-rate units. The Commenter also requests additional guidance as to what would be considered sufficient evidence of this requirement.

STAFF RESPONSE: The rule is silent as to whether the units in question must be affordable or market-rate, therefore staff would have no basis for denying either type of unit to meet the qualification.

Regarding adding guidance to the rule specifying acceptable documentation to demonstrate that this requirement has been met, the Qualified Allocation Plan previously contained similar language related to an experience requirement. A common complaint among Applicants was that the requirements were so specific that they prevented some Applicants from qualifying, even if they otherwise met the intention of the experience requirement. Recognizing that each Development and business are unique, staff recommends no change to the language to allow as much reasonableness and flexibility as possible when reviewing for this requirement.

COMMENT SUMMARY: Commenter 2 requests that NHTF applications be exempt from the requirement to include language concerning choice-limiting actions and environmental review in purchase contracts or site control agreements, stating that this language is not the result of any federal requirement for that particular program.

STAFF RESPONSE: Staff recommends exempting NHTF applications from having to meet this requirement unless the Development is layered with other funds subject to Part 50 and Part 58; however, potential Applicants should be aware that undertaking any choice-limiting action may render the Development ineligible for other types of funding should the need arise for an Application to be moved to another funding source.

13.7 Maximum Funding Requests and Minimum Number of MFDL Units

COMMENT SUMMARY: Commenter 2 requests that staff analysis follow HUD requirements for determining the minimum number of MFDL units and to not require any more 30% AMI units than what are required federally.

STAFF RESPONSE: Staff uses a unit-subsidy analysis and a cost-proportion analysis to determine the number of affordable units required on a project. This method is compliant with federal requirements. Staff recommends no change.

13.8 Loan Structure and Underwriting Requirements

COMMENT SUMMARY: Commenter 1 requests that TDHCA's loan only be superior to that have soft repayment structures, non-amortizing notes, have deferred forgivable provisions, or in which the lender has an identity of interest with any member of the Development Team, only in the event that the TDHCA loan is in an amount greater than those sources.

STAFF RESPONSE: Staff recommends that an Applicant that needs a structure that does not comply with the rules should submit a waiver request as soon as possible, but no later than with the Application for the Board's consideration. No change is recommended to the rule.

COMMENT SUMARRY: Commenter 2 requests that loans with soft repayment structures have a 0% interest during permanent periods. The commenter also requests that the Department begin determining lien priority and payment priority separately (current practice is that lien priority determines payment priority), and that certain fees that are payable from surplus cash, such as deferred developer fees and investor required fees, to be paid before the Department's loan.

STAFF RESPONSE: Permanent-period interest is established in each NOFA, and therefore recommends no change concerning that interest rate in the rule. Lien priority and payment priority have historically matched one another for Department programs. While staff appreciates the suggestion of treating them as separate concepts, this would represent a significant rule change, and therefore recommends exploring this concept for the 2025 rule.

Regarding loan priorities, staff recommends that an Applicant that needs a structure that does not comply with the rules should submit a waiver request with the Application for the Board's consideration. No change is recommended to the rule.

13.10 Development and Unit Requirements

COMMENT SUMMARY: Commenter 1 requests that the Department publish a calculator to assist Applicants in determining the appropriate number of HOME Match units that must be provided at each development. Commenter 1 also requests that no program other than HOME be required to provide match units.

STAFF RESPONSE: Staff appreciates the suggestion of publishing a match unit calculator, and will work on this in 2024. Regarding other programs providing match units, the Department has an obligation to match the majority of its federal HOME allocation each year at $0.25 per $1.00 received. The funds must contribute towards housing that qualifies as affordable housing under the HOME program (24 CFR 92.218(a)). A development that provides match funds must also provide match units to meet the requirement, otherwise the match would not be contributing to qualifying housing. The Department does not have the option of removing the requirement for non-HOME MFDL programs to provide match, as these contributions are necessary to meet the federal requirement, therefore this provision will remain in the rule.

13.11 Post-Award Requirements.

COMMENT SUMMARY: The new rule requires that a fully completed environmental review must be submitted to the Department within 90 days of the Application Acceptance Date. Commenter 1 requests that this be changed to within 90 days of the Board approval date.

STAFF RESPONSE: Staff will not enter into a contract for any awarded funds until the environmental clearance is completed. Shortening the time between Application receipt, underwriting, Board approval, contracting, and closing is a critical and immediate priority for the Department. Adding as many as 90 days between award and contract is contrary to this priority, and therefore staff recommends no change.

MISCELLANEOUS

Commenter 2 provided additional comment concerning priorities that should be established in the Department's NOFAs. Staff appreciates these comments and will revisit them during future NOFA development processes; however, no specific response is being provided at this time, as these items are part of a NOFA, rather than the rule in question.

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

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

§13.1. Purpose.

(a) Authority. The rules in this chapter apply to the funds provided to Multifamily Developments through the Multifamily Direct Loan Program (MFDL or Direct Loan Program) by the Texas Department of Housing and Community Affairs (the Department). Notwithstanding anything in this chapter to the contrary, loans and grants 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, Chapter 2306, and federal law pursuant to the requirements of Title II of the Cranston-Gonzalez National Affordable Housing Act, Division B, Title III of the Housing and Economic Recovery Act (HERA) of 2008 - Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes, Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Additional Assistance for Neighborhood Stabilization Programs, Title I of the Housing and Economic Recovery Act of 2008, Section 1131 (Public Law 110-289), and the implementing regulations 24 CFR Parts 91, 92, 93, and 570 as they may be applicable to a specific fund source. The Department is authorized to administer Direct Loan Program funds pursuant to Tex. Gov't Code, Chapter 2306.

(b) General. This chapter applies to Applications submitted for, and award of, MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all applicable rules that govern that specific program including, but not limited to this chapter, 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 11 of this title (relating to Qualified Allocation Plan (QAP)), and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) as applicable. The Applicant is also required to certify that it is familiar with the requirements of any other federal, state, or local financing sources that it identifies in its Application. Any conflict with rules, regulations, or statutes will be resolved on a case by case basis that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility, with the right to an Appeal as provided in 10 TAC §1.7 of this title (relating to Appeals Process) or 10 TAC §11.902 of this title (relating to Appeals Process for the Housing Tax Credit program), as applicable.

(c) Waivers. Requests for waivers of any program rules or requirements must be made in accordance with 10 TAC §11.207 of this title (relating to Waiver of Rules), as limited by the rules in this chapter. Waiver requirements are provided in paragraphs (1) - (3) of this subsection:

(1) Rule Waivers and NOFA Amendments prior to Construction Completion. For Direct Loan Developments, an Applicant may request, at the latest at Application submission, that the Department amend its NOFA, amend its Consolidated Plan or One Year Action Plan, or ask HUD to grant a waiver of its regulations, if such request will not impact the timing of the Application's review, nor alter the scoring or satisfaction of threshold requirements for the Housing Tax Credits or other Department resources. Such requests will be presented to the Department's Board. The Board may not waive rules that are federally required, or that have been incorporated as a required part of the Department's Consolidated Plan or One Year Action Plan (OYAP) to the U.S. Department of Housing and Urban Development (HUD), unless those Plans are so amended by the earlier of a date the NOFA is closed or by an earlier date that is identified by the Board. Such items include §13.8 of this chapter, relating to Loan Structure and Underwriting Requirements, the interest rate published in the NOFA, the maximum subsidy limits as published in the NOFA, the priorities listed in the NOFA, the eligibility requirements of applicants describe in rule or the NOFA, scoring, and the tiebreaker procedure. Prior to Contract, except as otherwise described in rule, the Application Acceptance Date will then be the date the Department completes the amendment process or receives a waiver from HUD, if funds are still available in the NOFA. After Contract, but prior to Construction Completion staff will not recommend a waiver or NOFA Amendment;

(2) Utility Allowance Waivers with Project-Based Vouchers. Upon request before or with the submittal of the Application or at the time the Application is amended to reflect the vouchers, for De-

velopments that are layered with Project-Based Vouchers awarded under 24 CFR Part 983 from a Housing Authority that is not Moving to Work Housing Authority, Department staff will submit a waiver to the Office of Community Planning and Development at HUD to allow the Development to use the Public Housing Utility Allowance. For Project-Based Vouchers from a Housing Authority that is a Moving to Work Housing Authority, the Applicant must have the Moving to Work Housing Authority obtain this waiver from the appropriate HUD office or agree that the Development will be all bills-paid before Contract Execution. These waivers, if granted by HUD, will not require the Development to receive a new Application Acceptance Date; and

(3) Waivers under Closed NOFAs. The Board may not waive any portion of a closed NOFA prior to Construction Completion. Thereafter, the Board may only waive any portion of a closed NOFA as part of an approved Asset Management Division work out. Allowable Post-Closing Amendments are described in 10 TAC §13.13 of this chapter (relating to Post-Closing Amendments to Direct Loan Terms).

(d) Eligibility and Threshold Requirements. Applications for Multifamily Direct Loan funds must meet all applicable eligibility and threshold requirements of Chapter 11 of this title (relating to the Qualified Allocation Plan (QAP)), unless otherwise excepted in this rule or NOFA.

§13.2. 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; 24 CFR Parts 91, 92, and 93; 2 CFR Part 200; and 10 TAC Chapters 1 of this title regarding Administration, 2 of this title regarding Enforcement, 10 of this title regarding Uniform Multifamily Rules, and 11 of this title regarding the Qualified Allocation Plan.

(1) Application Acceptance Date--The date the MFDL Application is considered received by the Department as described in this chapter, chapter 11 of this title, or in the NOFA.

(2) Community Housing Development Organization (CHDO)--A private nonprofit organization with experience developing or owning affordable rental housing that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME Investment Partnerships Program (HOME) funds under the CHDO Set-Aside. A member of a CHDO's board cannot be a Principal of the Development beyond their role as a board member of the CHDO or be an employee of the development team, and may not receive financial benefit other than reimbursement of expenses from the CHDO (e.g., a voting board member cannot also be a paid executive).

(3) Construction Completion or Development Period--The Development Period is the time allowed to complete construction, which includes, without limitation, that necessary title transfer requirements and construction work has been fully performed, the certificate(s) of occupancy (if New Construction or reconstruction), Certificate of Substantial Completion (AIA Form G704), Form HUD-92485 (for instances in which a federally insured HUD loan is utilized), or equivalent notice has been issued.

(4) 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.

(5) Federal Affordability Period--The period commencing on the later of the date after Construction Completion and after all Direct Loan funds have been disbursed for the project, or the date of Project Completion as defined in 24 CFR §92.2 or §93.3, as applicable, and ending on the date which is the required number of years as defined by the federal program.

(6) HOME--The HOME Investment Partnership Program, authorized by Title II of the Cranston-Gonzalez National Affordable Housing Act.

(7) HOME Match-Eligible Unit--A Unit in the Development that is not assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92. Unless otherwise identified by the provisions in the NOFA, TCAP RF and matching contribution on NSP and NHTF Developments must meet all criteria to be classified as HOME-Match Eligible Units.

(8) 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 by the Department for Direct Loan Programs administered by the Department.

(9) Land Use Restriction Agreement (LURA) Term--The period commencing on the effective date of the LURA and ending on the date which, at a minimum, is the greater of the loan term or 30 years. The LURA may include the Federal Affordability Period, in addition to the State Affordability Period requirements and State restrictive criteria.

(10) Matching Contribution (Match)--A contribution to a Development from nonfederal sources that may be in one or more of the forms provided in subparagraphs (A) through (E) of this paragraph:

(A) Cash contribution (grant), except for cash contributions made by investors in a limited partnership or other business entity subject to pass through tax benefits in a tax credit transaction or owner equity (including Deferred Developer Fee and General Partner advances);

(B) Reduced fees or donated labor from certain eligible contractors, subcontractors, architects, attorneys, engineers, excluding any contributions from a party related to the Developer or Owner;

(C) Net present value of yield foregone from a below market interest rate loan as described in HUD Community Planning and Development (CPD) Notice 97-03;

(D) Waived or reduced fees or taxes from cities or counties not related to the Applicant in connection with the proposed Development; or

(E) Donated land or land sold by an unrelated third party at a price below market value, as evidenced by a third party appraisal.

(11) NHTF--National Housing Trust Fund.

(12) NOFA--Notice of Funding Availability.

(13) NSP--Neighborhood Stabilization Program.

(14) Qualifying Unit--Means a Unit designated for Multifamily Direct Loan use and occupancy in compliance with State and federal regulations, as set forth in the Contract. Except if the Development is all-bills paid, Qualifying Units may not also have a Project-Based Voucher issued under 24 CFR Part 983, unless the Application contains permission from the Public and Indian Housing Division of HUD for the layered units to use a utility allowance that is not the Public Housing Utility Allowance, or the Applicant has received permission from the Community Planning and Development Division of HUD for the layered units to use the Public Housing Utility Allowance.

(15) Relocation Plan--A residential anti-displacement and relocation assistance plan and budget in an Application that addresses residential and non-residential displacement and complies with the Uniform Relocation Assistance and Real Property Act as implemented at 49 CFR Part 24, HUD Handbook 1378, and the TDHCA Relocation Handbook. Additionally, some HOME and NSP funded Developments must comply with Section 104(d) of the Housing and Community Development Act of 1974 (as amended), and 24 CFR Part 42 (as modified for NSP and HOME American Rescue Plan (ARP) funds), which requires a one-for-one replacement of occupied and vacant, occupiable low- and moderate-income dwelling units demolished or converted. Guidance is on the Department's website at https://www.tdhca.state.tx.us/multifamily/home/index.htm. The Relocation Plan must be in form and substance consistent with requirements of the Department.

(16) Section 234 Condominium Housing Basic Mortgage Limits (Section 234 Condo Limits)--The per-unit subsidy limits for all MFDL funding. These limits take into account whether or not a Development is elevator served and any local conditions that may make development of multifamily housing more or less expensive in a given metropolitan statistical area. If the high cost percentage adjustment applicable to the Section 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program, then confirmation of that applicability will be included in the applicable NOFA.

(17) Site and Neighborhood Standards--HUD requirements for New Construction or reconstruction Developments funded by NHTF (24 CFR §93.150) or New Construction Developments funded by HOME (24 CFR §92.202). Proposed Developments must provide evidence that the Development will comply with these federal regulations in the Application. Guidance for successful submissions is provided on the Department website at https://www.tdhca.state.tx.us/multifamily/apply-for-funds.htm. Applications that are unable to comply with requirements in 24 CFR §983.57(e)(2) and (3) will not be eligible for HOME or NHTF.

(18) State Affordability Period--The LURA Term as described in the MFDL contract and loan documents and as required by the Department in accordance with the Chapter 2306, Texas Gov't Code which may be an additional period after the Federal Affordability Period.

(19) Surplus Cash--Except when the first lien mortgage is a federally insured HUD mortgage that is subject to HUD's surplus cash definition, Surplus Cash is any cash remaining:

(A) After the payment of:

(i) All sums due or currently required to be paid under the terms of any superior lien;

(ii) All amounts required to be deposited in the reserve funds for replacement;

(iii) Operating expenses actually incurred by the borrower for the Development during the period with an appropriate adjustment for an allocable share of property taxes and insurance premiums;

(iv) Recurring maintenance expenses actually incurred by the borrower for the Development during the period; and

(v) All other obligations of the Development approved by the Department; and

(B) After the segregation of an amount equal to the aggregate of all special funds required to be maintained for the Development; and

(C) Excluding payment of:

(i) All sums due or currently required to be paid under the terms of any subordinate liens against the property;

(ii) Any development fees that are deferred including those in eligible basis; and

(iii) Any payments or obligations to the borrower, ownership entities of the borrower, related party entities; any payment to the management company exceeding 5% of the effective gross income; incentive management fee; asset management fees; or any other expenses or payments that shall be negotiated between the Department and borrower.

(20) TCAP Repayment Funds--(TCAP RF) the Tax Credit Assistance Payment program funds.

§13.3. General Loan Requirements.

(a) Funding Availability. Direct Loan funds may be made available through a NOFA or other similar governing document that includes the method for applying for funds and funding requirements.

(b) Oversourced Developments. A Direct Loan request may be reduced or not recommended if the Department's Underwriting Report concludes the Development does not need all or part of the MFDL funds requested in the Application because it is oversourced, and for which a timely appeal has been completed, as provided in 10 TAC §1.7 of this title (relating to Appeals Process) or 10 TAC §11.902 of this title (relating to Appeals Process for Competitive HTC Applications), as applicable.

(c) Funding Sources. Direct Loan funds are composed of annual HOME and National Housing Trust Fund (NHTF) allocations from HUD and associated Program Income, repayment of TCAP or TCAP RF loans, HOME Program Income, NSP Program Income (NSP PI or NSP), and any other similarly encumbered funding that may become available, except as otherwise noted in this chapter. Similar funds include any funds that are identified by the Board to be loaned or granted for the development of multifamily property and are not governed by another chapter in this title, with the exception of State funds appropriated for a specific purpose.

(d) Eligible and Ineligible Activities.

(1) Eligible Activities. Direct Loan funds may be used for the predevelopment, acquisition, New Construction, reconstruction, Adaptive Reuse, rehabilitation, or preservation of affordable housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, or operating cost reserves, subject to applicable HUD guidance. Other expenses, such as financing costs, relocation expenses of any displaced persons, families, businesses, or organizations may be included. MFDL funds may be used to assist Developments previously awarded by the Department when approved by specific action of the Board. Eligible Activities may have fund source restrictions or may be restricted by a NOFA.

(2) Ineligible Activities. Direct Loan funds may not be awarded to a Development:

(A) Layered with Housing Tax Credits that have elected the income averaging election under Section 42(g)(1)(C) of the Internal Revenue Code that have more than 15% of the Units designated as Market Rate Units;

(B) In which the Applicant will not be directly leasing Units to residents, except as specifically described in the NOFA;

(C) Applicants applying for HOME or NSP funds may not commit any choice limiting activities as defined by HUD in 24 CFR Part 58 prior to obtaining environmental clearance, and will be subject

to termination of the Direct Loan award if such action is undertaken. For an Applicant applying for NHTF funds, choice limiting activities prior to full execution of a Contract with the Department are not prohibited, unless the Development also has sources requiring environmental review under 24 CFR Part 50 or Part 58, but the eligibility of costs associated with these activities will be impacted in keeping with 24 CFR §93.201(h) and all applicable federal regulations. Furthermore, certain activities which prohibit environmental mitigation may cause the Development to be ineligible and will cause the termination of the Direct Loan award.

(e) Ineligible Costs. All costs associated with the Development and known by the Applicant must be disclosed as part of the Application. Other federal funds will be included in the Final Direct Loan Eligible Costs located in Table 1 of the Direct Loan Calculator as part of the required per-unit subsidy limit calculation. Costs ineligible for reimbursement with Direct Loan funds in accordance with 24 CFR Parts 91, 92, 93, and 570, and 2 CFR Part 200, as federally required or identified in the NOFA, include but are not limited to:

(1) Offsite costs;

(2) Stored Materials;

(3) Site Amenities, such as swimming pools and decking, landscaping, playgrounds, and athletic courts;

(4) The purchase of equipment required for construction;

(5) Furnishings and Furniture, Fixtures and Equipment (FF&E) required for the Development;

(6) Detached Community Buildings;

(7) Carports and/or parking garages, unless attached as a feature of the Unit;

(8) Commercial Space costs;

(9) Personal Property Taxes;

(10) TDHCA fees;

(11) Syndication and organizational costs;

(12) Reserve Accounts, except Initial Operating Deficit Reserve Accounts;

(13) Delinquent fees, taxes, or charges;

(14) Costs incurred more than 24 months prior to the effective date of the Direct Loan Contract, unless the Application is awarded TCAP RF, and if specifically allowed by the Board;

(15) Costs that have been allocated to or paid by another fund source (except for soft costs that are attributable to the entire project as specifically identified in the applicable federal rule, or for TCAP RF if specifically allowed by the NOFA), including but not limited to, contingency, including soft cost contingency, and general partner loans and advances;

(16) Deferred Developer Fee;

(17) Texas Bond Review Board (BRB) fees;

(18) Community Facility spaces that are not for the exclusive use of tenants and their guests;

(19) The portion of soft costs that are allocated to support ineligible hard costs;

(20) Other costs limited by Award or NOFA, or as established by the Board;

(21) Interest on Construction Loans; and

(22) Acquisition that occurred before the Application Acceptance Date and environmental clearance for HOME and NSP projects. For NHTF, acquisition that occurred prior to Contract signing.

§13.4. Set-Asides, Regional Allocation, and NOFA Priorities.

(a) Set-Asides. Specific types of Activities or Developments for which a portion of MFDL funds may be reserved in a NOFA will be grouped in categories called Set-Asides. Not all Set-Asides will be available in every NOFA, and the Board may approve Set-Asides not described in this section. The amount of a single award may be credited to multiple Set-Asides, in which case the credited portion of funds may be repositioned into an oversubscribed Set-Aside prior to a defined collapse deadline.

(1) General / Soft Repayment Set-Aside.

(A) Applicants seeking to qualify for NHTF under this set-aside must propose Developments in which all Units assisted with MFDL funds are available for households earning the greater of the poverty rate or 30% AMI, and have rents no higher than the rent limits for extremely low-income tenants in 24 CFR §93.302(b).

(B) Applicants seeking to qualify for HOME under this set-aside must propose Developments in which all Units assisted with MFDL funds are available to households earning no more than 80% AMI and have rents no higher than the rent limits 24 CFR §92.2.

(C) A portion of the General / Soft Repayment Set-Aside may be reallocated into the CHDO Set-Aside in order to fully fund a CHDO award that exceeds the remaining amount in the CHDO Set-Aside.

(2) CHDO Set-Aside. Unless waived or reduced by HUD, a portion of the Department's annual HOME allocation will be set aside for eligible CHDOs meeting the requirements of the definition of Community Housing Development Organization in 24 CFR §92.2 and 10 TAC §13.2(2) of this chapter. Applicants under the CHDO Set-Aside must be proposing to develop housing on Development Sites located outside Participating Jurisdictions (PJ), unless the award is made within a Persons with Disabilities (PWD) Set-Aside, or the requirement under Tex. Gov't Code §2306.111(c)(1) has been waived by the Governor. A grant for CHDO operating expenses may be awarded in conjunction with an award of MFDL funds under this Set-Aside, if no other CHDO operating grants have been awarded to the Applicant in the same Calendar year, in accordance with 24 CFR §92.208. Applications under the CHDO Set-Aside may not have a for profit special limited partner within the ownership organization chart.

(b) Regional Allocation and Collapse. All funds subject to Tex. Gov't Code §2306.111 or as described to HUD in planning documents will be allocated to regions and potentially subregions based on a Regional Allocation Formula (RAF) within the applicable Set-Asides (unless the funds have already been through a RAF of the annual NOFA and/or Special Purpose NOFA). The RAF methodology may differ by fund source. HOME funds will be allocated in accordance with Tex. Gov't Code Chapter 2306. The end date and Application Acceptance Date for the regionally allocated funds will be identified in the NOFA but in no instance shall it be less than 30 days from the date a link to the Board approved NOFA or NOFA Amendment is published on the Department's website.

(1) After funds have been made available regionally and the period for regional allocation has expired, remaining funds within each respective Set-Aside may collapse and be pooled together on a date identified in the NOFA. All Applications received prior to these collapse dates will continue to hold their priority unless they are withdrawn, terminated, suspended, or funded.

(2) Funds remaining after expiration of the Set-Asides on the end date identified in the NOFA, which have not been requested in the form of a complete Application, may be collapsed and pooled together to be made available statewide on a first-come first-served basis to Applications submitted after the collapse dates, as further described in the NOFA.

(3) In instances where the RAF would result in regional or subregional allocations insufficient to fund an Application, the Department may use an alternative method of distribution, including an early collapse, revised formula or other methods as approved by the Board, and reflected in the NOFA.

(c) Notice of Funding Availability (NOFA). MFDL funds will be distributed pursuant to the terms of a published NOFA that provides the specific collapse dates and deadlines as well as Set-Aside and RAF amounts applicable to each NOFA, along with scoring criteria, priorities, award limits, and other Application information. Set-asides, RAFs, and total funding amounts may increase or decrease in accordance with the provisions herein without further Board action as authorized by the Board.

§13.5. Application and Award Process.

(a) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 11, Subchapter C (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) and the Notice of Funding Availability for which the Application is submitted.

(b) Application Acceptance Date. Applications will be considered received on the business day of receipt, unless a different time period is described in the Department's rules or NOFA. If an Application is received after 5:00 p.m., Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all Application materials, required third party reports and application fee(s) are received by the Department. Within certain Set-Asides or priorities, the date of receipt may be fixed, regardless of the earlier actual date a complete Application is received, if so specified in the Department's rules or NOFA. If multiple Applications have the same Application Acceptance Date, in the same region or subregion (as applicable), within the same Set-Aside, and for 9% then score and tiebreaker factors, as described 10 TAC §11.7 of this title (relating to Tie Breaker Factors) will be used to determine the Application's rank.

(c) Market Analysis. Applications proposing Rehabilitation that request MFDL as the only source of Department funding may be exempted from the Market Analysis requirement in 10 TAC §11.205(2) (relating to Required Third Party Reports) if the Development's rent rolls for the most recent six months reflect occupancy of at least 80% of all Units.

(d) Required Site Control Agreement Provisions. All Applicants for MFDL funds where the Development is subject to environmental review under 24 CFR Part 50 and Part 58 must include the following provisions in the purchase contract or site control agreement if the subject property is not already owned by the Applicant:

(1) "Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that:

(A) It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract,

(i) the purchase may proceed, or

(ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or

(B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required."; and for all Developments using federal funding

(2) "The Buyer does not have the power of eminent domain relating to the purchase and acquisition of the Property. The Buyer may use federal funds from the U.S. Department of Housing and Urban Development (HUD) to complete this purchase. HUD will not use eminent domain authority to condemn the Property. All parties entered this transaction voluntarily and the Buyer has notified the Seller of what it believes the value of the Property to be in accordance with 49 CFR Part 24 Appendix A. If negotiations between both parties fail, Buyer will not take further action to acquire the Property."

(e) Oversubscribed Funds for Competitive HTC-Layered Applications. Should MFDL funds be oversubscribed in a Set-Aside or for a fund source that has geographic limitations within a Set-Aside, Applications concurrently requesting Competitive HTC will be notified and may amend their Application to accommodate another fund source and make changes that still meet threshold requirements in 10 TAC Chapters 11 and 13 of this title, if such changes do not impact scoring under 10 TAC §11.9 (relating to Competitive HTC Selection Criteria). The Department will provide notice to all impacted Applicants in the case of over-subscription, which will include a deadline by which the Applicant must respond to the Department. Multiple Applications from a single or affiliated Applicants do not constitute oversubscription, and the Applicant(s) will not be able to amend their Applications as described in this subsection. If MFDL funds become available between the Market Analysis Delivery Date, and the date of the Department's Board meeting at which final Competitive HTC awards are made, the MFDL funds will not be reserved for Competitive HTC-layered Applications, unless the reservation is described in the NOFA.

(f) Availability of funds for Non-Competitive HTC-layered Applications. If an Application requesting layered Non-Competitive HTC and Direct Loan funds is terminated under 10 TAC §11.201(2)(E) (relating to Withdrawal of Certificate of Reservation), the Application will receive a new Application Acceptance Date for purposes of Direct Loan funds upon submission to the Department of the new Certificate of Reservation if the Board has not made an award. Direct Loan funds will not be reserved for terminated Applications, and may not be available for the Application with a new Reservation.

(g) Eligibility Criteria and Determinations.

(1) The Department will evaluate Applications received under a NOFA for eligibility and threshold pursuant to the requirements of this chapter and Chapter 11 of this title (relating to the Qualified Allocation Plan). The Department may terminate the Application if there are changes at any point prior to MFDL loan closing that would have had an adverse effect on the score and ranking order of the Application that would have resulted in the Application not being recommended for an award or being ranked below another Application received prior to the subject Application.

(2) Applicants requesting MFDL as the only source of Department funds must be able to demonstrate that a Principal of the Developer, Development Owner, or General Partner has previously developed and placed into service a minimum of 50 multifamily housing units. It is the Applicant's responsibility to identify and submit sufficient evidence of this experience in the Application. If the Department determines that the evidence submitted is not substantial, ad-

ditional evidence may be submitted through the Administrative Deficiency process, if it is available. If the Applicant is unable to provide satisfactory evidence, the Applicant will be ineligible for funding.

(h) Effective rules and contractual terms. The contractual terms of an award will be governed by and reflect the rules in effect at the time of Application; however, any changes in federal requirements will be reflected in the contractual terms. Further provided, that if after award, but prior to execution of such Contract, there are new rules in effect, the Direct Loan awardee may elect to be governed by the new rules, provided the Application would continue to have been eligible for award under the rules and NOFA in effect at the time of Application.

§13.6. Scoring Criteria and Tie Breaker Factors.

(a) Scoring. The scoring items used to calculate the score for a Competitive HTC-Layered Application will be utilized for scoring for an MFDL Application, and evaluated in the same manner. For all other Applications, the Tie Breaker described below will be utilized to determine which Applications to recommend for an award if multiple Applications are given the same Application Acceptance Date within the same Set-Aside and with the same Priority as described in the NOFA.

(b) Tie Breaker. In the event that two or more Applications receive the same Application Acceptance Date, within the same Set-Aside and having the same Priority, staff will utilize the Tie Breaker Factors established in §11.7.

§13.7. Maximum Funding Requests and Minimum Number of MFDL Units.

(a) Maximum Funding Request. The maximum funding request for an Application will be identified in the NOFA, and may vary by development type, set-aside, Priority, or fund source.

(b) Maximum New Construction or Reconstruction Per-Unit Subsidy Limits. The per-Unit subsidy limit for a Development will be determined by the Department as the Section 234 Condo limits with the applicable high cost percentage adjustment in effect at the start date of the NOFA, which are the maximum MFDL eligible cost per-Unit subsidy limits that an Applicant may use to determine the amount of MFDL funds combined with other federal funds that may subsidize a Unit.

(c) Maximum Rehabilitation Per-Unit Subsidy Limits. The MFDL eligible cost per-Unit to rehabilitate a Development may not exceed the HUD 221(d)(4) statutory limits, subject to high cost factors as published in the NOFA.

(d) Minimum Number of MFDL Units. The minimum required number of MFDL Units will be determined by the MFDL per-Unit subsidy limits and the cost allocation analysis, which will ensure that the amount of MFDL Units as a percentage of total Units is equal to or greater than the percentage of MFDL funds requested as a percentage of total eligible MFDL Development costs.

§13.8. Loan Structure and Underwriting Requirements.

(a) Loan Structures. Loan structures must meet the criteria described in this section and as further described in a NOFA. The interest rate, amortization period, ad term for the loan will be approved by the Board at the time of award, and can only be amended prior to loan closing by the process in 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms).

(b) Criteria for Construction-to-Permanent Loans. Direct Loans awarded through the Department must adhere to the criteria as identified in paragraphs (1) - (7) of this subsection if being requested as construction-to-permanent loans, for which the interest rate will be specified in the NOFA and approved by the Board:

(1) The construction term for MFDL loans shall generally be coterminous with any superior construction loan(s), but no greater than 36 months. In the event the MFDL loan is the only loan with a construction term or is the superior construction loan, the construction term may be up to 36 months. Shorter timeframes may be required to meet federal project completion or expenditure deadlines;

(2) No interest will accrue during the construction term;

(3) The loan term shall be no less than 15 years and no greater than 40 years, and the amortization period shall be between 30 to 40 years. The Department's loan must mature at the same time or within six months of the shortest term of any senior debt, so long as neither exceeds 40 years. The loan term commences following the end of the construction term;

(4) Loans shall be secured with a deed of trust with a permanent lien position that is superior to any other sources for financing including hard repayment debt that is in an amount less than or equal to the Direct Loan amount and superior to any other sources that have soft repayment structures, non-amortizing notes, have deferred forgivable provisions, or in which the lender has an identity of interest with any member of the Development Team. Parity liens may only be considered with federal loan funds from USDA Rural Development;

(5) In general, up to 50% of the MFDL loan may be advanced at loan closing, should there be sufficient eligible costs to reimburse that amount; however, this amount may be proportionally exceeded for a Development being awarded additional MFDL funds, if the Development is past 50% at loan closing, so long as the required Mid-Construction Inspection has been completed. In all cases, at least 10% of the funds will be reserved for the final Draw.

(c) Criteria for Construction Only Loans. MFDL Loans through the Department must adhere to the following criteria as identified in this paragraph, if being requested as construction only loans. The term of the construction loan shall generally be coterminous with any superior construction loan(s), but no greater than 36 months. In the event that the MFDL loan is the only construction loan or is the superior construction loan, the term may not exceed 36 months. Shorter timeframes may be required to meet federal project completion or expenditure deadlines.

(d) Criteria for Permanent Refinance Loans. If 90% of the Department's loan will repay existing debt, the first payment will be due the month after the month of loan closing; 90% of the loan may be advanced at loan closing, unless the Board approves another date.

(e) Evaluations. All Direct Loan Applicants in which third-party financing entities are part of the sources of funding must include a pro forma and lender approval letter evidencing review of the Development and the Principals, as described in 10 TAC §11.9(f)(1) of this title (relating to Competitive HTC Selection Criteria). Where no third-party financing exists, the Department reserves the right to procure a third-party evaluation which will be required to be prepaid by the Applicant.

(f) Pass-Through Loans. Department funds may not be used as pass-through financing. The Department's Borrower must be the Development Owner.

§13.9. Construction Standards.

All Developments financed with Direct Loans will be required to meet at a minimum the applicable requirements in Chapter 11 of this title (relating to the Qualified Allocation Plan). In addition, Developments must meet all applicable state and local codes, ordinances, and standards; the 2021 International Existing Building Code (IEBC) or International Building Code (IBC), as applicable. Should IEBC be more restrictive than local codes, or should local codes not exist, then the

Development must meet the requirements imposed by IEBC or IBC, as applicable. Developments must also meet the requirements in paragraphs (1) - (5) of this section:

(1) Third-Party Recommendations. Recommendations made in the Environmental Site Assessment (§11.305 of this title) and any Scope of Work and Cost Review (§11.306 of this title) with respect to health and safety issues, life expectancy of major systems (structural support; roofing; cladding and weatherproofing; plumbing; electrical; and heating, ventilation, and air conditioning) must be implemented;

(2) Lead and Asbestos Testing. For properties originally constructed prior to 1978, the Scope of Work and Cost Review must be provided to the party conducting the lead-based paint and/or asbestos testing, and the Development Owner must implement the mitigation recommendations of the testing report;

(3) Broadband Infrastructure. The broadband infrastructure requirements described in 24 CFR §92.251(a)(2)(vi) or (b)(1)(x) for HOME, NSP, or TCAP RF; or 24 CFR §93.301(a)(2)(vi) or 24 CFR §93.301(b)(2)(vi) for NHTF, as applicable;

(4) Properties in Catastrophe Areas. Developments located in the designated catastrophe areas specified in 28 TAC §5.4008 must comply with 28 TAC §5.4012 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After April 1, 2020); and

(5) Minimum Construction Standards. Rehabilitation Developments funded with federal sources may also be required to meet Minimum Rehabilitation Standards, as required by HUD. Rehabilitation Developments funded by the national Housing Trust Fund are required to meet the Multifamily Minimum Rehabilitation Standards approved by HUD, as posted on the Department's website at https://www.tdhca.state.tx.us/multifamily/home/index.htm, in addition to the Department's rules and NOFA requirements.

§13.10. Development and Unit Requirements.

(a) Proportionality. The bedroom/bathroom/amenities and square footages for Direct Loan Units must be comparable to the bedroom/bathroom/amenities and square footages for the total number of Units in the Development based on the amount of Direct Loan funds requested as a percentage of total MFDL eligible costs. As a result of this requirement, the Department will use the Proration Method as the Cost Allocation Method in accordance with HUD CPD Notice 16-15, except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested cannot exceed the per-unit subsidy limit described in this chapter or in the applicable NOFA. Direct Loan Units must be provided as a percentage of each Unit Type, in proportion to the percentage of total costs included in the Direct Loan.

(b) Floating Units. Floating Direct Loan Units may only float among the Units as described in the Direct Loan Contract and Direct Loan LURA.

(1) For HOME, NSP, and TCAP RF, Direct Loan Units must float throughout the Development unless the Development also contains public housing Units that will receive Operating Fund or Capital Fund assistance under Section 9 of the 1937 Act as defined in 24 CFR §5.100.

(2) For NHTF, Direct Loan Units must float throughout the Development, except as prohibited by 24 CFR §93.203, concerning public housing units.

(c) Unit Match Requirements.

(1) For a Development funded with NSP and/or NHTF, a required matching contribution will result in at least one HOME Match-Eligible Unit, in addition to the NSP and/or NHTF Units.

(2) For a Development funded with HOME, a required matching contribution may or may not result in a HOME Match-Eligible Unit, beyond the Department's HOME assisted Units.

(3) For a Development funded with TCAP RF in the annual NOFA, a matching contribution in addition to the Match that the Department counts from the TCAP RF investment will result in some amount of TCAP RF assisted Units being considered HOME Match-Eligible Units.

(d) Minimum Affordability Period. The minimum affordability period for all Direct Loan Units awarded under a NOFA will match the greater of the term of the loan, or 30 years unless a lesser period is approved by the Board. The Department reserves the right to extend the Affordability Period for Developments that fail to meet Program requirements.

(e) Restricted Units. If the Department is the only source of permanent funding for the Development by virtue of equity from HTC and MFDL funding, all Units must be income and rent restricted under a combination of HTC and Direct Loan LURAs, regardless of the amount of deferred Developer Fee as a permanent source. If the MFDL funding is the only source of permanent funding for the Development, all Units must be income and rent restricted by the Direct Loan LURA, and all costs must be MFDL eligible, regardless of the amount of deferred Developer Fee as a permanent source.

(f) Income Levels Committed at Time of Application. If the Direct Loan funds are used in a Competitive or non-Competitive HTC-Layered Development that is electing Income Averaging to qualify under IRC §42, the Direct Loan Units required by the LURA must continue to be provided at the income levels committed at the time of Application. Direct Loan Unit designations may not change to meet Income Averaging requirements.

(g) Mandatory Development Features. Development features described under 10 TAC §11.101(b)(4) (relating to Mandatory Development Amenities) may be selected to meet federal or state requirements, without a change to the number or description of features (e.g. selection of Broadband).

§13.11. Post-Award Requirements.

(a) Direct Loan awardees must satisfactorily complete the Post-Award Requirements identified in this section after the Board approval date.

(b) If a Direct Loan award is declined by the Direct Loan awardee and returned after Board approval, or if the Direct Loan awardee or Affiliates fail to timely enter into the Contract, close the loan, begin and complete construction, or leave a portion of the Direct Loan award unexpended, penalties may apply under 10 TAC §11.9(f) (relating to Competitive HTC Selection Criteria), and/or the Department may prohibit the Applicant and all Affiliates from applying for MFDL funds for a period of two years.

(c) Benchmarks. Extensions to the benchmarks in paragraphs (1) - (8) of this subsection may only be approved by the Executive Director or authorized designee in accordance with §13.12 or §13.13 of this chapter (relating to Pre-Closing and Post-Closing Amendments), as applicable.

(1) Environmental Clearance. In order to obtain environmental clearance required by the National Environmental Policy Act (NEPA) and other related Federal and state environmental laws (if applicable), Direct Loan Applicants, including those previously awarded

HTC, must submit a fully completed environmental review, including any applicable reports to the Department within 90 days of the Application Acceptance Date.

(2) Contract Execution. After a Development receives environmental clearance (if applicable), the Department will draft a Contract to be emailed to the Direct Loan awardee. Direct Loan awardees must execute and return a Contract to the Department within 30 calendar days after receipt of the Contract.

(3) Loan Closing and Construction Commencement. Loan closing must occur and construction must begin on or before the dates described in the Contract. If construction has not commenced within 12 months of the Contract Effective Date, the award may be terminated.

(4) Loan Closing. In preparation for closing any Direct Loan, the Development Owner must submit the items described in subparagraphs (A) - (F) of this paragraph. Providing incomplete documents, or not responding timely to subsequent Department requests for materials needed to facilitate closing, may significantly delay closing. Any request to change the financing structure of the Development, or the ownership structure, will in most cases extend the amount of time it will take for the Department to meet closing timelines, and may move prioritization of the closing below that of other Developments.

(A) Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development.

(B) Due diligence items determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department, as requested by Staff.

(C) When Department funds have a first lien position during the construction term, or if the Development is a public work under state law, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee as allowable under state law in the sole determination of the Department is required. Development Owners utilizing the USDA §515 program for a Development that is not a public work are exempt from this requirement, but must meet the alternative requirements set forth by USDA.

(D) Documentation required for preparation of closing loan documents includes, but is not limited to:

(i) Substantially final information necessary for REA staff to reevaluate the transaction prior to loan closing, including but not limited to a substantially final development cost schedule, sources and uses, operating pro forma, annual operating expenses, rent schedule, updated written financial commitments or term sheets, and any additional financing exhibits that have changed since the time of Application;

(ii) Substantially final Draft Owner/General Contractor agreement and draft Owner/Architect agreement prior to closing with final executed copies required by the day of closing;

(iii) Survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(iv) Plans and specifications for review by the Department's inspection staff. Inspection staff will issue a plan review letter that is intended to assist in identifying early concerns associated with the Department's final construction requirements; and

(v) If layered with Housing Tax Credits, a substantially final draft limited partnership agreement between the General Partner and the tax credit investor entity.

(E) If required by the fund source, prior to Contract Execution unless an earlier period is described in Chapters 10, 11, or 12 of this title, the Development Owner must provide verification of:

(i) Environmental clearance from the Department or HUD, as applicable;

(ii) Site and Neighborhood clearance from the Department;

(iii) Documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply;

(iv) Title Insurance Commitment or Policy showing the Department as Lender, with copies of all Schedule B documents; and

(v) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(F) The Direct Loan Contract as executed, which will be drafted by the Department's counsel or its designee for the Department. No changes proposed by the Developer or Developer's counsel will be accepted unless approved by the Department's Legal Division or its designee.

(6) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in the form and substance acceptable to the Department's Legal Division.

(A) Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance or the Underwriting Report and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents. Additional loan terms and conditions may be imposed by the loan closing documents.

(B) Loan terms and conditions may vary based on the type of Development, Real Estate Analysis Underwriting Report, and the Set-Aside under which the award was made.

(7) Quarterly Construction Status Reports. The Development Owner is required to submit quarterly Construction Status Reports to the Asset Management Division as described and by the deadlines specified in 10 TAC §10.401(e) of this title (relating to Construction Status Report).

(8) Mid-Construction Development Inspection Letter. In addition to any other obligations required as the result of any other Department funding sources, the Development Owner must submit a Mid-Construction Development Inspection Request once the Development has met at least 25% construction completion as indicated on the G703 Continuation Sheet or HUD equivalent form. Department inspection staff will issue a Mid-Construction Development Inspection Letter that confirms work is being done in accordance with the applicable codes, the construction contract, and construction documents.

(9) Construction Completion. Construction must be completed, as reflected by the Development's certificate(s) of occupancy (if new construction and/or reconstruction) and Certificate of Substantial

Completion (AIA Form G704) or Form HUD-92485 for instances in which a federally insured HUD loan is being utilized, within the construction term of any superior construction loan(s) or up to 36 months of the actual loan closing date if no superior construction loan(s) exists, unless a shorter timeline is necessitated by the federal funding source.

(10) Closed Final Development Inspection Letter. The Closed Final Development Inspection Letter must be issued by the Department within 36 months of loan closing. This letter will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements; this letter may include deficiencies that require resolution. The Closed Final Development Inspection may be conducted concurrently with a NSPIRE inspection. However, any letters associated with a NSPIRE inspection will not satisfy the Closed Final Development Inspection Letter required by this subsection.

(11) Initial Occupancy. Initial occupancy of all MFDL assisted Units by eligible households shall occur within six months of the final Direct Loan draw. Requests to extend the initial occupancy period must be accompanied by documentation of marketing efforts and a marketing plan. The marketing plan may be submitted to HUD for final approval, if required by the MFDL fund source.

(12) Per Unit Repayment. Repayment may be required on a per Unit basis for Units that have not been rented to eligible households within 6-18 months of the final Direct Loan draw, depending on the fund source.

(13) Termination and Repayment for Failure to Complete. Termination of the Direct Loan award and repayment of all disbursed funds will be required for any Development that is not completed within four years of the effective date of a Direct Loan Contract.

(14) Disbursement of Funds. The Borrower must comply with the requirements in subparagraphs (A) - (K) of this paragraph in order to receive a disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Borrower's compliance with these requirements is required with a request for disbursement:

(A) All requests for disbursement must be submitted using the MFDL draw workbook or such other format as the Department may require;

(B) Documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702/ G703 or HUD equivalent form;

(C) Disbursement requests must include a down-date endorsement to the Direct Loan (mortgagee) title policy or Nothing Further Certificate that includes a title search through the date of the Architect's signature on AIA form G702 or HUD equivalent form. For release of retainage, the down-date endorsement to the Direct Loan title policy or Nothing Further Certificate must be dated at least 30 calendar days after the date of the completion as certified on the Certificate of Substantial Completion (AIA Form G704) with $0 as the work remaining to be completed. If AIA Form G704 or HUD equivalent form indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed. Disbursement requests for acquisition and closing costs are exempt from this requirement;

(D) Table Funding (the wiring of Direct Loan funds to the title company at loan closing) may be permitted at the time of closing, for disbursement of funds related to eligible acquisition costs and eligible softs costs incurred, and in an amount not to exceed 50% of the total funds. Table Funding must be requested in writing at least 30 calendar days prior to the anticipated closing date, and will not be considered unless the Direct Loan Contract has been executed and all necessary documentation has been submitted to and accepted by the Department at least 10 calendar days prior to the anticipated closing date;

(E) At least 50% of Direct Loan funds (except as otherwise allowed for Permanent Refinance Loans described in 10 TAC §13.8(e)) will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(F) The initial draw request for the Development (excluding Table Funding) must be entered into the Department's Housing Contract System no later than 180 days after loan closing, and may not be submitted prior to submission of all architectural drawings;

(G) Developer Fee disbursement shall be limited by subparagraph (I) of this paragraph and is further conditioned upon clauses (i) - (iii), as applicable:

(i) For Developments in which the loan is secured by a first lien deed of trust against the Property, 75% shall be disbursed in accordance with percent of construction completed. 75% of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25% shall be disbursed at the time of release of retainage; or

(ii) For Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, Developer Fees will not be reimbursed by the Department, except as follows. If all other lenders and syndicator in a Housing Tax Credit Development (if applicable) provide written confirmation that they do not have an existing or planned agreement to govern the disbursement of Developer Fees and expect that Department funds shall be used to fund Developer Fees, they shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(iii) The Department may reasonably withhold any disbursement in accordance with the Loan Documents and if it is determined that the Development is not progressing as reasonably necessary to meet the benchmarks for the timely completion of construction of the Development as set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction at risk in accordance with the terms of the loan documents and within budget. If disbursement has been withheld under this subsection, the Development Owner must provide evidence to the satisfaction of the Department that the Development will be timely completed and occupied in order to continue receiving funds. If disbursement is withheld for any reason, disbursement of any remaining Developer Fee will be made only after construction of the Development has been completed, and all requirements for expenditure and occupancy have been met;

(H) Expenditures must be allowable and reasonable in accordance with federal and state rules and regulations. The Department shall review each expenditure requested for reasonableness. The Department may request the Development Owner make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(I) Following 50% construction completion, any funds will be released in accordance with the percentage of construction completion as documented on AIA Form G702/703 or HUD equivalent

form. 10% of requested Hard Costs will be retained and will not be released until the final draw request. If the Development is receiving funds from more than one MFDL source, the retainage requirement will apply to each fund source individually. All of the items described in clauses (i) - (viii) of this subparagraph are required in order to approve the final draw request:

(i) Fully executed Certificate of Substantial Completion (AIA Form G704) or Form HUD-92485 (for instances in which a federally insured HUD loan is being utilized) with $0 as the cost estimate of work that is incomplete. If AIA Form G704 or Form HUD-92485 indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed;

(ii) A down date endorsement to the Direct Loan title policy or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704) or Form HUD-92485;

(iii) For Developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(iv) For NHTF Developments layered with HTCs, a separate, additional cost certification form completed by an independent, licensed, certified public accountant of all Development costs (including project costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract, commonly known as a cost certification;

(v) For Developments subject to the Davis-Bacon Act, written documentation from the Department that the Department's Notice to Proceed that serves to lock in the Department of Labor's worker prevailing wage mandates at the development and authorizes start of construction was sent and final wage compliance report was received and approved or confirmation that HUD or other entity maintains Davis-Bacon oversight;

(vi) Certificate(s) of Occupancy (for New Construction or Reconstruction Units);

(vii) Development completion reports, which includes, but is not limited to, documentation of full compliance with the Uniform Relocation Act/104(d), Match Documentation requirements, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement;

(viii) If applicable to the Development, certification from Architect or a licensed engineer that all HUD environmental mitigation conditions have been met; and

(ix) evidence of Match being credited to the Development.

(J) No disbursement of funds will be approved without receipt of all closing documents in the form and substance required by the Department's Legal Division;

(K) The final draw request must be submitted within the construction term as determined in accordance with 10 TAC §13.8(c)(1) or (d)(1) as applicable, unless the construction term has been extended in accordance with 10 TAC §13.12 or 10 TAC §13.13 of this chapter, as applicable; and

(L) Annually, Borrowers must submit at least one draw, and may not submit more than four draws, unless previously approved by the Executive Director or designee.

(15) Annual Audits and Cost Certifications under 24 CFR §93.406(b).

(A) Annual Audits under 24 CFR §93.406(b). Unless otherwise directed by the Department, the Development Owner shall arrange for the performance of an annual financial and compliance audit of funds received and performances rendered under the Direct Loan Contract, subject to the conditions and limitations set forth in the executed Direct Loan Contract. All approved audit reports will be made available for public inspection within 30 days after completion of the audit.

(B) Cost Certifications under 24 CFR §93.406(b).

(i) Non-HTC-Layered Developments. Within 180 calendar days of the later of all title transfer requirements and construction work having been performed, as reflected by the Development's Certificate(s) of Occupancy (if New Construction) or Certificate of Substantial Completion (AIA Form G704 or HUD equivalent form), or when all modifications required as a result of the Department's Final Construction Inspection are cleared as evidenced by receipt of the Closed Final Development Inspection Letter, the Development Owner will submit to the Department a cost certification done by an independent licensed certified public accountant of all Development costs (including project NHTF eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

(ii) HTC-Layered Developments. With the Cost Certification required by the Low Income Housing Tax Credit Program, the Development Owner must submit to the Department a cost certification completed by an independent licensed certified public accountant of all Development costs (including NHTF project eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

§13.12. Pre-Closing Amendments to Direct Loan Terms.

(a) Closing Memo to Underwriting Report. Any changes to the total development cost, expenses, income, and/or other sources of funds from time of the publication of the initial Underwriting Report at the time of award to the time of loan closing, if the type or amount of the sources and uses have changed must be reevaluated by the Real Estate Analysis division, which will typically publish a Closing Memo to the Underwriting Report. The Report may recommend changes to the principal amount and/or the repayment structure for the Multifamily Direct Loan pursuant to §11.302 of this title (relating to Underwriting Rules and Guidelines), except that the change must have been an available option in the rule or NOFA (as applicable), and may not be made to awards that were competitively scored to the extent that change would have caused the Development to lose points. This will allow the Department to uphold the competitive process, mitigate any increased risk, and to ensure that the Development is not oversubsidized. Where the Department determines such risk is not adequately mitigated, the award may be terminated or reconsidered by the Board. If the changes cause the total Debt Coverage Ratio (DCR) to no longer comply with 10 TAC §11.302 of this title (relating to Underwriting Rules and Guidelines), the award may be subject to termination. The Department may require the Closing Memo to be completed before providing a Contract to the Development Owner.

(b) Executive Approval Required Pre-Closing. The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (6) of this subsection. Under no circumstances may an amendment cause the Department to violate or be at risk of violating a federal requirement or deadline.

(1) Extensions to the loan closing date required in 10 TAC §13.11(c)(4) of this chapter (relating to Post-Award Requirements) may be approved prior to closing. An Applicant must submit sufficient evidence documenting good cause, including but not limited to, docu-

mented delays caused by circumstances outside the control of the applicant or constraints in arranging a multiple fund source closing.

(2) Changes to the construction term and/or loan maturity date to accommodate the requirements of other lenders or to maintain parity of term may be approved prior to closing.

(3) Extensions to the Construction Completion date or date of receipt of a Closed Final Development Inspection Letter required in 10 TAC §13.11(c)(8) of this chapter may be requested but generally are not approved prior to initial loan closing. Extensions under this paragraph are determined based on documentation that the extension is necessary to complete construction and that there is good cause for the extension.

(4) Only to the extent determined necessary by Real Estate Analysis to maintain financial feasibility, changes to the amortization period (not to exceed 40 years) or interest rate (to not less than the minimum specified in rule or NOFA) may be approved if such changes continue to meet all requirements of Chapter 11, Chapter 13, and the NOFA.

(5) Decreases in the Direct Loan amount, provided the decrease does not jeopardize the financial viability of the Development in the determination of Real Estate Analysis may be approved prior to closing, though the Development Owner may be subject to penalties as further described in 10 TAC §13.11 of this chapter (relating to Post-Award Requirements). Increases will not be approved unless the Applicant applies for the additional funding under an open NOFA.

(6) Changes to other loan terms or requirements that would not require a waiver, as necessary to facilitate the loan closing without exposing the Department to undue financial risk.

(c) Board Approval Required Pre-Closing. Board approval is necessary for any other changes prior to closing.

§13.13. Post-Closing Amendments to Direct Loan Terms.

(a) Good Cause Extensions. The Executive Director or authorized designee may approve extensions of up to 12 months under 10 TAC §13.11(c)(7) - (8) or (14)(L) of this chapter (relating to Post-Award Requirements) based on documentation that there is good cause for the extension and cause the Department to violate or be at risk of violating a federal requirement or deadline.

(b) Amendments to MFDL Awards. Except in cases of Force Majeure, changes to terms of awards subject to mandatory HUD reporting requirements will only be processed after the Construction Completion is reported to the federal oversight entity as completed, and the last of the MFDL funds have been drawn.

(c) Executive Amendments. The Executive Director or authorized designee may approve amendments to loan terms post-closing as described in paragraphs (1) - (3) of this subsection. Board approval is necessary for any other changes post-closing.

(1) Changes in Terms. Changes to the amortization or maturity date to accommodate the requirements of other lenders or maintain parity of term may be approved post-closing, provided the changes result in the Direct Loan continuing to meet the requirements of 10 TAC §13.8(c)(1) and (3) of this chapter (relating to Loan Structure and Underwriting Requirements), and NOFA requirements.

(2) Post-Closing Subordinations or Re-subordinations of MFDL Liens. Re-subordination of the Direct Loan in conjunction with refinancing may be approved post-closing, provided the conditions in subparagraphs (A) - (E) of this paragraph are met:

(A) The Borrower is current with loan payments to the Department, and no notice has been given of any Event of Default on any MFDL loan. Histories of late or non-payment on any other MFDL loan may result in denial of the request;

(B) The refinance does not propose payment to any of the Development Owner or Developer parties (including the Limited Partners);

(C) A proposal for partial repayment of the MFDL lien is made with the request;

(D) The new superior lien is in an amount that is equal to or less than the original senior lien and does not negatively affect the financial feasibility of the Development.

(i) For purposes of this section, a negative effect on the financial feasibility of the Development shall mean a reduction in the total Debt Coverage Ratio (DCR) of more than 0.05, or if the DCR no longer meets the requirements of 10 TAC §11.302 of this title; and

(ii) Changes to accommodate refinancing with a new superior lien that is in an amount that exceeds the original senior lien and which will be directly applied to property improvements, as evidenced by the loan or security agreements (exclusive of fees associated with the refinance and any required reserves), will be considered on a case by case basis; and

(E) The subordination or re-subordination request does not include a request to subordinate or resubordinate any MFDL LURA, with the exception of partial subordination or re-subordination of receivership rights (subject to the prosed receiver entity or Affiliate not having been Debarred by the Department or on the Federal Suspended or Debarred Listing).

(3) Workout Arrangements. Changes required to the Department's loan terms or amounts that are part of an approved Asset Management Division work out arrangement may be approved after Construction Completion.

(d) Contract Assignments and Assumptions of MFDL Liens. The Executive Director or authorized designee may approve the Contract Assignment and Assumption of MFDL Liens following approval of an Ownership Transfer request if the conditions in paragraphs (1) - (3) of this subsection are met:

(1) The assignment or assumption is not prohibited by the Contract, Loan Documents, or regulations;

(2) The assignment or assumption request is based on either subparagraph (A) or (B) of this paragraph:

(A) There are insufficient funds available in the transaction to fully repay the Direct Loan at the time of acquisition, for which Deferred Developer Fee, Development Owner or Affiliate Contributions, or other similar liabilities will not be considered in determining whether the Direct Loan could be repaid at the time of acquisition; or

(B) The new superior lien will be directly applied to property improvements as evidenced by the loan or security agreements, exclusive of fees association with the new financing and any required reserves; and

(3) The corresponding Ownership Transfer has been approved in accordance with all requirements in 10 TAC §10.406 of this title (relating to Ownership Transfers), and no prospective Owner including person, or affiliate, as those terms are defined in 2 CFR Part 180 and 2 CFR Part 2424, Subpart I, has been subject to state Debarment or are on the Federal Suspended or Debarred Listing. This includes Board Members and Limited Partners.

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

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 4. SCHOOL LIBRARY PROGRAMS SUBCHAPTER A. STANDARDS AND GUIDELINES

13 TAC §4.2

The Texas State Library and Archives Commission (commission) adopts new §4.2, School Library Programs: Collection Development Standards. The new section is adopted with changes to the proposed text as published in the October 27, 2023, issue of the *Texas Register* (48 TexReg 6291) and will be republished.

EXPLANATION OF ADOPTED NEW SECTIONS. The new section establishes collection development standards a school district must adhere to in developing or implementing the district's library collection development policies. The new rule is adopted to implement House Bill 900, 88th R.S. (2023) (HB 900), which amended Education Code, §33.021, to require the commission, with approval by majority vote of the State Board of Education (SBOE), to adopt these standards by January 1, 2024. The SBOE approved the standards at their December 13, 2023, meeting.

New §4.2(a) requires each public school district board of trustees or governing body to approve and institute a collection development policy that describes the processes and standards by which a school library acquires, maintains, and withdraws materials.

New §4.2(b) provides that school library collections should include a range of materials that are age appropriate and suitable to the campus and students the school library serves, offering guidance on the overall goals of a school library's collection. Under this guidance, a collection should enrich and support the Texas Essential Knowledge and Skills (TEKS) while taking into consideration students' varied interests, maturity levels, abilities, and learning styles; foster growth in factual knowledge, literary appreciation, aesthetic values, and societal standards; encourage the enjoyment of reading, foster high-level thinking skills, support personal learning, and encourage discussion based on rational analysis; and represent the ethnic, religious, and cultural groups of the state and their contribution to Texas, the nation, and the world.

New §4.2(c) enumerates multiple requirements for a school library collection development policy, including the requirements stated in HB 900.

New §4.2(d) defines "evaluation of materials" to include consideration of the factors proposed to guide library collections generally in subsection (b), which includes that the materials are age appropriate and suitable to the campus and students the library serves, local priorities and school district standards, and at least two additional factors, such as recommendations from parents, guardians, and local community members; consultation with educators and library staff; an extensive review of the text; the context of a work; or authoritative reviews.

New §4.2(e) provides that a reconsideration process should ensure that any parent or legal guardian of a student enrolled in the district or current school district employee may request the reconsideration of a specific item in their school district's library catalog. The rule further requires that a reconsideration process establish a uniform procedure an individual must follow when filing a request. The process should also include a reasonable timeframe for the review and final decision and establish a uniform process for the treatment of any library material undergoing reconsideration by a committee charged with review of the item in its entirety. The process should include a review and appeal process and provide that if an item has gone through the reconsideration process and remains in the collection, the school district may not be required to reconsider an item within two calendar years of final decision. For example, if a final decision on an item under reconsideration is made on March 1, 2025, the school district could not be required to reconsider the item again until March 2, 2027.

New §4.2(f) encourages a school district to ensure a State Board for Educator Certification certified professional librarian or other dedicated professional library staff trained on proper collection development standards is responsible for the selection and acquisition of library materials.

New §4.2(g) requires a school district to develop collection assessment and evaluation procedures to periodically appraise the quality of library materials in the school library to ensure the library's goals, objectives, and information needs are serving its school community.

New §4.2(h) recommends school districts review their collection development policies at least every three years, a practice that will ensure the policy remains up-to-date and consistent with current district priorities.

New §4.2(i) allows school districts to add procedures to the minimum requirements to satisfy local needs so long as the added procedures do not conflict with the minimum requirements.

Lastly, new §4.2(j) provides that school districts are responsible for ensuring their school libraries implement and adhere to these collection development standards. The commission has no enforcement authority with respect to school libraries.

SUMMARY OF COMMENTS. The Commission received 26 comments during the comment period on the proposed rule as discussed below.

COMMENT. The Commission received multiple comments expressing support for the proposed rule. The Lewisville Independent School District (LISD) provided comment in support of the following components of the proposed collection development standards:

Section 4.2(i), which establishes the standards as a minimum ensuring districts maintain local control;

Section 4.2(c)(7)A), which recognizes that parents are the primary decision-makers regarding their individual student's access to library materials;

Section 4.2(d), which includes multiple sources for selection aids in having a high-quality library collection; and

Section 4.2(e), which limits the reconsideration process to a parent or legal guardian of students within the district.

The Children's Defense Fund - Texas (CDF-Texas) provided comment largely in support of the proposed standards, commending the Commission's efforts to balance compliance with the law with healthy respect for local districts, individual needs, and community input. Specifically, CDF-Texas expressed support for the following three elements of the standards: allowing school districts to use their discretion to craft local policies that meet the unique needs of their students; prioritizing district parents, students, and employees in the reconsideration process; and recognizing the value of professional reviews in guiding library collection and acquisition decisions.

The Texas Library Association (TLA) submitted a comment supporting the standards, noting they will provide guidance and a strong foundation upon which school districts can build policies that support the educational needs of Texas students.

Five individuals also provided general comments of support regarding the proposed rule, with one commenter requesting the standards be approved as written, one commenter noting we have a moral duty to protect children from sexually explicit material, one commenter expressing they were happy the new standards included references to Texas law, one individual thanking the Commission for §4.2(c)(7) and expressing hope the adopted rules can be enforced for the children's sake, and one individual providing information regarding personal experience to demonstrate support of the collection development standards.

RESPONSE. The Commission appreciates the comments in support of the proposed rule.

COMMENT. Two individuals provided comment regarding the economic impact of the proposed rule. One individual commented that the statements in the preamble noting no anticipated economic costs to persons required to comply with the proposed new section and no adverse economic impact on small businesses, micro-businesses, or rural communities are incorrect. The commenter noted that school staff will have to write policies incorporating this policy into their own policies and librarians will have to develop new procedures for handling material labeled "sexually relevant," move library materials to accommodate a special shelf area and develop processes for tracking these changes across all the vendors they utilize. The commenter also noted a huge cost to booksellers. The other individual commented on the fiscal impact of HB 900, noting the costs involved in local committee meetings, librarians reviewing state laws and contested materials, bookseller ratings of materials and determining process for access, and policy reviews every two years.

RESPONSE. The Commission disagrees that the proposed rule would have an economic impact on persons required to comply with the rule or on small businesses, micro-businesses, or rural communities. The Commission notes that any potential economic impact and costs to schools described in the comments are not a result of the Commission's rule regarding collection development standards. Rather, any potential costs result from the statute (Education Code, §33.021) requiring school districts to adhere to the standards and explicitly specifying content for inclusion in the standards. Similarly, the requirement for different treatment of library materials rated as sexually relevant is required by Education Code, §35.005 (Parental Consent Required for Use of Certain Library Materials) and merely restated in the rule as required by Education Code, §33.021. Finally, the requirement for ratings by vendors is not a result of the Commission's rule. That requirement is specified in Education Code, §35.002 (Ratings Required).

COMMENT. One individual commented that the rule should require challenges to be submitted individually, as long lists of books for reconsideration prevent the process from occurring in a timely manner.

RESPONSE. The Commission appreciates the comment. Section 4.2(i) authorizes school districts to add procedures to the minimum requirements to satisfy local needs so long as the added procedures do not conflict with the minimum requirements. School districts are encouraged to create a reconsideration process that meets the individual school district's needs, which could include a requirement that requests for reconsideration be submitted individually. The Commission declines to make this change in the rule, however, as individual school districts have varying capacities for managing reconsideration requests.

COMMENT. LISD requested the Commission add superintendent or superintendent designee to §4.2(e)(3) to ensure district administration can support campuses through the reconsideration process.

RESPONSE. The Commission agrees with the comment and replaces "campus administrator" with "superintendent or superintendent designee" to ease the administrative burden on school districts and ensure campuses have flexibility.

COMMENT. One individual commented that §4.2(e) should require a complainant to read the entire book, encourage an informal meeting with a librarian and/or administrator, and require that the book in question be reviewed in its entirety.

RESPONSE. The Commission appreciates the comment. Section 4.2(i) authorizes school districts to add procedures to the minimum requirements to satisfy local needs so long as the added procedures do not conflict with the minimum requirements. While a school district may stipulate this requirement in its individual reconsideration policy, the Commission declines to make this change in the rule and concludes this decision is best left to school districts. The Commission does, however, confirm that a review committee must read an item under reconsideration in its entirety, and has made a clarifying change on adoption in §4.2(e)(4) in response to comments.

COMMENT. TLA and one individual commented on the inclusion of "authority" in §4.2(e)(4). TLA noted that the reference to an authority is vague and that it is important that those charged with the review of a library book reflect the community of the school it serves rather than an individual or group of individuals who do not know the campus. The individual commented that the reference to a committee or authority is unclear, asking how such a committee would be formed and whether it would vary from year to year.

RESPONSE. The Commission agrees that further clarification is needed, and amends §4.2(e)(4) to delete "authority" and clarify

that a district "should convene a review committee in accordance with criteria established by the district to ensure a thorough and fair process."

COMMENT. CDF-Texas and Students Engaged in Advancing Texas (SEAT) both commented that books should remain available while under review and reconsideration. SEAT further commented that all books currently on school library shelves already go through an extensive review by qualified educators and librarians.

RESPONSE. The Commission notes that this issue was discussed during the November 3, 2023, Commission meeting and the Commission ultimately decided to allow local districts to assess their own needs and comfort level with potential risks involved in removing books from the shelves rather than mandate uniform treatment of books statewide. The Commission declines to make this recommended change.

COMMENT. TLA and two individuals commented that a book undergoing reconsideration should be reviewed in its entirety. TLA further noted that to make an informed decision about material being reconsidered, it is important for the review committee to read the material in its entirety and not rely on a summary, excerpts of text, or a contextual review as such information does not provide an adequate understanding of the material.

RESPONSE. The Commission agrees with this comment and notes this was the intent of the proposed provision. For clarity, the Commission will make the suggested change in §4.2(e)(4).

COMMENT. TLA, LISD, and three individuals commented that the time frame within which a book may not be reconsidered after it has gone through the reconsideration process should be extended (ranging from three to five years), as reconsideration processes require significant time and resources. LISD commented that reconsideration of materials requires eight to ten hours of work by a district committee, so allowing for reconsideration of a single title every year would create an undue burden on the district. An individual expressed concern about opportunities in the rule for abuse that could clog library and school district time and resources, specifically noting that the one-year provision related to reconsideration would result in an inefficient use of a school's resources.

RESPONSE. The Commission agrees that a one-year time frame for a subsequent reconsideration of an item that has gone through the reconsideration process and remained in the collection could result in an inefficient use of school district resources. However, rather than mandate a minimum timeframe, the Commission is modifying the language of §4.2(e)(7) to provide that if an item has gone through the reconsideration process and remains in the collection, a school district may not be required to reconsider an item within two calendar years of final decision. The Commission believes this change provides districts with additional flexibility to manage reconsideration requests, appropriately and effectively consider items in the school library collection, and make efficient use of school district resources.

COMMENT. SEAT requested that a line be included in §4.2(c)(7)(F) explicitly recommending schools communicate with parents regarding books being removed from their child's library, informing families of newly created gaps in their student's literary options in the interest of transparency to parents.

RESPONSE. The Commission appreciates the comment and encourages school districts to communicate with parents regarding the school library collection and reconsideration process but declines to add the suggested language mandating this specific communication statewide. The Commission also notes that school districts are subject to the Public Information Act and this information could be obtained on request. A school district that receives numerous requests for this type of information may well decide to make this information available to parents regularly.

COMMENT. TLA and five individuals provided comment suggesting the time period specified for policy review in §4.2(h) be extended (ranging from three to five years), citing the significant time and cost involved in policy reviews and updates and implementation of new policies, which may require new processes and additional training.

RESPONSE. The Commission agrees that the minimum time period for policy review should be extended from at least every two years to at least every three years. The Commission also notes that the rule only requires a policy update if the update is necessary.

COMMENT. LISD and four individuals provided comment expressing concern over inclusion of classroom libraries in the collection development standards. One individual noted that classroom libraries are not governed by school libraries or school librarians. One individual similarly noted that school librarians are not in charge of classroom libraries nor are they responsible for what a teacher chooses to have on their shelves. Another individual expressed concern over the additional time that would be required of librarians to ensure compliance with all books in every teacher's classroom, which would take away from student instruction. LISD noted that the inclusion of classroom libraries in the standards creates an undue burden on classroom teachers to catalog and maintain collections. LISD recommended that classroom libraries have their own standards that consider the context of a classroom, a classroom teacher's job responsibilities, and resources available to classroom teachers to meet standards.

RESPONSE. While the Commission does not disagree that this requirement could place an additional burden on public school librarians, the Commission notes that this portion of the rule is a required element of HB 900, specifically Education Code, §33.021(d)(2)(C). Therefore, the Commission is required by law to include this element in the collection development rule and declines to make the requested change. The Commission will, however, change the rule language to mirror the statute to ensure no statutory intent is lost by changing "apply to" to "be required for."

COMMENT. One individual requested flexibility within the school district book purchasing process by allowing school librarians to purchase "unrated" books provided the books have been reviewed and sanctioned by reputable outside sources and extending the deadline for the bookstores to create and agree on their rating system.

RESPONSE. The Commission notes that this comment addresses matters outside the scope of proposed §4.2. However, the Commission points out that the collection development standards apply to a library's entire collection, not just books that have been rated by library material vendors. The Commission anticipates that most books sold by library material vendors will appropriately have "no rating."

COMMENT. TLA requested that §4.2(f) be modified to add that professional library staff must have successfully completed a collection development course.

RESPONSE. While the Commission agrees with this comment, the Commission notes that the intent of the language as proposed was to provide that if a school district does not have a professional librarian certified by the State Board for Educator Certification on staff, they should ensure the person responsible for the selection and acquisition of library materials is a professional library staff member who has received training on school library collection development. Because the language as proposed is substantially similar to the language recommended by TLA with added flexibility regarding training, the Commission declines to make the requested change.

COMMENT. TLA and one individual requested the addition of "maturity level" to §4.2(b)(1). TLA noted that it is important that materials selected for the library collection take into consideration the varied maturity levels of the students served. The individual noted that this addition would allow for readers to have access to books that will challenge them if they have a high reading level, noting this is especially important for students at the upper range of elementary, middle school, and high school.

RESPONSE. The Commission agrees with the comment and has made the change. The Commission notes that libraries support Gifted and Talented programs, and that it is important for library resources to support all levels of curriculum.

COMMENT. TLA and one individual requested the addition of "critical" before "thinking skills" in §4.2(b)(3). TLA noted that critical thinking is a higher order skill that goes beyond basic thinking skills of observation of facts and memorization. The individual noted that critical thinking is a very important component of the TEKS.

RESPONSE. The Commission agrees with the comment but added "high-level" instead of "critical" for clarity.

COMMENT. TLA requested the addition of the word "school" before "community" to clarify the school library serves the school community - its students, teachers, parents, and other school stakeholders.

RESPONSE. The Commission agrees with the comment and has made the suggested change.

COMMENT. LISD commented that school districts could benefit from additional clarification and definition of harmful material, pervasively vulgar, educationally unsuitable, and obscene content as used in §4.2(c)(7)(B) and (C).

RESPONSE. The Commission declines to expand on the definitions of "harmful material," "pervasively vulgar," "educationally unsuitable," and "obscene content" in rule, as such terms are either already defined in statute or case law or could be subject to differing definitions depending on specific circumstances. School districts are advised to consult with their district's legal counsel or the TEA for assistance with compliance.

COMMENT. One individual suggested that §4.2(c)(7) be divided into two sections, stating that several items under subsection (c)(7) are not about any legal requirement at any level of government. The individual suggested adding subsection (c)(8) listing the items that are not about legal compliance.

RESPONSE. The Commission notes that everything listed under §4.2(c)(7) stems from Education Code, §33.021 as amended by HB 900. See Educ. Code §33.021(d) (requiring that the standards adopted by the Commission

"must . . . include a collection development policy that: (A) prohibits the possession, acquisition, and purchase of: (i) harmful material, as defined by §43.24, Penal Code; (ii) library material rated sexually explicit material by the selling library material vendor; or (iii) library material that is pervasively vulgar or educationally unsuitable as referenced in Pico v. Board of Education, 457 U.S. 853 (1982); (B) recognizes that obscene content is not protected by the First Amendment to the United States Constitution; (C) is required for all library materials available for use or display, including material contained in school libraries, classroom libraries, and online catalogs; (D) recognizes that parents are the primary decisionmakers regarding a student's access to library material; (E) encourages schools to provide library catalog transparency; (F) recommends schools communicate effectively with parents regarding collection development; and (G) prohibits the removal of material based solely on the: (i) ideas contained in the material; or (ii) personal background of: (a) the author of the material; or (b) characters in the material.").

Because this information is required by Education Code, §33.021, the Commission declines to make this change.

COMMENT. LISD provided comment regarding §4.2(c)(5), pointing out that vendors have not yet rated books, limiting a district's ability to comply. Two individuals also suggested deleting §4.2(c)(5), noting the terminology is unclear, currently in litigation, and in conflict with state law.

RESPONSE. The Commission notes that HB 900 established a deadline of April 1, 2024, for library material vendors to rate books. If the collection development standards are effective prior to books being rated by vendors, then the portion of the collection development standards regarding books rated by vendors would be inapplicable. The Commission also notes that the lawsuit challenging HB 900 is currently on appeal. If the law changes in the future in such a way as to impact the Commission's rule, the statute would prevail. Furthermore, the Commission would amend its rule to be consistent with the law. Therefore, the Commission declines to make a change based on these comments.

COMMENT. One individual requested the addition of provisions that address how to enforce the new guidelines, accountability for school districts who do not remove applicable books, and checks and balances on school librarians who do not remove applicable books or who continue to purchase obscene and sexually explicit books. The commenter also asked what the deadline is for districts to develop and implement a new policy related to these standards and what is the deadline for school district library book publishers to adhere to each new district policy.

RESPONSE. The Commission notes that it has no enforcement authority over school districts or school district employees, including librarians. Section 4.2(j) of the proposed rule explicitly notes that school districts are responsible for ensuring their school libraries implement and adhere to these collection development standards. The Commission would expect the districts to communicate expectations related to enforcement and deadlines. In addition, the Commission notes that HB 900 granted the Texas Education Agency (TEA) broad rulemaking authority related to Education Code, Chapter 35, Regulation of Certain Library Materials, so such concerns could be further addressed by TEA.

COMMENT. One individual noted that the "societal standards" referenced in §4.2(b)(2) is vague.

RESPONSE. The Commission notes that "societal standards" is a common term used to refer to standards of acceptable behavior or "social norms."

COMMENT. One individual requested changing §4.2(c)(4) to "Are appropriate for the reading levels and understanding of students," as current language implies censorship if young readers access a 4th grade book.

RESPONSE. The Commission disagrees that the proposed language implies censorship and also points to §4.2(b), which should be read in conjunction with §4.2(c). The Commission declines to make this change.

COMMENT. Two individuals provided comments related to input of the community on a library's collection development. One individual noted that community members should have limited influence on a school library's collection development, citing the statement in §4.2(c)(7)(F)(iii), and noted that a school library is not a public library and therefore does not serve the community at large. The other individual commented that the proposal for library collection selection should be limited to students, parents, guardians, and teachers, and that the local community should not have a say in what books can and cannot be read in a school library.

RESPONSE. The Commission appreciates the concern. While the rule directs districts to allow students, parents, educators, and community members the opportunity to provide feedback on library materials and services, the district may determine how best to integrate feedback, in whatever form the district requests, into its library services and collections. The Commission declines to make a change.

COMMENT. One individual commented that she does not want vendors, who may not understand a community's particular needs, having the final say in what her children can and cannot read, and that parents can have conversations with their children about what is or is not sexually relevant.

RESPONSE. The Commission appreciates the comment but notes this comment addresses a matter outside the scope of the Commission's rulemaking authority.

COMMENT. One individual provided comments in opposition to HB 900, stating it takes responsibility away from parents and caregivers and places the onus on book sellers and vendors. The individual notes that parents and caregivers have an important role to play in what their children read, noting that if a book a child brings home does not align with the family's ideals, the book should be returned and the parent/caregiver should discuss with the child why the book was not a good fit for their family.

RESPONSE. The Commission appreciates the comment but notes this comment addresses a matter outside the scope of the Commission's rulemaking authority.

COMMENT. CDF-Texas recommended the rule explicitly affirm the right of students to read freely by adding a clause in §4.2(c) that recognizes students as important decision makers in their own rights.

RESPONSE. The Commission agrees that students are important decision makers in shaping their educational experience and will underscore this point by amending §4.2(b)(3) to read "Encourage the enjoyment of reading to foster thinking skills, support personal learning, and encourage discussion based on rational analysis."

COMMENT. SEAT requested the addition of the statement "Recognize that students are the primary stakeholders regarding their access to library material" to §4.2(c)(7), noting that such a statement emphasizes that while HB 900's statement about parents being the primary decision makers still stands, the state recognizes that students and students' futures will be directly affected by the new standards. Similarly, one individual commented that students should be involved in book challenges by being allowed to voice their opinions about what is best for their reading as an appropriate representation of their age group, especially in secondary school.

RESPONSE. The Commission agrees that students' perspectives should be considered. Students are included stakeholders in §4.2(c)(7)(F)(iii) in providing feedback on library collections and services. Districts may include students in their reconsideration processes but given the potential rigor, time commitments, and other potential conflicts for participation in a reconsideration process, districts are best suited to determine the appropriate level of student involvement. While the Commission agrees with the point, the Commission declines to make any additional change.

COMMENT. One individual asked for Commission support of the removal of all text and images that are sexually explicit or refer to human biological facts as non-factual and any statements that this nation is a racist nation, regarding white supremacy, or that are not historically proven facts of matter.

RESPONSE. The Commission underscores that sexually explicit material in public school libraries is prohibited by HB 900. The other topics addressed by this comment do not relate to the proposed rule.

COMMENT. One individual commented that HB 900 is "wrongheaded," "vague," and "misleading," and that the Commission's amendment of the Education Code while the law is on appeal is an effort to be complicit with the draconian law.

RESPONSE. The Commission notes that the portion of HB 900 that requires the Commission to adopt collection development standards has not been enjoined. The Commission is still required to adopt the collection development standards by January 1, 2024.

COMMENT. One individual commented that a policy is needed to purge school district libraries that promote promiscuity, homosexuality, bisexuality, and transgenderism.

RESPONSE. The Commission notes that the proposed rule adheres to the parameters of HB 900.

COMMENT. The Commission was copied on an email from an individual to two SBOE members regarding specific books she wants removed from a specific library.

RESPONSE. As this comment is unrelated to the rule, no Commission response is necessary.

COMMENT. One individual commented that they are very against adult content or pornographic books in Texas libraries.

RESPONSE. The Commission agrees that books in public school libraries should be age-appropriate and focused on the needs of the students the library serves.

COMMENT. One individual commented that the statement "parents are the primary decision makers regarding their student's access to library material" should not be part of the collection development policy.

RESPONSE. The Commission notes that this statement is required in the standards as mandated by Education Code, §33.021(d)(2)(D). The Commission declines to make this change.

The commission received three comments after the comment period closed but notes the substance of these comments was very similar to other comments received during the comment period.

STATUTORY AUTHORITY. The new section is adopted under Education Code, §33.021, which requires the commission to adopt standards for school library collection development that a school district shall adhere to in developing or implementing the district's library collection development policies.

§4.2. School Library Programs: Collection Development Standards.

(a) Each Texas public school district board or governing body must approve and institute a collection development policy that describes the processes and standards by which a school library acquires, maintains, and withdraws materials.

(b) A school library collection should include materials that are age appropriate and suitable to the campus and students it serves and include a range of materials. A school library collection should:

(1) Enrich and support the Texas Essential Knowledge and Skills (TEKS) and curriculum established by Education Code, §28.002 (relating to Required Curriculum), while taking into consideration students' varied interests, maturity levels, abilities, and learning styles;

(2) Foster growth in factual knowledge, literary appreciation, aesthetic values, and societal standards;

(3) Encourage the enjoyment of reading, foster high-level thinking skills, support personal learning, and encourage discussion based on rational analysis; and

(4) Represent the ethnic, religious, and cultural groups of the state and their contribution to Texas, the nation, and the world.

(c) A school library collection development policy must:

(1) Describe the purpose and collection development goals;

(2) Designate the responsibility for collection development;

(3) Establish procedures for the evaluation, selection, acquisition, reconsideration, and deselection of materials;

(4) Consider the distinct age groups, grade levels, and possible access to materials by all students within a campus;

(5) Include a process to determine and administer student access to material rated by library material vendors as "sexually relevant" as defined by Education Code, §35.001 consistent with any policies adopted by the Texas Education Agency and local school board requirements;

(6) Include an access plan that, at a minimum, allows efficient parental access to the school district's library and online library catalog; and

(7) Comply with all applicable local, state, and federal laws and regulations. Specifically, a collection development policy must:

(A) Recognize that parents are the primary decision makers regarding their student's access to library material;

(B) Prohibit the possession, acquisition, and purchase of harmful material, as defined by Penal Code, §43.24, library material rated sexually explicit material by the selling library material vendor under Education Code, §35.002, or library material that is pervasively vulgar or educationally unsuitable as referenced in Pico v. Board of Education, 457 U.S. 853 (1982);

(C) Recognize that obscene content is not protected by the First Amendment to the United States Constitution;

(D) Be required for all library materials available for use or display, including material contained in school libraries, classroom libraries, and online catalogs;

(E) Ensure schools provide library catalog transparency, including, but not limited to:

(i) Online catalogs that are publicly available; and

(ii) Information about titles and how and where material can be accessed;

(F) Recommend schools communicate effectively with parents regarding collection development, including, but not limited to:

(i) Access to district/campus policies relating to school libraries;

(ii) Consistent access to library resources; and

(iii) Opportunities for students, parents, educators, and community members to provide feedback on library materials and services; and

(G) Prohibit the removal of material based solely on the ideas contained in the material or the personal background of the author of the material or characters in the material.

(d) Evaluation of materials as referenced in this section includes a consideration of the factors described in subsection (b) of this section, consideration of local priorities and school district standards, and at least two of the following:

(1) Consideration of recommendations from parents, guardians, and local community members;

(2) Consultation with the school district's educators and library staff and/or consultation with library staff of similarly situated school districts and their collections and collection development policies;

(3) An extensive review of the text of item;

(4) The context of a work, including consideration of the contextual characteristics, overall fit within existing school library collection, and potential support of the school curriculum; or

(5) Consideration of authoritative reviews of the items from sources such as professional journals in library science, recognized professional education or content journals with book reviews, national and state award recognition lists, library science field experts, and highly acclaimed author and literacy expert recommendations.

(e) A reconsideration process as referenced in this section should ensure that any parent or legal guardian of a student currently enrolled in the school district or employee of the school district may request the reconsideration of a specific item in their school district's library catalog. A reconsideration process should:

(1) Establish a uniform procedure an individual must follow when filing a request;

(2) Require a school district to include a form to request a reconsideration of an item on the school's public internet website if the school has a public internet website or ensure the form is publicly available at a school district administrative office;

(3) Require that the completed request for reconsideration form be distributed to the superintendent or superintendent designee, school librarian, and school district board of trustees or governing body at the time of submission;

(4) Include a reasonable timeframe, approved by the school board, for the review and final decision by a committee charged with the review of the item in its entirety. A district should convene a review committee in accordance with criteria established by the district to ensure a thorough and fair process. A reasonable timeframe should take into account:

(A) The time necessary to convene a committee to meet and review the item;

(B) Flexibility that may be necessary depending on the number of pending reconsideration requests; and

(C) Other factors relevant to a fair and consistent process, including informing the requester on the progress of the review in a timely fashion;

(5) Establish a uniform process approved by the school district board of trustees or governing body for the treatment of any library material undergoing reconsideration;

(6) Include a review and appeal process approved by the school district board of trustees or governing body; and

(7) Provide that if an item has gone through the reconsideration process and remains in the collection, a school district may not be required to reconsider an item within two calendar years of the final decision.

(f) School districts should ensure a professional librarian certified by the State Board for Educator Certification or other dedicated professional library staff trained on proper collection development standards is responsible for the selection and acquisition of library materials.

(g) A school district must develop collection assessment and evaluation procedures to periodically appraise the quality of library materials in the school library to ensure the library's goals, objectives, and information needs are serving its school community and should stipulate the means to weed or update the collection.

(h) A school district's collection development policy should be reviewed at least every three years and updated as necessary.

(i) School districts may add procedures to these minimum requirements to satisfy local needs so long as the added procedures do not conflict with these minimum requirements.

(j) School districts are responsible for ensuring their school libraries implement and adhere to these collection development standards.

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

Filed with the Office of the Secretary of State on December 14, 2023.

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Sarah Swanson
General Counsel
Texas State Library Archives Commission
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Proposal publication date: October 27, 2023
For further information, please call: (512) 463-5460

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

SUBCHAPTER K. LICENSING PROVISIONS RELATED TO MILITARY SERVICE MEMBERS, MILITARY VETERANS, AND MILITARY SPOUSES

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 60, Subchapter K, §§60.500-60.504, 60.510, 60.512, 60.514, 60.516, and 60.519; adopts a new rule at Subchapter K, §60.518; and adopts the repeal of an existing rule at Subchapter K, §60.518, regarding the Procedural Rules of the Commission and the Department, without changes to the proposed text as published in the September 29, 2023, issue of the *Texas Register* (48 TexReg 5609). These rules will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 60, Subchapter K, implement Texas Occupations Code, Chapter 51, General Provisions Related to Licensing; Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses; and the license portability provisions of the federal Servicemembers' Civil Relief Act found at 50 U.S.C. §4025a.

The adopted rules are necessary to implement Senate Bill (SB) 422, 88th Legislature, Regular Session (2023), and the federal Servicemembers' Civil Relief Act by: (1) updating current rule definitions and terms to comport with federal and state law; (2) extending the license portability of out-of-state occupational licenses for military service members stationed in Texas consistent with federal and state law; (3) extending residency status for non-resident license applicants to military service members; and (4) implementing a three-year recognition of out-of-state occupational licenses for military spouses whose status as a spouse changes due to a divorce or other occurrence. The adopted rules also repeal the issuance of a three-year temporary license "formerly available in conjunction with the recognition of an out-of-state license" for eligible military members, as it is redundant with other licensing options. The adopted rules also introduce new §60.518 to implement the provisions of SB 422 and the federal legislation. Current §60.518 is repealed by the adopted rules.

SECTION-BY-SECTION SUMMARY

The adopted rules amend §60.500, Military Subchapter, to include a reference to the license portability provisions of the federal Servicemembers' Civil Relief Act found at 50 U.S.C. §4025a.

The adopted rules amend §60.501, Definitions, by: (1) expanding the definition of "active duty" to include an added portion of the federal definition for "military service" from 50 U.S.C. §3911(2)(C) which requires any period during which a person is absent from duty on account of sickness, wounds, leave, or other lawful cause to be classified as active duty; and (2) shortening the length of defined terms used throughout the rules.

The adopted rules amend §60.502, Determining the Amount of Military Experience, Service, Training, or Education, to remove redundant or unnecessary language.

The adopted rules amend §60.503, Exemption from Late Renewal Fees, to remove redundant or unnecessary language.

The adopted rules amend §60.504, Extension of Certain Deadlines, to remove redundant or unnecessary language.

The adopted rules amend §60.510, License Requirements for Applicants with Military Experience, Service, Training, or Education, to remove redundant or unnecessary language.

The adopted rules amend §60.512, Expedited Alternative Licensing Requirements--Substantially Equivalent License, to remove redundant or unnecessary language.

The adopted rules amend §60.514, Expedited Alternative Licensing Requirements--Previously Held Texas License, to remove redundant or unnecessary language.

The adopted rules amend §60.516, Expedited Alternative Licensing Requirements--Demonstration of Competency by Alternative Methods, to remove redundant or unnecessary language.

The adopted rules add new §60.518, Recognition of Out-of-State License of Military Service Members and Military Spouses, which describes the out-of-state license recognition process related to a regulated business or occupation for eligible service members and their spouses. The new rule will: (1) implement pertinent provisions of the federal Servicemembers' Civil Relief Act alongside SB 422 to provide for recognition of out-of-state occupational licenses for service members and spouses; (2) describe the specific prerequisites and procedure by which the department will grant recognition to out-of-state occupational licenses to eligible persons; (3) repeal the department's issuance of a three-year temporary license to an eligible person whose out-of-state occupational has been recognized; (4) authorize a military spouse who is recognized to engage in a business or occupation in Texas under a current out-of-state license to continue to engage in that business or occupation for three years after formal department recognition, in the event of divorce or similar event that affects the spouse's status as a military spouse; (5) acknowledge the applicability of interstate licensure compacts to state law; and (6) remove redundant or unnecessary language. This rule replaces existing §60.518.

The adopted rules amend §60.519, License Eligibility-Establishing License Residency Requirement for Out-of-State Military Service Members and Military Spouses, to: (1) acknowledge the applicability of interstate licensure compacts to state law; and (2) remove redundant or unnecessary language.

The adopted rules repeal existing §60.518.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 29, 2023, issue of the *Texas Register* (48 TexReg 5609). The public comment period closed on October 30, 2023. The Department did not receive any comments from interested parties on the proposed rules.

COMMISSION ACTION

At its meeting on December 1, 2023, the Commission adopted the proposed rules as published in the *Texas Register.*

16 TAC §§60.500 - 60.504, 60.510, 60.512, 60.514, 60.516, 60.518, 60.519

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapters 51 and 55, which authorize the Commission, 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 55, and the Federal Servicemembers Civil Relief Act at 50 U.S.C. §4025a, and the program statutes for all of the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 (Motor Fuel Metering and Quality); 2311 (Electric Vehicle Charging Stations); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

The legislation that enacted the statutory authority under which the adopted rules are proposed to be adopted is Senate Bill 422, 88th Legislature, Regular Session (2023).

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

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

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Texas Department of Licensing and Regulation
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Proposal publication date: September 29, 2023
For further information, please call: (512) 475-4879

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16 TAC §60.518

STATUTORY AUTHORITY

The adopted repeals are adopted under Texas Occupations Code, Chapters 51 and 55, which authorize the Commission, 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 adopted repeals are those set forth in Texas Occupations Code, Chapters 51 and 55, and the Federal Servicemembers Civil Relief Act at 50 U.S.C. §4025a, and the program statutes for all of the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 (Motor Fuel Metering and Quality); 2311 (Electric Vehicle Charging Stations); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

The legislation that enacted the statutory authority under which the adopted repeals are proposed to be adopted is Senate Bill 422, 88th Legislature, Regular Session (2023).

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

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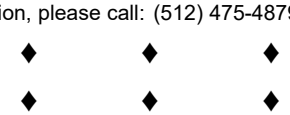

CHAPTER 76. WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

16 TAC §§76.22, 76.24, 76.25, 76.27, 76.70, 76.80

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 76, §§76.22, 76.24, 76.25, 76.27, 76.70, and 76.80, regarding the Water Well Drillers and Pump Installers program, without changes to the proposed text as published in the October 6, 2023, issue of the *Texas Register* (48 TexReg 5801). These rules will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 76, implement Texas Occupations Code, Chapter 1901, Water Well Drillers, and Chapter 1902, Water Well Pump Installers.

Implementation of HB 3744

The adopted rules implement House Bill 3744, 88th Legislature, Regular Session (2023). This legislation establishes that a license issued under Sections 1901.155 and 1902.155 of the Texas Occupations Code, relating to water well drillers and water well pump installers, is valid for one or two years, as determined by commission rule.

The adopted rules are necessary to establish a change in the length of the license terms for certain license holders. Beginning on January 1, 2024, the license terms for initial licenses for the driller, pump installer, and combination driller and pump installer license types change from one to two years.

Additionally, the adopted rules are necessary to establish that existing licenses renewed by the Department are valid for one year if renewed before March 1, 2024, or for two years if renewed on or after March 1, 2024. The adopted rules will allow for the change in the license terms to be phased in as the license holders renew their licenses. The continuing education requirements and the fees are also adjusted accordingly for holders of those licenses.

Changes to State Well Reports

Lastly, the adopted rules implement staff changes. The adopted rules establish that well drillers shall now deliver a copy of their well log to the Department electronically through the Texas Well Report Submission and Retrieval System (TWRSRS). The adopted rules are necessary to streamline the state well report process which will save well drillers and the state resources.

SECTION-BY-SECTION SUMMARY

The adopted rules amend §76.22. Applications for Licenses and Renewals. The adopted rules establish that, beginning on January 1, 2024, a license issued by the Department will no longer expire annually from the date issued. Instead, licenses issued by the Department are valid for two years from the date issued. Any license issued before January 1, 2024, will continue to be valid for one year.

The adopted rules amend §76.24. License Renewal. The adopted rules remove the requirement of paying an annual fee to the Department for license renewal and establishes that it must instead be paid on or before the expiration date of the license. Licensees must show proof of continuing education to renew. Licenses that are renewed before March 1, 2024, are valid for one year while those renewed on or after March 1, 2024, are valid for two years. This change ensures that revenue from licensees is received in odd-numbered and even-numbered years.

The adopted rules amend §76.25. Continuing Education. The adopted rules update the continuing education hour requirements for licensees to correspond with the changes in the license terms. For licensees who renew before March 1, 2024, four hours of continuing education are required to renew a license: one hour of instruction dedicated to Water Well Driller/Pump Installer statutes and rules and three hours of topics directly related to the water well industry. For licensees who renew on or after March 1, 2024, eight hours of continuing education are required to renew a license: one hour of instruction dedicated to Water Well Driller/Pump Installer statutes and rules and seven hours of topics directly related to the water well industry.

The adopted rules amend §76.27. Registration for Driller and/or Pump Installer Apprenticeship. The adopted rules rename the section "Registration for Driller and/or Pump Installer Apprenticeship; Renewal." The adopted rules establish that an apprentice registration issued by the Department is valid for one year and establish the renewal requirements for apprentices.

The adopted rules amend §76.70. Responsibilities of the Licensee--State Well Reports. The existing rules establish that every driller who drills, deepens, or alters a well shall maintain a State of Texas Well Report and provide a copy of the well log to: the Department; the Texas Commission on Environmental Quality; the owner of the well or the person for whom the well was drilled; and the groundwater conservation district in which the well is located, if any. The adopted rules establish that the driller shall deliver a copy of the well log to: the Department, electronically, through the Texas Well Report Submission and Retrieval System; the owner of the well or the person for whom the well was drilled; and the groundwater conservation district in which the well is located, if any. The adopted rules remove the requirement of delivering a copy of the well log to the Texas Commission on Environmental Quality.

The adopted rules amend §76.80. Fees. The adopted rules update the application and renewal fees for licensees. Beginning January 1, 2024, application fees are doubled to reflect the change from a one-year to a two-year license. Licenses that are renewed before March 1, 2024, will not see an increase in renewal fees, but for licenses that are renewed on or after March 1, 2024, the renewal fees are doubled to reflect the change from a one-year to a two-year license. This change ensures that revenue from licensees is received in odd-numbered and even-numbered years.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 6, 2023, issue of the *Texas Register* (48 TexReg 5801). The public comment period closed on November 6, 2023. The Department received comments from two interested parties on the proposed rules. The public comments are summarized below.

Comment: One comment from Rolling Plains GCD was in support of the effort to require electronic submission of state well reports.

Department Response: The Department appreciates the comment in support of the proposed rule.

Comment: One comment from an interested party was against the effort to require electronic submission of state well reports unless there is a method of selecting information that can be duplicated between documents.

Department Response: The Department disagrees with this comment - electronic submission, in the aggregate, will save time and redirect resources to areas such as water well quality assurance and abandoned and deteriorated wells mitigation to better protect the public's groundwater resources. The Department did not make any changes as a result of this comment.

ADVISORY COUNCIL RECOMMENDATIONS AND COMMISSION ACTION

The Water Well Drillers and Pump Installers Advisory Council met on September 21, 2023, to discuss the proposed rules. The Advisory Council voted and recommended that the proposed rules be published in the *Texas Register* for public comment with additional recommended changes to §76.25(c). The Advisory Council recommended to increase the number of continuing education hours for an apprentice registrant from one hour to four hours, with one hour dedicated to statutes and rules and three hours dedicated to topics directly related to the water well industry. The Department did not include the Advisory Council's recommendation regarding §76.25(c) in this adoption, but it will take it into consideration for a future rulemaking. At its meeting on December 1, 2023, the Commission adopted the proposed rules as published in the *Texas Register.*

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapters 51, 1901, and 1902 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51, 1901, and 1902. No other statutes, articles, or codes are affected by the adopted rules. The legislation that enacted the statutory authority under which the adopted rules are proposed to be adopted is House Bill 3744, 88th Legislature, Regular Session (2023).

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

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

TRD-202304684
Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
Effective date: January 1, 2024
Proposal publication date: October 6, 2023
For further information, please call: (512) 463-3306

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CHAPTER 91. DOG OR CAT BREEDERS PROGRAM

The Texas Commission of Licensing and Regulation (Commission) adopts 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; adopts new rules at §§91.61, 91.63 - 91.65; and adopts the repeal of existing rule §91.65, regarding the Licensed Breeder program, without changes to the proposed text as published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5347). These rules will not be republished.

The Commission also adopts amendments to existing rules at 16 TAC Chapter 91, §§91.53, 91.62 and 91.80, regarding the Licensed Breeder program, with changes to the proposed text as published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5347). These rules will be republished.

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 now 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 adopted rules also make minor changes to the responsibilities of license holders, as well as 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 who are 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. 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 adopted rules add a new authorization from the CFR allowing license holders 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 adopted 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 adopted 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.

SECTION-BY-SECTION SUMMARY

The adopted rules amend §91.10, Definitions, 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 adopted rules amend §91.20, Applicability, to update a citation to the Texas Racing Act.

The adopted 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 adopted rules amend §91.23, License Requirements, to update, clarify, and reorganize the section.

The adopted rules amend §91.24, License Renewal, to update and clarify language.

The adopted 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 adopted 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 has also been updated.

The adopted 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 adopted rules amend §91.51, Inspections-Prelicense Exemption, to make the rule language more concise.

The adopted 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 adopted 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. Minor grammatical edits to §91.53(b), changing "licensee" to "licensees," and §91.53(h), adding "a" to read "a Tier 2 out-of-cycle inspection," were approved at adoption.

The adopted rules amend §91.54, Corrective Actions Following Periodic or Out-of-Cycle Inspections, 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 adopted rules amend §91.55, Responsibilities of the Department--Directory, to clarify language.

The adopted rules amend §91.57, Responsibilities of the Department--Consumer Interest 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 adopted rules amend §91.58, Responsibilities of the Departmentâ--Donations, Disbursements and Reporting, to correct a term.

The adopted 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 adopted rules repeal §91.65, Advisory Committee, to move, update, and standardize advisory committee requirements in new §§91.61-91.65.

The adopted rules amend §91.66, Responsibilities of Inspectors--Inspections, Investigations, and Reports of Animal Cruelty, to update and correct language.

The adopted rules amend §91.73, Responsibilities of Licensee--Onsite Availability of Law and Rules, to clarify the wording of the requirement and to allow licensed breeders to maintain electronic copies of the Act and program rules.

The adopted rules amend §91.74, Responsibilities of Licensee--Mandatory Contract Provisions, to remove unnecessary language.

The adopted rules amend §91.76, Responsibilities of Licensee--Annual Inventory, to clarify language.

The adopted rules amend §91.77, Responsibilities of Licensee--Animal Records Content, Availability, and Retention Period, 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 adopted 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 adult intact female animals. Standard provisions relating to Department fees are also added and language is updated and corrected. On recommendation from staff, three instances of the word "adult" were added for internal consistency in the rules and were approved by the Advisory Committee when it recommended adoption of the rules.

The adopted rules amend §§91.90, 91.91, and 91.92, relating to penalties and enforcement, to update and clarify language.

The adopted rules amend §91.100, Standards of Care--Housing Generally, to move a provision from this section to §91.10, Definitions, and to renumber the section.

The adopted rules amend §91.101, Standards of Care--Indoor Housing Facilities, to correct a term.

The adopted rules amend §§91.102 and 91.103, relating to sheltered housing and outdoor housing, to clarify language.

The adopted rules amend §91.104, Standards of Care--Primary Enclosure, to clarify language and to renumber the provisions of the section.

The adopted rules amend §91.105, Standards of Care--Compatible Grouping, to clarify and renumber the provisions.

The adopted rules amend §91.107, Standards of Care--Feeding, to clarify that measures must be taken to ensure that self-feeders are free from molding, deterioration, or caking of feed.

The adopted rules amend §91.112, Standards of Care--Veterinary Care, to update a citation to the Veterinary Licensing Act and clarify language.

The adopted rules amend §91.202, Transportation Standards--Primary Enclosure Used to Transport Live Dogs and Cats, to clarify language.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5347). The public comment period closed on October 23, 2023. The Department received comments from 253 interested parties, including 21 organizations. The public comments are summarized below.

Many written comments from individuals indicated an affiliation with an organization but did not specify that the comment was made on behalf of, or as a representative of, the organization. More than one individual submitted comments stating that they represent an organization, so for some of the listed organizations comments were submitted by more than one individual. The Department does not verify whether a person is authorized to comment as a representative of an organization. The organizations for which comments were submitted are the following:

A. American Kennel Club;

B. Anderson County Humane Society;

C. Animal Connection of Texas, Inc.;

D. Animal Legal Defense Fund;

E. Aussie Rescue of North Texas;

F. Barrio Dogs, Inc.;

G. Best Friends Animal Society;

H. Find Your Riley Fund;

I. Houston PetSet;

J. Humane Tomorrow;

K. Kerrville Pets Alive!;

L. Lucky Two Times Animal Sanctuary and Advocacy Programs;

M. Metro Animals;

N. People Assisting Animal Control;

O. Responsible Pet Owners Alliance;

P. SPCA;

Q. SPCA of Dallas Texas;

R. SPCA of Texas;

S. TAP Newsletter;

T. Texas Animal Control Association; and

U. Texas Humane Legislation Network.

For conciseness in this response these organizations are identified by the letter preceding the name in the list above.

The Department must respond to comments on the proposed rules. 251 of the 253 interested parties who commented expressed support for the rules, but many also raised concerns for their implementation and effect. The Department believes it is appropriate to acknowledge these areas of concern and is doing so in its response. The Department is also initiating a new rulemaking to update the standards of care, as required by law, during which these concerns may be further addressed.

The public comments received did not include recommendations for specific changes to the rule text as proposed. The Department may not insert text changes at the time of rule adoption that depart in any significant way from the rules as proposed. Therefore, the following comment summaries and responses address the topics and issues raised without identifying word-for-word rule text changes that are not being made in this rulemaking but that might be made in the future.

Comment: 120 individuals and four organizations (P, Q, R, U) submitted the following comment. Some of the submissions included additional details about how the commenter contacted his or her legislators, and word choices varied somewhat from person to person, but the same main statements were made:

"I supported the passage of S.B. 876 during the regular legislative session as it fixed two major loopholes preventing the Texas Licensed Breeders Program from working as intended. AKC wants more loopholes for breeders to operate outside the law. Please ignore AKC's attempt to undermine the Legislature and the Program by muddying the waters on the exceptions passed by the Legislature. I fully support the legislation and the rules as proposed to make much-needed improvements to the Texas Licensed Breeder Program."

32 individuals and two organizations (B, U) submitted the following, similar comment with minor variations in wording:

"I advocated for my Representative and Senator to support and vote to pass S.B. 876 during the regular legislative session, as it fixed two major loopholes preventing the Texas Licensed Breeders Program from working as intended. I fully support the legislation and the rules as proposed to make much-needed improvements to the Texas Licensed Breeder Program. Please ignore other organizations' attempts to make additional changes and create needless loopholes within the rules and laws surrounding breeding dogs and cats in the State of Texas."

In addition to the multiple similar comments from 152 individuals and five organizations just described above:

Sixty-three additional individuals and 11 organizations (C, D, E, G, H, I, K, Q, R, T, U) expressed their support for S.B. 876 and the proposed rules. Four organizations (A, L, M, N) expressed support specifically for the proposed rules.

Fourteen additional individuals and eight organizations (C, D, G, H, K, N, T, U) expressed strong concern about not creating loopholes in the rules that would weaken them such that breeders could unfairly qualify for exemptions from licensing or otherwise evade complying with the law and rules. Another 24 individuals and 10 organizations (E, F, H, I, J, N, P, Q, R, U) commented specifically against the American Kennel Club (AKC) attempting to open loopholes in the rules that would reduce protections for dogs and urged the Department not to respond to this pressure.

Fifty-two individuals and 15 organizations (C, D, F, G, H, I, J, K, M, N, P, Q, R, T, U) expressed support for the rules but emphasized their desire that no further changes be made to the rules, stating concern that the rules might be made less stringent if modified. Eight individuals and one organization (S) commented that the rules should be more stringent than currently proposed.

Nine individuals commented that the standards in the rules are very important and must be maintained. Four individuals and two organizations (F, H) commented that the proposed rules will improve the Licensed Breeder program.

Department Response: The Department acknowledges and appreciates the expressions of support for the proposed rules. The Department agrees with the commenters that the rules should not be made less stringent. No changes have been made to the proposed rules in response to these comments.

Comment: Thirty-four individuals and five organizations (D, F, S, T, U) supporting the rules expressed negative feelings toward "unscrupulous" and "unaccountable" animal breeders for causing an animal overbreeding and overpopulation problem in Texas. Thirteen individuals and two organizations (D, H) expressed concern over an increasing number of those animals needing rescue or rehabilitation or being euthanized in Texas.

Seventeen individuals and three organizations (D, H, J) specifically expressed concern about maltreatment, cruelty, substandard care, abuse, or poor living conditions of animals possessed by breeders or so-called "puppy mills."

Sixteen individuals and three organizations (C, H, I) made comments stating that breeders are greedy and make money off of the suffering and poor care given to the animals they possess without regard for the animals' health, well-being, or life.

Department Response: The Department appreciates the commenters' support for the proposed rules and acknowledges the seriousness of their concerns. The Department agrees with the comments pointing out various problems related to the care of animals in Texas and will be working with the public, stakeholders, and the Licensed Breeder Advisory Committee to identify and implement rule or procedure changes, where possible, that will help to address these problems. While the Act imposes minimum standards for the care and treatment of the animals in a licensed breeder's possession, it does not require licensed breeders to ensure that every animal receives a home and does not specify how excess animals must be handled. Legislative action would be required to update the Act to include such subject matter. The Department has made no changes to the proposed rules in response to these comments.

Comment: The American Kennel Club commented that the Department must clarify how the changes to the law and rules regarding applicability and exemptions will be applied to those who own but are not actively breeding five or more intact female dogs. The commenter also asked the Department to explain how the exemption for breed and conformation shows will apply to dogs that are more than six months old but are not yet being shown despite having been bred to be shown.

Department Response: This comment relates to the interpretation of both existing and new provisions in the law and rules. In accordance with §91.21 of the rules, "[E]ach adult intact female animal possessed by a person engaged in the business of breeding animals for direct or indirect sale or for exchange in return for consideration is presumed to be used for breeding purposes unless the person establishes to the satisfaction of the department,

based on the person's breeding records or other evidence reasonably acceptable to the department, that the animal is not used for breeding." Section 91.30 states that "a dog bred with the intent that it be used primarily for competing in field trials, hunting tests, breed or conformation shows, or similar organized performance events" may not be counted for purposes of determining the number of adult intact female animals possessed by a person. Possession of an animal is defined as "To have custody of or control over."

The issue of ownership of an animal is irrelevant to determining if the animal is possessed by a breeder. A breeder in possession of adult intact female animals who is in the business of breeding them must demonstrate for each animal that it qualifies for one of the exemptions in the law or that it is not being used for breeding. Otherwise, it must be counted among the animals possessed by that breeder that may subject the breeder to the licensing requirement. An adult intact female dog for which the breeder can demonstrate that it was bred with the intent that it be used primarily for breed or conformation shows or similar organized performance events need not be counted among the animals that may subject the breeder to the licensing requirement. The Department agrees that it is obligated to enforce the law and rules as written, but it is not obligated to prove that exemptions or exceptions apply. No changes to the proposed rules have been made in response to these comments.

Comment: Included in the comments on the proposed rules were a number of concerns regarding issues and subjects that are not within the scope of the proposed rules:

- Three individuals commented that breeders are selling animals for cash, thus avoiding paying state sales tax on potentially hundreds of thousands of dollars per year per breeder.

- Four individuals and two organizations (D, H) commented that the costs associated with breeders' excess animals are being borne by taxpayers, local jurisdictions, and animal welfare organizations and that these costs should be assigned to breeders.

- All breeders of any number of dogs should be required to be licensed and adhere to required ethical breeding standards (S).

- Small-scale service-dog breeders should be exempt from the rules or less stringent rules should be adopted for them or they will be put out of business (O).

- The Licensed Breeder Act applies to both dogs and cats so rules should be adopted to exempt cats bred for breed or conformation shows (O).

- The USDA is failing to enforce and regulate properly under the Animal Welfare Act (AWA) because it is stretched too thin and the AWA standards are too low (D).

Department Response: The Department agrees that the comments raise issues of concern, but it is not currently empowered by the law to address them. The Act does not authorize the Department to regulate outside of the parameters of the Act. At present, the Act does not impose any restrictions regarding cash sales of animals; however, other laws may apply. No requirements are in place for disposition of excess animals by a licensed breeder. Likewise, no mechanism exists in the Act that would enable local jurisdictions or other entities to recoup their costs related to excess animals produced by breeders, so the Department may not create rules to do so.

The number of adult intact female dogs that a breeder possesses that may subject the breeder to the licensing requirement is five or more; therefore, the Department is not authorized to require breeders who possess fewer than five non-exempt dogs to be licensed. Only breeders that are subject to the licensing requirement are required to comply with the Department standards for licensed breeders. The exemptions in the Act do not apply to breeders of service dogs even if they are nonprofit or charitable organizations unless the dogs also qualify for one of the existing exemptions. The Department is not authorized to create exemptions that are not included in the Act. Likewise, the Department may not open the §91.30 exemptions currently available only for breeders of dogs to breeders of cats without such a provision in the Act.

Finally, the Department is required by the Act to adopt into Department rules and enforce the Specifications for the Humane Handling, Care, Treatment, and Transportation of Dogs and Cats, which are minimum federal standards of the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture. The Department rules in §91.23 may waive certain licensing requirements for Texas breeders who hold a Class A or Class B federal animal dealers' license issued under the Animal Welfare Act, but these breeders are obligated to comply with Department rules for standards of care like any other Texas-licensed breeder. A breeder who is subject to both the federal and state license requirements may not violate Department rules regardless of whether that breeder is in compliance with the requirements to hold the federal license. The Department does not have jurisdiction to enforce the federal regulations against a Texas breeder who holds a federal license but may enforce the state rules if that breeder holds or is required to hold a Texas breeder license. The Department has no jurisdiction or control over the operations of the federal APHIS. No changes to the proposed rules have been made in response to these comments.

ADVISORY COMMITTEE RECOMMENDATIONS AND COMMISSION ACTION

The Licensed Breeder Advisory Committee met on November 1, 2023, to discuss the proposed rules and the public comments received. The Advisory Committee recommended that the Commission adopt the proposed rules as published in the *Texas Register* with changes to §91.80 made in response to a staff recommendation. The word "adult" was inserted in three provisions for internal consistency in the rules. At its meeting on December 1, 2023, the Commission adopted the proposed rules as recommended by the Advisory Committee with minor grammatical edits to §91.53(b), changing "licensee" to "licensees," and §91.53(h), adding "a" to read "a Tier 2 out- of-cycle inspection."

16 TAC §§91.10, 91.20 - 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, 91.90 - 91.92, 91.100 - 91.105, 91.107, 91.112, 91.202

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 802. No other statutes, articles, or codes are affected by the adopted rules. The legislation that enacted the statutory authority under

which the adopted rules are proposed to be adopted is Senate Bill 876, 88th Legislature, Regular Session (2023).

§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 licensees 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 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 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 also indicate recommended 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 a 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.

§91.62. 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 subsection (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).

§91.80. Fees.

(a) Application Fees

(1) Dog or Cat Breeder License, 5-10 Adult Intact Female Animals

(A) Original Application--$150

(B) Renewal--$150

(2) Dog or Cat Breeder License, 11-25 Adult Intact Female Animals

(A) Original Application--$300

(B) Renewal--$300

(3) Dog or Cat Breeder License, 26 or more Adult Intact Female Animals

(A) Original Application--$500

(B) Renewal--$500

(b) Out-of-Cycle Inspections--$150

(c) Revised/Duplicate License--$25

(d) Late renewal fees for licenses under this chapter are provided under §60.83.

(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) All fees paid to the department are nonrefundable.

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

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

TRD-202304679
Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
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Proposal publication date: September 22, 2023
For further information, please call: (512) 463-3306

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16 TAC §91.65

STATUTORY AUTHORITY

The repealed rules are repealed 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 repealed rules are those set forth in Texas Occupations Code, Chapters 51 and 802. No other statutes, articles, or codes are affected by the repealed rules. The legislation that enacted the statutory authority under which the repealed rules are proposed to be adopted is Senate Bill 876, 88th Legislature, Regular Session (2023).

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

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

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Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
Effective date: January 1, 2024
Proposal publication date: September 22, 2023
For further information, please call: (512) 463-3306

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CHAPTER 111. SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

The Texas Commission of Licensing and Regulation (Commission) adopts 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 adopts a new rule at Subchapter A, §111.3, regarding the Speech-Language Pathologists and Audiologists program, without changes to the proposed text as published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5369). These rules will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 111 implement 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 Texas Department of Licensing and Regulation (Department).

The adopted rules implement changes made to Texas Occupations Code, Chapter 401 by Senate Bill (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 adopted 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", SB 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 adopted 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 adopted 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 adopted 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.

SECTION-BY-SECTION SUMMARY

Subchapter A. General Provisions.

The adopted rules amend §111.2, Definitions. The adopted rules amend definitions for "fitting and dispensing hearing instruments," "hearing instrument," and "sale" (previously "sale or purchase"); 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 adopted 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 adopted rules amend §111.201, General Practice Requirements of Audiologists and Interns in Audiology Who Fit and Dispense Hearing Instruments.

The adopted 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 adopted rules references new federal rule 21 CFR §801.422, which addresses prescription hearing aids. The adopted rules reflect the changes made by the FDA Hearing Aid Rule.

The adopted rules amend §111.201(2) to change "insure" to "ensure."

The adopted 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 adopted rules now read 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 adopted 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 adopted rules amend §111.220. Requirements Regarding the Sale of Hearing Instruments.

The adopted rules amend §111.220(b) and §111.220(b)(1) to clarify that the 30-day trial period referenced relates to a hearing instrument.

The adopted 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) was amended, this paragraph was also removed. The remaining paragraphs in this subsection are renumbered.

The adopted 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 the 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.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5369). The public comment period closed on October 23, 2023. The Department received comments from three interested parties on the proposed rules. The public comments are summarized below.

Comment: An individual submitted a comment concurring with the proposed rules and stating that the proposed changes to the medical waiver requirements are timely and necessary based on the FDA changes in the over-the-counter market. The individual expressed appreciation for ensuring that the state licensure requirements are contemporary and consistent with the federal requirements.

Department Response: The Department appreciates the comment in support of the proposed rules. The Department did not make any changes to the proposed rules in response to this comment.

Comment: The Texas Medical Association (TMA) submitted a combined comment letter on the Speech-Language Pathologists and Audiologists (SPA) proposed rules under 16 TAC Chapter 111 and the Hearing Instrument Fitters and Dispensers (HFD) proposed rules under 16 TAC Chapter 112.

TMA stated that the FDA federal rules for hearing instruments no longer require certain medical evaluations and waivers, and that the Department's proposed rules remove the corresponding medical evaluation requirements in SPA rule §111.201 for an adult prospective hearing aid user. TMA offered the following comments in its letter: "TMA has concerns that removing these requirements will leave adult patients [uninformed] about when it is recommended to undergo medical evaluation for hearing loss. The hearing aid labeling requirements in the new federal rules contain a list of "Red Flag" conditions for which a hearing aid dispenser should refer a prospective hearing aid user to a physician." In summary, TMA commented: "Though the federal rule underlying [the medical evaluation] requirement has been removed, to promote patient safety, TMA recommends that TDLR's adopted rules should still contain the new federal "Red Flag" guidelines for when a patient should be medically evaluated."

TMA recommended that the Department amend SPA rule §111.201 to include new suggested language that tracks the "Red Flag" labeling requirements in new FDA rule §801.422. TMA also recommended making the corresponding change to HFD rule §112.96, either by adding the same new suggested language or by adding a cross-reference to SPA rule §111.201.

Department Response: The Department reviewed the comment, but disagrees with the comment. The Department did not make any changes to the proposed rules in response to this comment for the following reasons.

First, the proposed rules align with the federal FDA rule changes. While the HFD rules did not include the same separate medical evaluation and waiver provisions as the SPA rules, both sets of rules previously required compliance with the former FDA rules 21 CFR §801.420 and §801.421. Former FDA rule §801.420 included the "red flag" conditions, and former FDA rule §801.421 included the medical evaluation and waiver provisions. These two FDA rules were repealed as part of the FDA Hearing Aid Rule, and new FDA rule §801.422 Prescription Hearing Aid Labeling, was adopted. The HFD and SPA proposed rules align with these FDA rule changes.

Second, the Department cannot add new substantive requirements to the rules at this stage of the rulemaking process, since the public has not had notice and opportunity to comment on those substantive changes. If the Department agreed that substantive changes needed to be made, the Department would either have to withdraw the proposed rules, republish them with the new provisions, and start the public comment period over, or the Department would have to add the substantive changes in the future in a separate future rulemaking.

Finally, the suggested changes are unnecessary. The comment suggested adding the requirements regarding the "red flag" conditions from FDA rule 21 CFR §801.422, Prescription Hearing Aid Labeling, into SPA rule §111.201 and HFD rule §112.96. The proposed changes to SPA rule §111.201 and HFD rule §112.96, however, already require compliance with new FDA rule §801.422, which includes the requirements regarding the "red flag" conditions along with other requirements. It is not necessary to have a separate provision in the SPA rules or the HFD rules specifically addressing the "red flag" conditions.

Comment: The Texas Academy of Audiology (TAA) submitted a comment letter in support of the proposed rules. TAA offered the following comments in its letter: (1) TAA stated that the proposed rules bring the rules under 16 TAC Chapter 111 in alignment with the FDA final rule regarding over-the-counter (OTC) hearing aids. (2) TAA appreciates and agrees with the updated definitions that align with the new classifications for OTC hearing aids and prescription hearing aids, along with the other rule changes that follow the definition changes. (3) TAA appreciates the timeliness of the proposed rules and that the proposed rules provide necessary clarifications for practicing audiologists related to OTC hearing aids. (4) TAA agrees with the changes related to the medical waiver requirement as it relates to persons 18 years and older. TAA stated that the medical waiver requirement brought little public health benefit and served as a barrier to hearing healthcare accessibility. The proposed rules align with the FDA's repeal of the requirement in the FDA final rule on OTC hearing aids. (5) TAA agrees with retaining the medical evaluation requirement including a written statement from a physician for persons under age 18. (6) TAA appreciates the clarification to maintain the medical evaluation and the medical evaluation waiver on file if provided.

Department Response: The Department appreciates the comment in support of the proposed rules. The Department did not make any changes to the proposed rules in response to this comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Speech-Language Pathologists and Audiologists Advisory Board met on October 31, 2023, to discuss the proposed rules and the public comments received. The Advisory Board recommended that the Commission adopt the proposed rules as published in the *Texas Register.* At its meeting on December 1, 2023, the Commission adopted the proposed rules as recommended by the Advisory Board and the Department.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §111.2, §111.3

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 401, and 402 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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

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Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
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Proposal publication date: September 22, 2023
For further information, please call: (512) 463-3306

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SUBCHAPTER U. FITTING AND DISPENSING OF HEARING INSTRUMENTS

16 TAC §111.201

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 401, and 402 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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For further information, please call: (512) 463-3306

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SUBCHAPTER W. JOINT RULE REGARDING THE SALE OF HEARING INSTRUMENTS

16 TAC §111.220

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 401, and 402 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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CHAPTER 112. HEARING INSTRUMENT FITTERS AND DISPENSERS

The Texas Commission of Licensing and Regulation (Commission) adopts 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 adopts a new rule at Subchapter A, §112.3, regarding the Hearing Instrument Fitters and Dispensers program, without changes to the proposed text as published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5375). These rules will not be republished.

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 Texas Department of Licensing and Regulation (Department).

The adopted rules implement changes made to Texas Occupations Code, Chapter 402 by Senate Bill (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 adopted 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," SB 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 adopted 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 adopted 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 adopted 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 adopted 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 adopted 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.

SECTION-BY-SECTION SUMMARY

Subchapter A. General Provisions.

The adopted rules amend §111.2, Definitions. The adopted rules amend definitions for "fitting and dispensing hearing instruments," "hearing instrument," and "sale" (previously "sale or sell"); 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 including 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 subsection (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 subsection (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 subsection (a).

Subchapter H. Continuing Education Requirements.

The adopted rules amend §112.70. Continuing Education--Hours and Courses. The adopted 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 adopted rules amend §112.92, Consumer Information and Client Records. The adopted rules 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 adopted 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 adopted rule references new federal rule 21 CFR §801.422, which addresses prescription hearing aids. The adopted rules reflect the changes made by the FDA Hearing Aid Rule.

Subchapter O. Joint Rule Regarding the Sale of Hearing Instruments.

The adopted rules amend §112.140. Requirements Regarding the Sale of Hearing Instruments.

The adopted 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 adopted 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 adopted 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.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 22, 2023, issue of the *Texas Register* (48 TexReg 5375). The public comment period closed on October 23, 2023. The Department received comments from two interested parties on the proposed rules. The public comments are summarized below.

Comment: An individual submitted a comment on proposed new rule §112.3, subsections (a) and (b), regarding Over-the-Counter Hearing Aids. The commenter stated that the proposed rules only apply to people living in Texas, but there are companies and individuals who sell all types of hearing aids to Texas consumers by the internet and by mail. The commenter expressed concerns that out-of-state providers are not required to be licensed in Texas. The commenter asked why people who live in Texas are required to be licensed if they want to sell all types of hearing aids to Texas consumers and asked if a Texas license was optional and not mandatory.

Department Response: The Department reviewed but disagrees with the comment. The Department did not make any changes to the proposed rules in response to this comment for the following reasons.

New rule §112.3, Over-the-Counter Hearing Aids, closely mirrors the provision in Occupations Code, Chapter 402, §402.004, Over-The-Counter Hearing Aids, which was added by SB 2017. The new statute and rules align with FDA rule 21 CFR §800.30, Over-the-counter hearing aid controls, and the federal law, FDA Reauthorization Act of 2017 (H.R. 2430, Public Law 115-52) (Section 709 of the Act, Regulation of Over-the-Counter Hearing Aids).

The proposed rules implement SB 2017 and the federal changes related to over-the-counter hearing aids. As provided by the federal law, the FDA rules, and Occupations Code, Chapter 402, as amended by SB 2017, a person does not need a license under Chapter 402 or 401 to sell or dispense over-the-counter hearing aids.

The proposed rules, however, do not make any changes to the licensing requirements under the Texas statutes or rules related to hearing instruments (prescription hearing aids). A person is still required to be licensed in Texas to fit and dispense hearing instruments (prescription hearing aids) to persons in Texas.

Comment: The Texas Medical Association (TMA) submitted a combined comment letter on the Speech-Language Pathologists and Audiologists (SPA) proposed rules under 16 TAC Chapter 111 and the Hearing Instrument Fitters and Dispensers (HFD) proposed rules under 16 TAC Chapter 112.

TMA stated that the FDA federal rules for hearing instruments no longer require certain medical evaluations and waivers, and that the Department's proposed rules remove the correspond-

ing medical evaluation requirements in SPA rule §111.201 for an adult prospective hearing aid user. TMA offered the following comments in its letter: "TMA has concerns that removing these requirements will leave adult patients [uninformed] about when it is recommended to undergo medical evaluation for hearing loss. The hearing aid labeling requirements in the new federal rules contain a list of "Red Flag" conditions for which a hearing aid dispenser should refer a prospective hearing aid user to a physician." In summary, TMA commented: "Though the federal rule underlying [the medical evaluation] requirement has been removed, to promote patient safety, TMA recommends that TDLR's adopted rules should still contain the new federal "Red Flag" guidelines for when a patient should be medically evaluated."

TMA recommended that the Department amend SPA rule §111.201 to include new suggested language that tracks the "Red Flag" labeling requirements in new FDA rule §801.422. TMA also recommended making the corresponding change to HFD rule §112.96, either by adding the same new suggested language or by adding a cross-reference to SPA rule §111.201.

Department Response: The Department reviewed the comment, but disagrees with the comment. The Department did not make any changes to the proposed rules in response to this comment for the following reasons.

First, the proposed rules align with the federal FDA rule changes. While the HFD rules did not include the same separate medical evaluation and waiver provisions as the SPA rules, both sets of rules previously required compliance with the former FDA rules 21 CFR §801.420 and §801.421. Former FDA rule §801.420 included the "red flag" conditions, and former FDA rule §801.421 included the medical evaluation and waiver provisions. These two FDA rules were repealed as part of the FDA Hearing Aid Rule, and new FDA rule §801.422 Prescription Hearing Aid Labeling, was adopted. The HFD and SPA proposed rules align with these FDA rule changes.

Second, the Department cannot add new substantive requirements to the rules at this stage of the rulemaking process, since the public has not had notice and opportunity to comment on those substantive changes. If the Department agreed that substantive changes needed to be made, the Department would either have to withdraw the proposed rules, republish them with the new provisions, and start the public comment period over, or the Department would have to add the substantive changes in the future in a separate future rulemaking.

Finally, the suggested changes are unnecessary. The comment suggested adding the requirements regarding the "red flag" conditions from FDA rule 21 CFR §801.422, Prescription Hearing Aid Labeling, into SPA rule §111.201 and HFD rule §112.96. The proposed changes to SPA rule §111.201 and HFD rule §112.96, however, already require compliance with new FDA rule §801.422, which includes the requirements regarding the "red flag" conditions along with other requirements. It is not necessary to have a separate provision in the SPA rules or the HFD rules specifically addressing the "red flag" conditions.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Hearing Instrument Fitters and Dispensers Advisory Board met on October 31, 2023, to discuss the proposed rules and the public comments received. The Advisory Board recommended that the Commission adopt the proposed rules as published in the *Texas Register.* At its meeting on December 1, 2023, the Commission adopted the proposed rules as recommended by the Advisory Board and the Department.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §112.2, §112.3

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 402, and 401 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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Doug Jennings
General Counsel
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For further information, please call: (512) 463-3306

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SUBCHAPTER H. CONTINUING EDUCATION REQUIREMENTS

16 TAC §112.70

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 402, and 401 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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Doug Jennings
General Counsel
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SUBCHAPTER J. RESPONSIBILITIES OF THE LICENSEE

16 TAC §112.92, §112.96

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 402, and 401 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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SUBCHAPTER O. JOINT RULE REGARDING THE SALE OF HEARING INSTRUMENTS

16 TAC §112.140

STATUTORY AUTHORITY

The adopted rules are adopted 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 adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 402, and 401 as applicable. No other statutes, articles, or codes are affected by the adopted rules.

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

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Doug Jennings
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-3306

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO OPERATIONS DIVISION

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §§402.200 (General Restrictions on the Conduct of Bingo), 402.203 (Unit Accounting) 402.400 (General Licensing Provisions), 402.401 (Temporary License), 402.404 (License Classes and Fees), 402.405 (Temporary Authorization), 402.413 (Military Service Members, Military Veterans, and Military Spouses), 402.420 (Qualifications and Requirements for Conductor's License), 402.451 (Operating Capital), 402.452 (Net Proceeds), 402.503 (Bingo Gift Certificates), 402.600 (Bingo Reports and Payments), 402.706 (Schedule of Sanctions), and 402.707 (Expedited Administrative Penalty Guideline) without changes to the proposed text as published in the October 27, 2023, issue of the *Texas Register* (48 TexReg 6301). The rules will not be republished. The purpose of the amendments is to implement statutory changes required by House Bill 639 (HB 639), Senate Bill 422 (SB 422), and Senate Bill 643 (SB 643) from the Regular Session of the 88th Texas Legislature.

The amendments implementing HB 639 increase the maximum yearly number of temporary bingo licenses that a non-regular authorized organization may receive from 6 to 12.

The amendments implementing SB 422 allow military members to engage in bingo without a license or worker registration for up to three years while they are stationed at a military base in Texas, provided they are similarly licensed or registered and in good standing in another state.

The amendments implementing SB 643 amend the definition of "regular license" to mean a 2-year license to conduct bingo that is not a temporary license; require the Texas Lottery Commission (Commission) to issue to regular licensees 48 temporary licenses (up from 24) for each 12-month period ending on the anniversary of their licensing date; increase the maximum prize value that can be awarded during an occasion from $2,500 to $5,000 and eliminate the $750 prize limit for a single game; allow bingo accounting units three days to deposit bingo funds into their bank account; provide that all of the members of a unit may not be penalized for a violation that is wholly attributable to a specific member or members of the unit; change the required net proceeds period from 12 months to 24 months; and specify that prize fees retained or held in escrow by the authorized organization for remittance to the Commission, a county, or a municipality are not included in the calculation of the organization's operating capital.

On November 13, 2023, the Commission held a public hearing to receive comments on this proposal. No one appeared at the hearing and the Commission did not receive any written comments on the proposed amendments during the public comment period.

SUBCHAPTER B. CONDUCT OF BINGO

16 TAC §402.200, §402.203

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction; and SB 422 and SB 643, which require the Commission to adopt the rules necessary to implement the changes in the law by December 1st, 2023, and January 1st, 2024, respectively.

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

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Bob Biard
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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §§402.400, 402.401, 402.404, 402.405, 402.413, 402.420, 402.451, 402.452

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction; and SB 422 and SB 643, which require the Commission to adopt the rules necessary to implement the changes in the law by December 1st, 2023, and January 1st, 2024, respectively.

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SUBCHAPTER E. BOOKS AND RECORDS

16 TAC §402.503

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction; and SB 422 and SB 643, which require the Commission to adopt the rules necessary to implement the changes in the law by December 1st, 2023, and January 1st, 2024, respectively.

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SUBCHAPTER F. PAYMENT OF TAXES, PRIZE FEES AND BONDS

16 TAC §402.600

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction; and SB 422 and SB 643, which require the Commission to adopt the rules necessary to implement the changes in the law by December 1st, 2023, and January 1st, 2024, respectively.

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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

16 TAC §402.706, §402.707

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction; and SB 422 and SB 643, which require the Commission to adopt the rules necessary to implement the changes in the law by December 1st, 2023, and January 1st, 2024, respectively.

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

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

SUBCHAPTER HH. STANDARDS FOR REASONABLE COST CONTROL AND UTILIZATION REVIEW FOR CHEMICAL DEPENDENCY TREATMENT CENTERS

The commissioner of the Texas Department of Insurance (TDI) adopts the repeal of 28 TAC §§3.8001 - 3.8005 and §§3.8007 - 3.8030, and adopts new 28 TAC §3.8001, concerning chemical dependency treatment standards. The new section is adopted with changes to the proposed text published in the July 14, 2023, issue of the *Texas Register* (48 TexReg 3829). The rule will be republished. Section 3.8001 was revised in response to public comment and to reference up-to-date criteria.

REASONED JUSTIFICATION. The repeals of 28 TAC §§3.8001 - 3.8030 are necessary to remove existing dated and obsolete standards. New §3.8001 requires group health benefit plan issuers subject to Insurance Code Chapter 1368 to use the applicable treatment criteria published in the 27th edition of the MCG Care Guidelines (formerly Milliman Care Guidelines), the 3rd edition of the American Society of Addiction Medicine (ASAM) Criteria, or the 4th edition, Volume I, Adults, of the ASAM Criteria for any utilization review of treatment required under Insurance Code Chapter 1368. Both the 3rd edition ASAM Criteria and the 4th edition, Volume 1, are in effect and are collectively referred to as the ASAM Criteria. This provides group health benefit plans flexibility to select the treatment standards that work best for their utilization review systems. Following the MCG Care Guidelines and the ASAM Criteria will ensure that group health benefit plan issuers cover an appropriate continuum of care for treatment of substance use disorders and support the health, safety, and welfare of Texas insureds.

New §3.8001 identifies the treatment standards that must be used for coverage of chemical dependency treatment. Subsection (a) explains that the purpose of the rule is to implement Insurance Code §1368.007. Subsection (b) clarifies that the section applies to a group health benefit plan that is subject to Insurance Code Chapter 1368. Subsection (c) specifies the treatment standards adopted by the section. Subsection (d) requires that group health benefit plans use either the MCG Care Guidelines or the ASAM Criteria for any treatment required to be covered under Insurance Code Chapter 1368.

In response to a comment, subsection (c) of new §3.8001 is adopted with changes to the text as proposed. Subsection (c) is modified to add a reference the 4th edition, Volume I, Adults, of the ASAM Criteria, which was released in October 2023, in addition to the 3rd edition of the ASAM Criteria referenced in the proposal.

These changes will not result in the rule affecting people who were not on notice by the proposal, nor do they materially alter the issues addressed in the proposal. The proposal notified insurers, other third-party reimbursement sources, and chemical dependency treatment centers that the new section was intended to reference current and valid criteria, and that TDI intends to update the referenced criteria in the section as needed. TDI has reviewed the updates to the ASAM Criteria 4th edition, Volume I, Adults, and determined that they will not significantly change how insurers, other third-party reimbursement sources, and chemical dependency treatment centers use it for Insurance Code §1368.007. The 3rd edition of the ASAM Criteria remains valid and is still needed until other volumes of the 4th edition are released.

Additionally, the new rule will not become effective until 180 days after adoption, to provide adequate time for group health benefit plans to transition to the new standards. TDI provided notice of its intent to delay the effective date of this rule in the rule proposal.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received comments from one commenter, Texas Association of Health Plans (TAHP), which also had a representative speak on its behalf at a public hearing on the proposal held on August 8, 2023. TAHP supports the proposal with changes.

General comments

Comment. A commenter states that it supports the proposed rule.

Agency Response. TDI appreciates the support.

Comment. A commenter recommends that TDI remove reference to specific editions of the standards to avoid the regulatory burden of having to adjust this rule regularly. The commenter notes that the 4th edition of the ASAM Criteria will soon replace the 3rd edition that was proposed.

Agency Response. TDI appreciates the comment and has modified subsection (c) of §3.8001 as proposed to adopt the 4th edition, Volume I, Adults, of the ASAM Criteria, as released in October 2023, in addition to the 3rd edition, which remains part of the ASAM Criteria. However, TDI declines to remove reference to specific editions of the standards, as this provides the public

with clear notice of the specific editions providing the standards that are applicable.

Commenter for the proposal with changes

Comment. A commenter suggests that TDI include an additional treatment standard, specifically InterQual Criteria. The commenter asserts that along with MCG Care Guidelines, InterQual is one of the two more commonly used criteria for chemical dependency.

Agency Response. TDI declines to adopt the InterQual Criteria. TDI recognizes that patients, plans, and providers need to have the flexibility to use and access the most current and patient-specific treatment standards available, but TDI has determined that the MCG Care Guidelines and the ASAM Criteria sufficiently meet this need and address the treatment standard requirements under Insurance Code §1368.007. These guidelines and criteria are widely used by most health benefit plans and will ensure that group health benefit plan issuers cover an appropriate continuum of care for the treatment of substance use disorders.

28 TAC §§3.8001 - 3.8005, 3.8007 - 3.8030

STATUTORY AUTHORITY. The commissioner adopts the repeal of §§3.8001 - 3.8030 under Insurance Code §§1355.258, 1368.007, 4201.003, and 36.001.

Insurance Code §1355.258 requires the commissioner to adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §1368.007 requires that TDI adopt by rule chemical dependency treatment standards for use by insurers, other third-party reimbursement sources, and chemical dependency treatment centers. These standards must provide for (1) reasonable control of costs necessary for inpatient and outpatient treatment of chemical dependency, including guidelines for treatment periods; and (2) appropriate utilization review of treatment, as well as necessary extensions of treatment.

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

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

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

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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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28 TAC §3.8001

STATUTORY AUTHORITY. The commissioner adopts new §3.8001 under Insurance Code §§1355.258, 1368.007, 4201.003, and 36.001.

Insurance Code §1355.258 requires the commissioner to adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §1368.007 requires that TDI adopt by rule chemical dependency treatment standards for use by insurers, other third-party reimbursement sources, and chemical dependency treatment centers. These standards must provide for (1) reasonable control of costs necessary for inpatient and outpatient treatment of chemical dependency, including guidelines for treatment periods; and (2) appropriate utilization review of treatment, as well as necessary extensions of treatment.

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

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

§3.8001. Chemical Dependency Treatment Standards.

(a) Purpose. This section implements Insurance Code §1368.007, concerning Treatment Standards.

(b) Applicability. This section applies to a group health benefit plan that is subject to Insurance Code Chapter 1368, concerning Availability of Chemical Dependency Coverage.

(c) Treatment standards. For the purpose of this section, the department adopts the treatment standards in the 27th edition of the MCG Care Guidelines; the 3rd edition of the American Society of Addiction Medicine (ASAM) Criteria; and the 4th edition Volume I, Adults, of the ASAM Criteria.

(d) Coverage required. For any treatment for which coverage is required under Insurance Code Chapter 1368, a group health benefit plan must use the MCG Care Guidelines or ASAM Criteria, as applicable to the treatment and care provided.

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

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CHAPTER 21. TRADE PRACTICES

The commissioner of insurance adopts amendments to 28 TAC §§21.4902, 21.5002, 21.5003, and 21.5040, concerning the independent dispute resolution (IDR) process, and adopts new §§21.5060, 21.5070, and 21.5071, concerning submission requirements for certain entities. The commissioner adopts §§21.4902, 21.5002, and 21.5003 without changes to the proposed text published in the September 1, 2023, issue of the

Texas Register (48 TexReg 4774). These sections will not be republished. Sections 21.5040, 21.5060, 21.5070, and 21.5071 are adopted with changes made in response to public comment and will be republished.

REASONED JUSTIFICATION. The amendments to §§21.4902, 21.5002, 21.5003, and 21.5040, and new §21.5060 are necessary to implement House Bill 1592, 88th Legislature, 2023, and Insurance Code Chapter 1275. Insurance Code §1275.002 as amended by HB 1592 permits a plan sponsor of a self-insured or self-funded plan established by an employer under the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §1001 et seq.) to opt in to the Texas IDR process under Insurance Code Chapter 1467 by electing to apply Insurance Code Chapter 1275 to the plan during the relevant plan year. Insurance Code Chapter 1275 creates similar requirements for out-of-network billing that already exist for HMOs and preferred provider benefit plans, as well as for health benefit plans administered by the Employees Retirement System of Texas and Teacher Retirement System of Texas plans under Insurance Code Chapters 1551, 1575, and 1579.

The amendments to §§21.4902, 21.5002, and 21.5003 clarify that a plan sponsor may elect to apply Insurance Code Chapter 1275 to its self-insured or self-funded plan. Under Insurance Code §1275.004, Insurance Code Chapter 1467 applies to a health benefit plan to which Insurance Code Chapter 1275 applies.

The amendments to §21.5040 require health benefit plans offered by nonprofit agricultural organizations and ERISA plans to include additional information in the explanation of benefits (EOB) provided to physicians or providers. The additional information includes a disclaimer that the plan opted in to the Texas IDR process for the relevant plan year and that the claim must proceed through the Texas IDR process. Amendments to §21.5040 also require health benefit plans offered by nonprofit agricultural organizations and ERISA plans to display a signifier on the ID card issued to enrollees that identifies the Texas IDR process as the IDR process claims must proceed through. The ID card requirement will apply to plans delivered, issued for delivery, or renewed on or after 90 days following the effective date of the section. The proposed text of this section has been modified in response to comment. Additional amendments to this section are discussed in the subsequent paragraphs as they relate to the implementation of Senate Bill 2476, 88th Legislature, 2023.

The adoption also adds new Division 7 and new §21.5060 to prescribe the form and manner of identifying information that plan sponsors must include to make an election for the relevant plan year under Insurance Code §1275.002. The identifying information must be submitted to TDI as specified on TDI's website at www.tdi.texas.gov.

Amendments to §21.5040 and new Division 8, consisting of §21.5070 and §21.5071, are necessary to implement SB 2476. This bill authorizes political subdivisions to submit rates for emergency medical services (EMS) to TDI for use in payment by health benefit plans. SB 2476 requires health benefit plans to cover ground emergency medical services at (1) the rates submitted to TDI by a political subdivision; or (2) if no rates have been submitted, the lesser of either the EMS provider's billed charge or 325% of the current Medicare rate.

Additional amendments to §21.5040 require the explanation of benefits to include transport as added by SB 2476 and clarify that the right to pursue mediation or arbitration applies only to out-of-network claims subject to Insurance Code Chapter 1467.

New §21.5070 and §21.5071 prescribe the form and manner that political subdivisions must use if they wish to submit rates to TDI for use in EMS billing, and the EMS payment standards that apply to an applicable health benefit plan issuer or administrator. The rate submission must be submitted to TDI as specified on TDI's website at www.tdi.texas.gov. The proposed text of these sections has been modified in response to comment.

New §21.5070 and §21.5071 adopt a single rate submission deadline. A modification to the rate submission schedule was requested by commenters and replaces the quarterly schedule that was included in the proposed text. The adopted text also requires health plans to apply the published rate data based on the date the claim is incurred, rather than basing payments on the data published at the time the claim is submitted. The publication schedule will remove the ability of a political subdivision to submit rates to TDI more than once. For a rate to be reflected in the updated rate publication, a political subdivision must submit a rate by the submission deadline.

Health benefit plans must apply the rates, as reflected in the published rate database, to claims incurred during any plan year that begins before September 1, 2024. Claims incurred during a plan year that begins on or after September 1, 2024, are paid based on the lesser of the billed charge, the reported rate increased by 10%, or the reported rate increased by the Medicare Economic Index rate that applies to the first day of the new plan year.

The adopted text permits a political subdivision to submit EMS rates until the submission deadline of 30 days after the date the section is effective. TDI will publish the submitted rates no later than 10 business days after the submission deadline. The final submission deadline is modified from what was proposed in response to comment to better align with SB 2476, which requires health benefit plans to adjust the payment rates each plan year with reference to the provider's previous calendar year rates. The payment standard is clarified to prevent requiring a health benefit plan issuer or administrator to pay more than the EMS provider charges. Figure: 28 TAC §21.5071(e) provides illustrative examples of how the published rates apply, subject to maximum rate increase amounts for plans that renew on or after September 1, 2024.

The deadline for rate data will require health benefit plans to quickly update software and internal databases to reflect the published rates. SB 2476 applies to emergency medical services provided on or after January 1, 2024, and requires TDI to establish the publicly accessible database by January 1, 2024.

SB 2476 requires health benefit plans to make the payment using the submitted rate, if applicable, and the bill provides 30 or 45 days for payment of the claim, depending on whether the claim is electronic. The 30- or 45-day period provided by SB 2476 will provide health benefit plans with some lead time to update internal systems.

TDI recognizes that multiple political subdivisions may submit rates associated with the same ZIP code and that health benefit plans may occasionally have difficulty determining which rate applies to the EMS claim. TDI encourages health benefit plans and EMS providers to collaborate when multiple rates apply to a ZIP code and to use existing internal processes to resolve any claims in which an overpayment or underpayment occurs.

The new and amended sections are described in the following paragraphs.

Section 21.4902. The amendments to §21.4902 clarify that the section provides definitions for use in Subchapter OO and that an administrator as defined in Insurance Code §1467.001 may also include an administrator of a self-insured or self-funded plan under Insurance Code Chapter 1275 when election by a plan sponsor has occurred. The amendments expand the definition of "health benefit plan" to include a self-insured or self-funded plan for which the plan sponsor has elected to apply Insurance Code Chapter 1275. The amendments also add a definition of "ERISA" to reflect agency drafting style and plain language preferences.

The amendments add "Insurance Code" to a citation, add "an administrator of" to the definition of "administrator" for consistency in §21.4902(1), renumber paragraphs to reflect the expansion of definitions, and amend punctuation and grammar throughout.

Section 21.5002. This section describes the scope of Subchapter PP. The amendments to §21.5002 expand the applicability of Subchapter PP to a self-insured or self-funded plan if election by the plan sponsor is submitted according to the requirements in new §21.5060. Amendments also change punctuation and grammar to reflect the addition of new paragraph (4) and add "Insurance Code" to an incomplete citation.

Section 21.5003. This section provides definitions for use in Subchapter PP. The amendments to §21.5003 clarify that, in addition to having the meaning assigned by Insurance Code §1467.001, for purposes of 28 TAC Chapter 21, Subchapter PP, "administrator" also includes an administrator of a self-insured or self-funded plan under Insurance Code Chapter 1275 when election by a plan sponsor has occurred. The amendments expand the definition of "health benefit plan" to include a self-insured or self-funded plan for which the plan sponsor has elected to apply Insurance Code Chapter 1275. The amendments also add a definition of "ERISA" to reflect agency drafting style and plain language preferences.

Amendments add "Insurance Code" to a citation, add "an administrator of" to the definition of "administrator" for consistency in §21.5003(1), renumber paragraphs to reflect the expansion of definitions, and amend punctuation and grammar throughout the section.

Section 21.5040. This section provides the contents required in an explanation of benefits for to an enrollee, physician, and provider. The amendments clarify that a plan subject to §21.5040 must give written notice in an EOB as specified in the section in connection with transport provided by a non-network or out-of-network provider, as added by SB 2476. The amendments also clarify that the notice explaining that a physician or provider may request mediation or arbitration for a payment dispute should be included only for a claim that is subject to mediation or arbitration under Insurance Code Chapter 1467. The amendments to the titles of Division 5 and §21.5040 reflect the expanded scope of the ID card requirements.

The amendments also add new subsections (b) and (c). Section 21.5040(b) includes additional requirements for EOBs provided by certain health benefit plans. Section 21.5040(c) adds information that must be included in the ID card provided to enrollees. To reflect the addition of subsections (b) and (c), the previously existing rule text has been designated as subsection (a). The new requirements in §21.5040(b) and (c) apply only to a health benefit plan offered by a nonprofit agricultural organization or a self-funded or self-insured plan under ERISA where a plan sponsor has elected to apply Insurance Code Chapter 1275.

Section 21.5040(b)(1) requires a health benefit plan offered by a nonprofit agricultural organization under Insurance Code Chapter 1682 to include in the EOB to physicians and providers instructions to identify the plan type as "Ag Plan" when requesting mediation or arbitration. Similarly, §21.5040(b)(2) requires health benefit plans offered by ERISA plans that have opted in to the Texas IDR process under Insurance Code Chapter 1275 to include in the EOB a statement about the opt-in, a prohibition against using the federal IDR process, and instructions to physicians and providers to identify the plan type as "ERISA Opt-In" when requesting mediation or arbitration.

The text of §21.5040(b)(2) as proposed has been modified in response to comment. As adopted, §21.5040(b)(2) does not include the proposed requirement to provide the plan name and effective date of the election and instead substitutes a more general disclosure in the EOB.

Section 21.5040(c) requires a health benefit plan offered by a nonprofit agricultural organization or self-insured or self-funded ERISA plan to include the letters "TXI" on the ID cards issued to enrollees. This requirement applies to a plan that is delivered, issued for delivery, or renewed on or after 90 days following the section's effective date.

The text of §21.5040(c) as proposed has been modified in response to comment to replace "TXIDR" with "TXI" on the front of the ID card and to add quotation marks in the rule text around "TXI." In addition, a clarifying modification to §21.5040(c) replaces "of" with "following" to state that the requirements apply 90 days following the effective date of §21.5040.

Section 21.5060. New §21.5060, in new Division 7, provides submission requirements for a plan sponsor that elects to apply Insurance Code Chapter 1275 to a self-insured or self-funded plan for the relevant plan year. Submission requirements include:

- the name and contact information of both the plan sponsor and, if applicable, the administrator;

- the health benefit plan year start and end dates;

- the requested effective date of the election, which must be at least 30 days after the date the identifying information is submitted;

- the group number of the health benefit plan; and

- the number of enrollees covered under the health benefit plan.

Identifying information must be submitted to TDI as specified on TDI's website at www.tdi.texas.gov. This requirement ensures that a plan sponsor is able to successfully elect to apply Insurance Code Chapter 1275 (including the Texas IDR process) and that IDR claims submitted by physicians or providers are correctly matched to the ERISA plan.

The text of §21.5060(a) as proposed has been modified in response to comment to delete the phrase "in out-of-network claim dispute resolution," to clarify that an ERISA plan that elects to apply Insurance Code Chapter 1275 must comply with all the provisions in that chapter, not just those related to the dispute resolution process. In addition, the text of §21.5060(a)(3) as proposed has been modified to correct a grammatical error by adding an "s" at the end of "dates."

The text of §21.5060(a)(4) as proposed has been modified in response to comment to clarify that the requested effective date must be the same as the start date of the relevant plan year, except as provided in newly added subsection (d). Section 21.5060(d) is a new addition from the text as it was proposed and provides an exception to the modified rule text in §21.5060(a)(4). Section 21.5060(d) clarifies that a plan with a plan year start date between September 1, 2023, and February 1, 2024, may make an election with a requested effective date that is after the first day of the relevant plan year if the information required under §21.5060(a) is provided no later than 45 days after the effective date of the section.

The text of §21.5060(b) as proposed has been changed in response to comment to clarify that the election applies to all of Insurance Code 1275, and not just the Texas IDR process, and applies to claims incurred during the relevant plan year.

The section requires a plan sponsor to renew its election each plan year, update identifying information required in the section, and make the election 30 days before the date the relevant plan year begins. Once a plan sponsor opts in to the Texas IDR process for the relevant plan year, the plan sponsor may not opt out until the end of the relevant plan year.

Section 21.5070. New §21.5070, in new Division 8, provides EMS rate submission and claims requirements. Section 21.5070 provides the form and manner for a political subdivision to submit rates for emergency medical services. Political subdivisions that choose to submit rates to TDI must comply with the data submission requirements, including providing certain identifying information and submitting rate information using the method provided on TDI's website at www.tdi.texas.gov.

Identifying information includes:

- the political subdivision's name and contact information;

- the National Provider Identification number of each EMS provider that is subject to the rates set by the political subdivision, if known;

- each ZIP code subject to the rates set, controlled, or regulated by the political subdivision; and

- applicable billing codes, code types, and dollar amounts for each health care service, supply, or transport rate that is set, controlled, or regulated by the political subdivision.

A claim submitted by an EMS provider or its designee must include the ZIP code in which the health care service, supply, or transport originated. A political subdivision or EMS provider subject to the rule may not issue a bill that exceeds the amount of the rate set, controlled, or regulated by the political subdivision.

Political subdivisions that choose to submit rates to TDI must comply with the single submission deadline adopted in §21.5070(d). The text of §21.5070(d) and (e) as proposed has been modified in response to comment to replace the quarterly schedule with a single deadline for submission and publication. Data for calendar year 2024 is due 30 days after the section's effective date. TDI will publish data within 10 business days of the reporting deadline. Because the reporting schedule is simplified from the proposed rule, proposed §21.5070(h) and Figure §21.5070(h) are not adopted.

Political subdivisions are not required to submit rates under SB 2476. However, if a political subdivision chooses not to submit rates by the submission deadline and has no published rates for a particular health care service, supply, or transport, then the health benefit plan must determine the applicable rate according to the formulas in SB 2476 and implemented in §21.5071(b)(2).

Additionally, because some of the text of §21.5070(d) and (e) as proposed has been modified to allow submission once during the effective period of SB 2476, §21.5070(f) as proposed is not adopted. As proposed, subsection (f) permitted a political subdivision to remove a submitted rate according to the proposed submission schedule. Because §21.5060(f) is not adopted, subsection (g) as proposed has been designated as new subsection (f).

Section 21.5071. New §21.5071, in new Division 8, provides emergency medical service rate payment requirements. Section 21.5071 clarifies that certain health benefit plans must pay EMS provider claims under SB 2476. Health benefit plan issuers and administrators must pay EMS provider claims at the rate submitted by a political subdivision or, if no rate has been submitted under §21.5070, according to the rate specified in SB 2476 and implemented in §21.5071(b)(2).

The text of §21.5071(b)(1) as proposed has been modified in response to comment to clarify that the health benefit plan must pay the lesser of the billed charge or the applicable rate published by TDI. TDI has also modified §21.5071(b)(1) and (2) to remove the phrase, "consistent with the time frames addressed in subsection (c) of this section." This phrase is no longer needed, since the rate data will only be published once.

Health benefit plan issuers and administrators must apply published rates by the implementation schedule in §21.5071(c) and (d). In response to comment, TDI has replaced the proposed quarterly schedule in §21.5071(c) with a single implementation date to align with the single submission deadline in §21.5070(d). In response to comment, TDI has also replaced the proposed references to the claim submission date with references to the claim incurred date.

For claims incurred during a plan year that starts before September 1, 2024, plans must apply the applicable rate published in TDI's rate database for 2024. For claims incurred during a plan year that starts on or after September 1, 2024, plans must pay the lesser of the billed charge, the published rate for 2024 increased by 10%, or the published rate for 2024 increased by the Medicare Economic Index rate.

SB 2476 uses the term "Medicare Inflation Index." TDI interprets that term to mean the Medicare Economic Index (MEI), a measure of inflation faced by physicians with respect to their practice costs and general wage levels that is updated annually. The MEI is available on the CMS website at www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/medicareprogramratesstats/marketbasketdata. The MEI rate is established on a calendar year basis. TDI adds text to clarify that the applicable MEI rate is the rate that applies to the first day of the new plan year. For a plan year that renews in September of 2024, the MEI for calendar year 2024 applies. For a plan year that renews in January of 2025, the calendar year 2025 MEI applies.

TDI has modified the text of §21.5071(d) in response to comment to clarify that a health benefit plan issuer or administrator must adjust the applicable rate required by SB 2476 for a plan year that starts on or after September 1, 2024. TDI has modified the text of §21.5071(d) to simplify the explanation for how rates must be adjusted for a new plan year, and align this section with the modifications in §21.5071(b) that clarify that the payment standard is the lesser of the billed charge or the applicable rate. The

proposed definitions for "plan year" and "calendar year rate" are not adopted because they are no longer needed within the simplified text of the subsection. For claims incurred during a plan year that starts on or after September 1, 2024, plans must pay the lesser of the billed charge, the published rate for 2024 increased by 10%, or the published rate for 2024 increased by the Medicare Economic Index rate that applies to the first day of the new plan year.

Figure: 28 TAC §21.5071(e) provides examples of the published rates health benefit plans must use when adjusting a payment under SB 2476, depending on the renewal date of the health benefit plan. These examples have been updated from those proposed to conform to the changes made in §21.5071 and previously contained in §21.5071(d)(2).

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received five written comments and two commenters spoke at a public hearing on the proposal held on September 26, 2023. Commenters in support of the proposal with changes were Emergency Department Practice Management Association, Texas Association of Health Plans, Texas EMS Alliance, Texas Medical Association, Texas Ophthalmological Association, Texas Orthopaedic Association, Texas Osteopathic Medical Association, and Texas Society of Anesthesiologists, and U.S. Anesthesia Partners.

Comments on §21.5003

Comment: One commenter recommends adding the title of Insurance Code Chapter 1682 in §21.5003(11)(C).

Agency Response: TDI declines to make the change because the chapter title for Insurance Code Chapter 1682 is provided in §21.5003(1). Consistent with TDI drafting and style preferences, the title is listed only for the first instance in which the chapter is cited within each section.

Comments on §21.5040

Comments: One commenter states their support for including information on the EOB that indicates that the plan has opted in to the Texas IDR system, but the commenter emphasizes that requiring the plan name and effective date of election as proposed in §21.5040(b)(2) will create significant administrative challenges without providing additional value. Another commenter supports including the information on the EOB as proposed and has requested that the EOB specify the entire plan year, not just the effective date.

Agency Response: The purpose of the EOB notice is to inform the provider that the claim contained on the EOB is subject to the Texas IDR process. TDI agrees with the first commenter that the EOB notice does not need plan-specific information in order to serve its purpose and has modified §21.5040(b)(2) to remove the plan-specific language. As a result, TDI declines to specify the entire plan year on the EOB, as suggested by the second commenter.

Comments: One commenter asks TDI to clarify in §21.5040 that the EOB and ID card requirements for ERISA plans that have opted in apply only to Texas residents. The commenter notes that (1) Texas does not have jurisdiction over services provided to nonresidents, (2) the benchmarking database used by arbitrators in the Texas IDR system includes only rate data for Texas ZIP codes, and (3) IDR for out-of-state claims is effectively unworkable.

Agency Response: TDI agrees that Insurance Code Chapter 1275 applies to plans issued to Texas residents and to claims for services provided by Texas providers. TDI declines to make a change, but affirms that the requirements in §21.5040 do not apply to ID cards issued to non-Texas residents, or to EOBs issued for claims provided by out-of-state providers.

Comments: Two commenters support the new requirements for the ID card and EOBs to indicate participation in the Texas IDR system. The commenters state that this information is critical for physicians and providers to properly process claim disputes. While the vast majority of claims are submitted electronically, and EOBs are returned electronically in an 835-remittance file, the commenters note that some carriers in Texas have provided information about a claim's eligibility for IDR only in a paper or PDF format, which creates a significant administrative burden. The commenters request that the rules require that for claims submitted electronically, the information required on the EOB must be "provided in the form of a searchable, standardized remark code or similar searchable language in an electronic explanation of benefits file."

Agency Response: TDI appreciates the commenters' support for the new requirements and agrees that the information on the ID cards and EOB is needed to enable providers to discern which claims are subject to the Texas IDR process. The submission of ineligible claims creates a substantial burden for TDI and the responding health plans. TDI agrees that health plans should use a standardized and searchable electronic method for providing the required information within EOBs. TDI will monitor this issue and consider addressing it in future rules if health plans do not conform to best practices for conveying this information.

Comments: One commenter requests that the ID card requirement in §21.5040(c) be modified to include only three characters, as requiring the five characters in "TXIDR" would require one or more health plans to make programming changes. Another commenter supports retaining the five characters, as fewer characters would not adequately inform the physician, provider, or enrollee of which IDR program a claim arising under the health plan must proceed through.

Agency Response: TDI agrees to make a change to shorten "TXIDR" to a three-character descriptor. TDI replaces "TXIDR" as proposed with "TXI." TDI recognizes that a shorter descriptor conveys less information but recognizes that the EOB contains the most pertinent information. TDI seeks to balance the benefit of requiring additional information with the cost of implementing new requirements.

Comment: One commenter requests that quotation marks be added to the requirement in §21.5040(c), for ID cards to include the letters "TXIDR." The commenter also asks that the rule require "TXIDR" to be prominently displayed on the front of the ID card and on other forms of identifying an enrollee's plan information, such as electronic ID cards. The commenter states that these changes would align with corresponding rules for TDI-regulated HMO and PPO plans in §21.2820.

Agency Response: TDI agrees in part and has modified the rule to add quotation marks to the new three-character descriptor "TXI," and require the information to be located on the front of the ID card. TDI declines to broaden the ID card requirement to apply to other documents but believes the rule text is sufficiently clear to require the information on any ID card, whether it is issued electronically or in physical form.

Comments: Two commenters request that TDI publish information listing each ERISA plan that opts in to the Texas IDR process. One of the commenters suggests additional rule text that would address this issue.

Agency Response: TDI agrees that this information may be of use to the public but declines to make a change to the rule text, as it is outside the scope of this rule as proposed. TDI will have the information available and will review the best method for providing this information to the public.

Comments on §21.5060

Comment: One commenter notes that the language in §21.5060 may create confusion by referring to a plan sponsor electing to "participate in out-of-network dispute resolution under Insurance Code Chapter 1275," when the law refers to an election to apply Chapter 1275 in its entirety to the plan for the relevant plan year.

Agency Response: TDI agrees and has modified §21.5060 in two places to delete the words "in out-of-network claim dispute resolution," and clarify that the election refers to Insurance Code Chapter 1275.

Comment: One commenter recommends that TDI modify §21.5060 to state that an election made by an ERISA plan to apply Insurance Code Chapter 1275 must span the entire plan year and must be made 60 days in advance of the plan year. The commenter also suggests clarifying that the election applies to claims that are incurred during the relevant plan year, including a dispute that may proceed through the Texas IDR process after the end of the relevant plan year.

Agency Response: TDI declines to increase the election requirement from 30 to 60 days, as 30 days provides sufficient time for TDI to update its website. In general, TDI agrees that Insurance Code §1275.002 requires that an ERISA plan opt in for the entirety of a plan year. However, TDI believes an exception is appropriate for plan years that started after the statute became effective and before TDI's rules were operational. TDI added new subsection (d) to §21.5060 to clarify that an election applies to the entirety of the plan year, except for plans starting between September 1, 2023, and February 1, 2024. Such plans may elect an effective date after the first day of the relevant plan year if they submit the election within 45 days of this rule taking effect. TDI also modified §21.5060(b) to clarify that the election applies with respect to claims incurred during the plan year to which the election applies, even if the dispute occurs after the relevant plan year ends.

Comment: One commenter asks for clarification on §21.5060(a)(6), which requires ERISA plans to provide the number of enrollees covered by the plan when opting to participate in Insurance Code Chapter 1275. The commenter notes that this number changes frequently, and asked whether it should be reported as of a specific date, or if plans can provide an approximate number.

Agency Response: A plan sponsor should provide the number of enrollees covered under the health plan based on the best information available at the time the information is submitted--such as the number of enrollees on the last day of the previous month. While TDI understands that this number changes frequently, this data will inform policymakers on the general number of Texans participating in plans under Insurance Code Chapter 1275.

General comments on Division 8

Comment: One commenter requests that the rules clarify that an out-of-network EMS provider may not balance bill a patient, and suggests TDI adopt language similar to that used in 28 TAC §21.4903.

Agency Response: TDI agrees that the Insurance Code, as amended by SB 2476, prohibits an EMS provider from balance billing for EMS services provided between January 1, 2024, and August 31, 2025. However, TDI declines to make a change to the rule text because the statutory prohibition is sufficiently clear and does not need to be repeated in rule.

Comment: One commenter notes that political subdivisions typically establish EMS mileage rates in addition to base transport charges. Mileage rates are not flat fees, but are multiplied by the number of miles that the patient is transported.

Agency Response: TDI thanks the commenter for this information. TDI's data portal includes HCPCS code A0425, which political subdivisions may use to report their mileage rates. The data portal also allows political subdivisions to enter any other applicable codes for which rates are set.

Comment: Two commenters note that claim information may not always be sufficient to determine the applicable political subdivision and recommend that the rules include how incorrect payment amounts should be addressed. Another commenter suggests that when there is uncertainty about the correct payment amount, the health plan should be permitted to pay either rate and handle corrections through an internal appeals process.

Agency Response: TDI appreciates the challenge posed by the fact that standard claim fields may be insufficient to determine the applicable payment amount but declines to make a change. TDI expects health plans to act in good faith to attempt to determine the correct payment amount and encourages health benefit plans and EMS providers to work together to determine that amount.

Comment: One commenter suggests specifying timeframes for notifications of and corrections to underpayments and overpayments, consistent with 28 TAC §21.2809. Another commenter suggests that any incorrect payments should be resolved through an internal appeals process.

Agency Response: TDI appreciates the suggestion regarding timeframes but declines to make the change, as it is outside the scope of this rule project. TDI encourages health plans and EMS providers to use existing internal processes to resolve any underpayments or overpayments that may occur.

Comments on §21.5070

Comments: Two commenters recommend replacing the reporting schedule in §21.5070(e), which as proposed allows for four opportunities to report, with an annual reporting schedule. The commenters indicate that allowing rates to change up to four times in a plan year creates administrative and pricing challenges for plans. They state that the intent of the legislation was to limit opportunities to increase rates, since the statute specifically addresses rate increases. One of the two commenters suggests an alternative approach that would not allow a political subdivision to submit its rates more than once.

Agency Response: TDI agrees with the commenters and has modified §21.5070(d) and (e) to replace the four reporting periods with a single reporting deadline. The adopted rule extends the rate submission deadline to 30 days from the date the rule is adopted for political subdivisions to submit data for calendar

year 2024. Since the data reporting schedule has been simplified, TDI has not adopted Figure: 28 TAC §21.5070(h). Instead, §21.5070(e) clarifies that TDI will publish data no later than 10 business days following the data reporting deadline. Likewise, §21.5071(c) is simplified to indicate that the data reported for calendar year 2024 applies to claims incurred during a plan year that starts before September 1, 2024. TDI makes a conforming change to §21.5071(d) to clarify the adjusted payment standard for a plan that renews on or after September 1, 2024. The examples are moved to Figure 28 TAC §21.5071(e) and updated consistent with the modified reporting deadline and simplified instructions for adjusting the payment rate at plan renewal.

Comments on §21.5071

Comment: One commenter notes that in §21.5071(c), the proposal used the term "claims submitted," while the examples used "claims submitted" and "claims incurred" interchangeably. The commenter asks TDI to clarify that the relevant date is the date the service is provided--that is, the date the claim is incurred--and not the date the claim is submitted.

Agency Response: TDI agrees and has changed the language in §21.5071(c) to use the term "claim incurred." TDI also makes conforming changes in §21.5071(d), and in the examples contained in Figure: 28 TAC §21.5071(e).

Comment: One commenter recommends that TDI modify §21.5071(d) to refer to Medicare's Ambulance Inflation Factor (AIF), rather than the Medicare Economic Index, because CMS uses the AIF to adjust Medicare's ambulance fee schedule.

Agency Response: TDI declines to make the requested change. TDI maintains its interpretation that when the statute uses the term "Medicare Inflation Index," it is referring to the Medicare Economic Index.

Comment: Two commenters indicate that the rate increase provision in §21.5071(d) was intended to apply only to the extent that a political subdivision has increased its rates. The commenters state that the purpose of the provision was to limit the amount of such increases. Without clarification, the automatic adjustment of required payments could result in health plans reimbursing providers more than the locally set rates.

Agency Response: TDI appreciates the commenters' concerns and has made changes to address the issue. First, TDI notes that §21.5070(b) makes clear that a billed charge is prohibited from exceeding the rate set by the political subdivision. TDI agrees that it would be inappropriate to require payment of a rate that exceeds the amount billed. Therefore, TDI modifies §21.5071(b)(1) to clarify that the issuer or administrator must pay the lesser of the billed charge or the applicable rate for the political subdivision. TDI makes conforming changes to §21.5071(d) to clarify that the subsection does not require a payment to exceed the amount billed.

SUBCHAPTER OO. DISCLOSURES BY OUT-OF-NETWORK PROVIDERS

28 TAC §21.4902

STATUTORY AUTHORITY. The commissioner adopts amendments to §21.4902 under Insurance Code §§1275.002, 1275.004, 1467.003, and 36.001.

Insurance Code §1275.002 authorizes a plan sponsor to elect to apply Insurance Code Chapter 1275 to a self-insured or self-funded plan established by an employer for the benefit of the employer's employees in accordance with the Employee Retirement Income Security Act of 1974 (29 USC §1001 et seq.).

Insurance Code §1275.004 states that Insurance Code Chapter 1467 applies to a health benefit plan to which Insurance Code Chapter 1275 applies, and the administrator of a health benefit plan to which Insurance Code Chapter 1275 applies is an administrator for purposes of Insurance Code Chapter 1467.

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

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

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

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For further information, please call: (512) 676-6555

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SUBCHAPTER PP. OUT-OF-NETWORK CLAIM DISPUTE RESOLUTION
DIVISION 1. GENERAL PROVISIONS

28 TAC §21.5002, §21.5003

STATUTORY AUTHORITY. The commissioner adopts amendments to §21.5002 and §21.5003 under Insurance Code §§1275.002, 1275.004, 1467.003, and 36.001.

Insurance Code §1275.002 authorizes a plan sponsor to elect to apply Insurance Code Chapter 1275 to a self-insured or self-funded plan established by an employer for the benefit of the employer's employees in accordance with the Employee Retirement Income Security Act of 1974 (29 USC §1001 et seq.).

Insurance Code §1275.004 states that Insurance Code Chapter 1467 applies to a health benefit plan to which Insurance Code Chapter 1275 applies, and the administrator of a health benefit plan to which Insurance Code Chapter 1275 applies is an administrator for purposes of Insurance Code Chapter 1467.

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

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.

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DIVISION 5. EXPLANATION OF BENEFITS

28 TAC §21.5040

STATUTORY AUTHORITY. The commissioner adopts amendments to §21.5040 under Insurance Code §§1275.004, 1301.007, 1467.003, and 36.001.

Insurance Code §1275.004 states that Insurance Code Chapter 1467 applies to a health benefit plan to which Insurance Code Chapter 1275 applies, and the administrator of a health benefit plan to which Insurance Code Chapter 1275 applies is an administrator for purposes of Insurance Code Chapter 1467.

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

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

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.

§21.5040. Required Explanation of Benefits and Enrollee Identification Card Information.

(a) General requirements for explanation of benefits. A health benefit plan issuer or administrator subject to Insurance Code §1271.008, concerning Balance Billing Prohibition Notice; §1275.003, concerning Balance Billing Prohibition Notice; §1301.010, concerning Balance Billing Prohibition Notice; §1551.015, concerning Balance Billing Prohibition Notice; §1575.009, concerning Balance Billing Prohibition Notice; or §1579.009, concerning Balance Billing Prohibition Notice must provide written notice in accordance with this section in an explanation of benefits in connection with a health care or medical service or supply or transport provided by a non-network provider or an out-of-network provider:

(1) to the enrollee and physician or provider, which must include:

(A) a statement of the billing prohibition, as applicable; and

(B) the total amount the physician or provider may bill the enrollee under the health benefit plan and an itemization of in-network copayments, coinsurance, deductibles, and other amounts included in that total; and

(2) to the physician or provider, for a claim that is subject to mediation or arbitration under Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution, a conspicuous statement in not less than 10-point boldface type that is substantially similar to the following: "If you disagree with the payment amount, you can request mediation or arbitration. To learn more and submit a request, go to www.tdi.texas.gov. After you submit a complete request, you must notify {HEALTH BENEFIT PLAN ISSUER OR ADMINISTRATOR NAME} at {EMAIL}."

(b) Specific requirements for explanation of benefits provided by health benefit plans subject to Insurance Code Chapter 1275. In addition to the requirements in subsection (a) of this section, the following requirements apply.

(1) For a health benefit plan offered by a nonprofit agricultural organization under Insurance Code Chapter 1682, concerning Health Benefits Provided by Certain Nonprofit Agricultural Organizations, the notice to a physician or provider for a claim must also include the following instruction that is substantially similar to the following: "The request for mediation or arbitration must identify the plan type as 'Ag Plan.'"

(2) For a self-insured or self-funded plan under ERISA where the plan sponsor has elected to apply Insurance Code Chapter 1275, concerning Balance Billing Prohibitions and Out-Of-Network Claim Dispute Resolution for Certain Plans, to the plan for the relevant plan year, the notice to a physician or provider for a claim must also include a statement that is substantially similar to the following: "The plan sponsor has opted in to the Texas Independent Dispute Resolution Process under Insurance Code Chapter 1275 for this plan year. A dispute related to this claim must proceed through the Texas process and may not proceed through the Federal No Surprises Act Independent Dispute Resolution Process. The request for mediation or arbitration must identify the plan type as 'ERISA Opt-In.'"

(c) Requirements for ID cards issued to enrollees of health benefit plans subject to Insurance Code Chapter 1275. For a plan that is delivered, issued for delivery, or renewed on or after 90 days following the effective date of this section, a health benefit plan issuer or administrator that is subject to Insurance Code §1275.003 must include the letters "TXI" on the front of the ID card issued to enrollees.

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

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DIVISION 7. SUBMISSION REQUIREMENTS FOR ELECTION BY ERISA PLANS

28 TAC §21.5060

STATUTORY AUTHORITY. The commissioner adopts new §21.5060 under Insurance Code §§1275.002, 1275.004, 1467.003, and 36.001.

Insurance Code §1275.002 authorizes the commissioner to prescribe the form and manner in which a plan sponsor may elect to apply Insurance Code Chapter 1275 to a self-insured or self-

funded plan established by an employer for the benefit of the employer's employees in accordance with the Employee Retirement Income Security Act of 1974 (29 USC §1001 et seq.).

Insurance Code §1275.004 states that Insurance Code Chapter 1467 applies to a health benefit plan to which Insurance Code Chapter 1275 applies, and the administrator of a health benefit plan to which Insurance Code Chapter 1275 applies is an administrator for purposes of Insurance Code Chapter 1467.

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

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.

§21.5060. Election Submission Requirements.

(a) A plan sponsor of a self-insured or self-funded plan may elect to participate under Insurance Code Chapter 1275, concerning Balance Billing Prohibitions and Out-of-Network Claim Dispute Resolution for Certain Plans, by providing identifying information to the Texas Department of Insurance as specified on the department's website at www.tdi.texas.gov, including:

(1) the name and contact information of the plan sponsor;

(2) the name and contact information of the administrator of the health benefit plan, if applicable;

(3) the health benefit plan year start and end dates;

(4) the requested effective date, which, except as provided in subsection (d) of this section, must be the same as the start date of the relevant plan year and at least 30 days after the date the identifying information is submitted;

(5) the group number of the health benefit plan; and

(6) the number of enrollees covered under the health benefit plan.

(b) Election under subsection (a) of this section applies only to the relevant plan year. A plan sponsor must elect to apply Insurance Code Chapter 1275 (which includes an election to participate in out-of-network claim dispute resolution for applicable claims incurred during the relevant plan year) with respect to each plan year and must provide or update identifying information required by this section. A plan sponsor that elects to apply Insurance Code Chapter 1275 to a plan for the relevant plan year may not opt out until the end of that relevant plan year.

(c) A plan sponsor or its authorized representative may provide the identifying information required by this section.

(d) A health benefit plan with a plan year start date between September 1, 2023, and February 1, 2024, may make an election with a requested effective date that is after the first day of the relevant plan year if the information required under subsection (a) of this section is submitted not later than 45 days after the effective date of this section. An election for a plan year with a start date after February 1, 2024, must apply for the entirety of the plan year.

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

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DIVISION 8. EMERGENCY MEDICAL SERVICE RATE SUBMISSION AND PAYMENT REQUIREMENTS

28 TAC §21.5070, §21.5071

STATUTORY AUTHORITY. The commissioner adopts new §21.5070 and §21.5071 under Insurance Code §§38.006, 1301.007, and 36.001.

Insurance Code §38.006 authorizes the commissioner to prescribe the form and manner by which political subdivisions may submit rates for ground ambulance services.

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

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.

§21.5070. Rate Database for Emergency Medical Services Providers.

(a) Consistent with Insurance Code §38.006, concerning Emergency Medical Services Provider Balance Billing Rate Database, this section applies to:

(1) a political subdivision that sets, controls, or regulates a rate charged for a health care service, supply, or transport provided by an emergency medical services (EMS) provider, other than an air ambulance; and

(2) an EMS provider or its designee that provides a health care service, supply, or transport on behalf of a political subdivision that sets, controls, or regulates a rate.

(b) A political subdivision or EMS provider subject to this section may not issue a bill for a health care service, supply, or transport that exceeds the amount of the rate set, controlled, or regulated by the political subdivision.

(c) A political subdivision that chooses to submit data to the Texas Department of Insurance (TDI) under this section must submit data using the data submission method available at www.tdi.texas.gov and must include at a minimum:

(1) the political subdivision's name and contact information;

(2) if known, the National Provider Identification (NPI) number of each EMS provider that provides a health care service, supply, or transport that is subject to rates set, controlled, or regulated by the political subdivision;

(3) each ZIP code that is subject to the rates set, controlled, or regulated by the political subdivision; and

(4) the applicable billing code, code type, and dollar amount for each health care service, supply, or transport rate that is set, controlled, or regulated by the political subdivision.

(d) The data submission deadline for a political subdivision that chooses to submit data is 30 days after the date this section becomes effective.

(e) TDI will publish data reported by a political subdivision no later than 10 business days after the data reporting deadline specified in subsection (d) of this section.

(f) A claim submitted by an EMS provider or its designee for a health care service, supply, or transport provided on behalf of a political subdivision must include the ZIP code in which the health care service, supply, or transport originated.

§21.5071. Payments to Emergency Medical Services Providers.

(a) This section applies to a health benefit plan issuer or administrator that is subject to one of the following statutes:

(1) Insurance Code §1271.159, concerning Non-Network Emergency Medical Services Provider;

(2) Insurance Code §1275.054, concerning Out-of-Network Emergency Medical Services Provider Payments;

(3) Insurance Code §1301.166, concerning Out-of-Network Emergency Medical Services Provider;

(4) Insurance Code §1551.231, concerning Out-of-Network Emergency Medical Services Provider Payments;

(5) Insurance Code §1575.174, concerning Out-of-Network Emergency Medical Services Provider Payments; or

(6) Insurance Code §1579.112, concerning Out-of-Network Emergency Medical Services Provider Payments.

(b) For a covered health care or medical service, supply, or transport that is provided to an enrollee by an out-of-network emergency medical services (EMS) provider, a health benefit plan issuer or administrator must pay:

(1) for a service or transport that originated in a political subdivision that sets, controls, or regulates the rate, the lesser of the billed charge or the applicable rate for that political subdivision that is published in the EMS provider rate database established by the department and adjusted as required in subsection (d) of this section; or

(2) if there is not a rate published in the EMS provider rate database for the political subdivision in which the service or transport originated, the lesser of:

(A) the provider's billed charge; or

(B) 325% of the current Medicare rate, including any applicable extenders or modifiers.

(c) For claims incurred during a plan year that starts before September 1, 2024, for a claim for emergency medical services that is provided on or after January 1, 2024, and before September 1, 2025, a health benefit plan issuer or administrator that must make a payment consistent with subsection (b)(1) of this section must use the rate data published in the department's EMS provider rate database for calendar year 2024.

(d) For claims incurred during a plan year that starts on or after September 1, 2024, a health benefit plan issuer or administrator that must make a payment consistent with subsection (b)(1) of this section must pay the lesser of:

(1) the billed charge;

(2) the rate published in the department's EMS provider rate database for calendar year 2024 increased by 10%; or

(3) the rate published in the department's EMS provider rate database for calendar year 2024 increased by the Medicare Economic Index rate that applies to the first day of the new plan year.

(e) Figure: 28 TAC §21.5071(e) provides examples illustrating how a health benefit plan should apply published rates to a plan year under subsection (d) of this section.
Figure: 28 TAC §21.5071(e)

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

Filed with the Office of the Secretary of State on December 14, 2023.

TRD-202304764
Jessica Barta
General Counsel
Texas Department of Insurance
Effective date: January 3, 2024
Proposal publication date: September 1, 2023
For further information, please call: (512) 676-6555

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 94. NURSE AIDES

40 TAC §94.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts the repeal of Title 40, Part 1, Chapter 94, Nurse Aides, consisting of §94.1.

The repeal of Chapter 94 is adopted without changes to the proposed text as published in the October 20, 2023, issue of the *Texas Register* (48 TexReg 6198). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The adoption removes unnecessary rules from the Texas Administrative Code. As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011. In September 2018, the rules pertaining to Nurse Aides in Chapter 94 were repealed and proposed as new rules in Title 26, Part 1, Chapter 556, and a reference to those rules was adopted in Chapter 94. This reference is no longer needed and not the current practice for repealing and proposing new rules.

COMMENTS

The 31-day comment period ended November 20, 2023.

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

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0202(b), abolishing DADS, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011.

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

Filed with the Office of the Secretary of State on December 14, 2023.

TRD-202304730
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 3, 2024
Proposal publication date: October 20, 2023
For further information, please call: (512) 221-9021

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CHAPTER 95. MEDICATION AIDES--PROGRAM REQUIREMENTS

40 TAC §95.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts the repeal of Title 40, Part 1, Chapter 95, Medication Aides--Program Requirements, consisting of §95.1.

The repeal is adopted without changes to the proposed text as published in the October 20, 2023, issue of the *Texas Register* (48 TexReg 6199). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The adoption removes unnecessary rules from the Texas Administrative Code. As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011. In September 2018, the rules pertaining to Medication Aides--Program Requirements in Chapter 95 were repealed and proposed as new rules in Title 26, Part 1, Chapter 557, and a reference to those rules was adopted in Chapter 95. This reference is no longer needed and not the current practice for repealing and proposing new rules.

COMMENTS

The 31-day comment period ended November 20, 2023.

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

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0202(b), abolishing DADS, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011.

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

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TRD-202304731
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 3, 2024
Proposal publication date: October 20, 2023
For further information, please call: (512) 221-9021

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CHAPTER 99. DENIAL OR REFUSAL OF LICENSE

40 TAC §99.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts the repeal of Title 40, Part 1, Chapter 99, Denial or Refusal of License, consisting of §99.1.

The repeal is adopted without changes to the proposed text as published in the October 20, 2023, issue of the *Texas Register* (48 TexReg 6200). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The adoption removes unnecessary rules from the Texas Administrative Code. As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011. In September 2018, the rules pertaining to Denial or Refusal of License in Chapter 99 were repealed and proposed as new rules in Title 26, Part 1, Chapter 560, and a reference to those rules was adopted in Chapter 99. This reference is no longer needed and not the current practice for repealing and proposing new rules.

COMMENTS

The 31-day comment period ended November 20, 2023.

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

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.0202(b), abolishing DADS, after all of its functions were transferred to HHSC in accordance with Texas Government Code §531.0201 and §531.02011.

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

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TRD-202304732
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 3, 2024
Proposal publication date: October 20, 2023
For further information, please call: (512) 221-9021

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 219. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

INTRODUCTION. The Texas Department of Motor Vehicles (department) adopts amendments to 43 Texas Administrative Code (TAC) Subchapter B, General Permits, §§219.11, 219.13, and 219.14; Subchapter C, Permits for Over Axle and Over Gross Weight Tolerances, §§219.30-219.36; Subchapter D, Permits for Oversize and Overweight Oil Well Related Vehicles, §219.41 and §219.43; and Subchapter E, Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles, §219.61 and §219.63 without changes to the proposed text as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4810). The rules will not be republished.

The adopted amendments implement legislation; modify language to be consistent with statutes and other sections in Chapter 219 of Title 43; delete language that is already contained in statute; delete language for which the department does not have rulemaking authority; clarify the language; modify language to be consistent with current practice; amend certain application requirements to provide the department with additional information that will help it administer and enforce Subtitle E of Title 7 of the Transportation Code and that the department will provide to law enforcement officers who use the information to enforce the laws regarding size and weight under Subtitle E of Title 7 of the Transportation Code; and update application requirements to allow applicants that are required to file a surety bond under Transportation Code, §623.075 to file an electronic copy, rather than a paper copy.

REASONED JUSTIFICATION.

The amendment to §219.11(c)(1) creates an exception for a permit application under §219.14(b), which prescribes the permit application requirements that are unique to a manufactured house as defined by Transportation Code, §623.091. A permit applicant for a permit regarding a manufactured house under §219.14 must provide additional specific information to the department, as explained below regarding the amendments to §219.14(b). The amendment to §219.11(c)(1) clarifies that the more specific requirements in §219.14(b) control over the more general requirements in §219.11(c)(1).

The amendments to §219.11(c)(1)(A) and (B) modify the application requirements to provide the department with the information it needs to process an application and to contact the correct person if there are updates to the permit restrictions. The amendments require the applicant to provide the department with the name, telephone number, and email address of the contact person, and delete the requirement for the applicant to provide the department with the applicant's telephone number and email address. The applicant could be a large corporation with different contact people for different permits. Having the contact person's email address and telephone number enables the department to communicate more efficiently with the applicant and any permit holder. The amendments also move the requirement for the applicant to provide its customer identification number from subparagraph (B) to subparagraph (A).

An amendment to §219.11(c)(1)(C) removes the requirement for a permit applicant under Subchapter B of Chapter 219 to provide their motor carrier registration (MCR) number to the department. An MCR number is issued to a motor carrier in a certificate of registration under Transportation Code, Chapter 643. The department no longer needs the MCR number in an application for a permit under Subchapter B of Chapter 219 because the department's Texas Permitting and Routing Optimization System (TxPROS or permitting system) can search the federal motor carrier system by using the applicant's United States Department of Transportation (USDOT) Number to determine if the applicant has an MCR number under Transportation Code, Chapter 643 if necessary. Transportation Code, §623.075 and §623.094 state when it may be necessary for the department to know if a permit applicant under Subchapter B of Chapter 219 has an MCR number.

An amendment to §219.11(c)(1)(C) clarifies whether the permit applicant must provide their USDOT Number. The amendment replaces the words "if applicable" with the more precise explanation "if applicant is required by law to have a USDOT Number" because federal law and Texas law prescribe when a motor carrier must have a USDOT Number. For example, 49 U.S.C. §31134 requires an employer or person to be registered by the Secretary of Transportation and obtain a USDOT Number in order to operate a commercial motor vehicle in interstate transportation. Transportation Code, §643.064 requires a motor carrier to have and maintain a USDOT Number if they are required to register with the department under Subchapter B of Chapter 643 of the Transportation Code to engage in intrastate transportation in Texas.

A motor carrier's USDOT number is used as its identification number in state and federal agencies' databases and tracking systems that contain information the department needs to evaluate an applicant for a permit. To leverage this ease of reference and consistent identification that a USDOT number provides, amendments to the following sections conform with the requirement in §219.11(c)(1)(C) for a permit applicant to provide their USDOT Number if the applicant is required by law to have a USDOT Number: §§219.14(b), re-lettered 219.30(c)(2), 219.31(b)(2), 219.32(c)(2), 219.33(b)(2), 219.34(b)(2), 219.35(b)(2), 219.36(b)(2), 219.41(b), and 219.61(b). As previously explained, the department's permitting system can search the federal motor carrier system by using the motor carrier's USDOT Number to determine if the applicant has a certificate of registration under Chapter 643, which allows the department to determine, for example, whether certain applicants for permits for oil well-related vehicles are eligible for a permit because an applicant is not eligible if the applicant has a certificate of registration under Chapter 643. As another example, the department needs the permit applicant's USDOT Number to query the federal motor carrier system to determine the following: 1) whether the Federal Motor Carrier Safety Ad-

ministration (FMCSA) placed the applicant out of service, which prohibits the applicant from engaging in interstate transportation on a public roadway; or 2) whether the Texas Department of Public Safety (DPS) issued the applicant an order to cease, which prohibits the applicant from engaging in intrastate transportation on a public roadway. Transportation Code, §623.004, which was enacted by House Bill 2620, 86th Legislature, Regular Session (2019), authorizes the department to deny a permit application under Subtitle E of Title 7 of the Transportation Code if the applicant is subject to an out-of-service order issued by FMCSA, if DPS determined the applicant has an unsatisfactory safety rating under 49 C.F.R. Part 385, or if DPS determined the applicant has multiple violations of Transportation Code, Chapter 644, a rule adopted under Chapter 644, or Subtitle C of Title 7 of the Transportation Code. Making the USDOT number a consistent application requirement for permits is necessary for the department to get the information it needs to vet the permit applications under Transportation Code, §623.004.

Amendments to §219.11(l)(1) delete language regarding hazardous conditions during which movement of a permitted vehicle is prohibited and renumber the remaining paragraphs. This amendment is necessary because DPS and FMCSA, rather than the department, have the statutory authority to determine when road conditions are hazardous for vehicle movement. Transportation Code, §644.051 gives DPS the authority to adopt rules regulating the safe operation of commercial motor vehicles, including the authority to adopt by reference all or part of the federal safety regulations. DPS adopted 49 C.F.R. §392.14 by reference in 37 TAC §4.11(a). Section 392.14 regulates the operation of a commercial motor vehicle regarding hazardous conditions. Together, 49 C.F.R. §392.14 and 37 TAC §4.11(a) regulate the operation of a commercial motor vehicle regarding hazardous conditions for both interstate and intrastate transportation. Also, even if a permittee is not operating a commercial motor vehicle, the Rules of the Road (Subtitle C of Title 7 of the Transportation Code) include provisions that govern the safe operation of a vehicle, such as Transportation Code, §545.401, which says a person commits an offense if the person drives a vehicle in willful or wanton disregard for the safety of persons or property. To align with the amendments to §219.11(l), the following provisions were also amended to delete the language regarding hazardous conditions during which movement of a permitted vehicle is prohibited and to renumber or re-letter the remaining subdivisions within these sections as necessary: §§219.13(e)(6), 219.32(h), 219.33(c), 219.34(e), 219.35(g), 219.36(g), 219.41(d), and 219.61(d).

Additionally, other sections cross-reference §219.11(l). While these sections were not amended, the meaning of the provisions that cite to §219.11(l) were impacted by the amendments to §219.11(l). The deletion of the language regarding hazardous conditions in §219.11(l) had the effect of removing hazardous conditions from §§219.13(a), 219.13(e)(1)(C), 219.16(e), and 219.31(h).

An amendment to §219.11(n) authorizes applicants for permits to file an electronic copy of a surety bond that a permit applicant must file with the department under Transportation Code, §623.075(c). Transportation Code, §623.074(d) authorizes the department to adopt a rule to authorize an applicant to submit an application electronically. Prior to this amendment, permit applicants were required to file an original surety bond (the paper version with the original signature) with the department under §219.11(n)(1)(A)(iv) and (2)(B). New §219.11(n)(4) allows permit applicants to file their bonds electronically, providing a convenience for permit applicants that want to file their bonds electronically, potentially reducing costs for the department, and potentially streamlining the department's process. An electronic copy of a surety bond is legally enforceable under Texas Business and Commerce Code, §322.007. Moreover, the department currently maintains its records in electronic format, scanning a copy of the original surety bond and destroying the original as authorized by the Texas Department of Transportation (TxDOT). The amendment removes the scanning step from the department's process to the extent the applicant chooses to file an electronic copy of its surety bond with the department, rather than filing the original surety bond.

Amendments to §219.11(n) delete language that was inconsistent with the amendment to allow a permit applicant to file an electronic copy of the surety bond. The department deleted the following: the requirement for the bond to have an original signature under §219.11(n)(1)(A)(iv), the authority for an applicant to file a facsimile or electronic copy of the surety bond as long as the original surety bond is received by the department within 10 days under §219.11(n)(2)(B), and the restriction on the department issuing the applicant a permit until the original surety bond has been received by the department under §219.11(n)(2)(B). None of these requirements were necessary because new §219.11(n)(4) allows electronic filing of surety bonds.

Other amendments to §219.11(n) removed language in §219.11(n)(1)(C) regarding TxDOT's process for making a claim on a surety bond. TxDOT's process for making a claim against a surety bond should not be included in the department's rules because the department does not have statutory authority to set processes for TxDOT through rule. Section 219.11(n)(1)(C) was a relic from a time when TxDOT was responsible for implementing and administering Subtitle E of Title 7 of the Transportation Code and was no longer necessary or appropriate in the department's rule. This amendment also removes the reference to a bond under Transportation Code, §623.163 because the §623.163 bond is addressed in §219.3.

New §219.11(n)(1) through (3) set out the procedures for filing surety bonds with the department for clarity and ease of reference. New paragraphs (1) through (3) consist of rearranged and edited language found in the following subdivisions that existed under §219.11(n) prior to the adoption of these amendments: §§219.11(n)(1)(A)(ii) (minus the unnecessary language that provides an example), 219.11(n)(1)(A)(iii), 219.11(n)(1)(A)(iv), 219.11(n)(1)(A)(v), 219.11(n)(1)(A)(vi), 219.11(n)(1)(B), and 219.11(n)(2)(A).

Other amendments to §219.11(n) remove all or part of the language in the following subdivisions that existed under §219.11(n) prior to the adoption of these amendments because the language was redundant and duplicative of Transportation Code, §623.075, and therefore unnecessary in rule: §§219.11(n)(1)(A)(i), 219.11(n)(1)(D), and 219.11(n)(2)(E) and (F). The deletion of §219.11(n)(2)(F) also removed the reference to Chapter 645 of the Transportation Code because Senate Bill 1814, 87th Legislature, Regular Session (2021) removed the reference to Chapter 645 from Transportation Code, §623.075. Amendments deleted §219.11(n)(2)(C) and (D) because they were unnecessary interpretations of the exemption in Transportation Code, §623.075(b)(1).

Amendments to §219.14(b) update the permit application requirements to be consistent with the format and application requirements in §219.11(c), while omitting unnecessary requirements and customizing the requirements to comply with Sub-

chapter E of Chapter 623 of the Transportation Code. Amended §219.14(b)(1) clarifies that the permit applicant must submit the application to the department.

Amendments to §219.14(b)(2) modify the application requirements to provide the department with the information it needs to process an application and to contact the correct person if there are updates to the permit restrictions. The amendments require the applicant to provide the department with the name, customer identification number, and address of the applicant. The department needs the name of the applicant, so the department has the name of the person to whom the department issues a permit. The applicant's name and address will help law enforcement to enforce Transportation Code, §621.511, which makes it an offense if a person operates or moves a vehicle on a public highway under a permit when the person is not the person named on the permit or an employee of the person named on the permit. Also, the department cannot issue a permit unless the applicant provides their customer identification number, which the applicant can obtain from the department at no cost.

The amendments also require the applicant to provide the department with the name, telephone number, and email address of the contact person. Having the contact person's email address and telephone number enables the department to communicate more efficiently with the applicant and any permit holder. The applicant could be a large corporation with different contact people for different permits.

The amended §219.14(b)(2) also includes rearranged and edited language found in §219.14(b)(1) prior to the adoption of these amendments and incorporates the specific requirements which are unique to manufactured houses as defined by Transportation Code, §623.091. The permit applicant must provide a description of the manufactured home and the dimensions of the manufactured home to the department, so the department can include certain information on the permit as required by Transportation Code, §623.093. Amended §219.14(b)(2) also states that the permit applicant must provide any other information required by law, including the information listed in Transportation Code, §623.093(a).

An amendment to §219.14(b) deletes the following language which is included in Transportation Code, §623.093 because it is not necessary to repeat statutory language in a rule: "If the manufactured home is being moved to or from a site in this state where it has been, or will be, occupied as a dwelling, the permit must also show the name of the owner of the home, the location from which the home is being moved, and the location to which the home is being delivered." An amendment to §219.14(b) deleted the language §219.14(b)(2) that existed prior to the adoption of these amendments because the language was an unnecessary cross-reference that did not add clarity.

Amendments to §219.30 removed language that was duplicative with statute because it is not necessary to repeat statutory language in a rule. An amendment to §219.30(c) deleted language that is in Transportation Code, §623.011(b)(1). An amendment to re-lettered §219.30(d) deleted language that is in Transportation Code, §623.012 and the reference to the state highway system, which was removed by Senate Bill 1814, 87th Legislature, Regular Session (2021). Amendments to §219.30 re-lettered the remaining subsections, as well as an internal cross-reference to re-lettered subsection (e), due to the deletion of subsections (c) and (d).

An amendment to re-lettered §219.30(c)(1) updated the language to be consistent with the language in other sections of Chapter 219 regarding permit applications by stating the person must submit an application to qualify for the permit. An amendment to re-lettered §219.30(c)(2)(A) requires the applicant to provide its customer identification number because the department cannot issue a permit without the customer's identification number. The applicant can obtain a customer identification number from the department at no cost. An amendment to §219.30(c)(2)(B) rearranged the language for clarity. An amendment to re-lettered §219.30(c)(2)(B) also requires the applicant to provide an email address for its contact person to enable the department to communicate more efficiently with the applicant's contact person. Having an email address for the permittee's contact person enables the department to disseminate information more quickly and easily. For example, if the department wants to amend the permit because of a new restriction provided by TxDOT, the department will be able to send an email to the permit holders regarding the new restriction, so they can receive the update as soon as possible and print an updated permit. As another example, when a safety issue arises like a new height restriction on a specific roadway that includes a bridge, the permit holders need to know about the new height restriction as soon as possible. The department will be able to send an email to the permit holders regarding the new height restriction, which will reach the permittees more quickly than phone calls, which can be a slow process, especially if the department must call a large number of permit holders. Also, the department's permitting staff currently contact applicants and permit holders by both email and telephone, depending on the issue. For these reasons, similar amendments were made to the following sections to require applicants to provide email addresses: §§219.14(b), 219.31(b), 219.32(c), 219.33(b), 219.34(b), 219.35(b), and 219.36(b).

An amendment to re-lettered §219.30(c)(2)(C) requires the applicant to provide vehicle registration information because Transportation Code, §623.011(b)(1) says the vehicle must be registered under Transportation Code, Chapter 502 for the maximum gross weight applicable to the vehicle under Transportation Code, §621.101, not to exceed 80,000 pounds. Other amendments to re-lettered §219.30(c)(2)(C) require the permit applicant to provide the truck year and vehicle identification number. The department needs the vehicle information for investigations regarding possible administrative enforcement actions and to provide to law enforcement officers who use the information to enforce the laws regarding size and weight under Subtitle E of Title 7 of the Transportation Code. For example, law enforcement officers use vehicle information to verify whether a permit is being used for more than one vehicle in violation of the law.

Amendments to re-lettered §219.30(h)(4) substitute the word "permittee" for the word "applicant" and add the replacement of the letter of credit or bond to be consistent with Transportation Code, §623.012(c) and (d). An amendment to re-lettered §219.30(h) replaces the reference to deleted §219.30(d) with a reference to Transportation Code, §623.012, which contains the relevant language. Amendments to §219.30 delete subsections (k) and (l) because the applicable statutes do not provide the authority to void the permit for the reason stated in subsection (k).

An amendment to §219.31(b)(2)(A) requires the applicant to provide its customer identification number because the department cannot issue a permit without the customer's identification number. The applicant can obtain a customer identification

number from the department at no cost. An amendment to §219.31(b)(2)(A) also deletes the requirement for the applicant to provide its telephone number and email address because §219.31(b)(2)(B) already requires the applicant to provide the department with the contact information for the applicant's contact person. An amendment to §219.31(b)(2)(B) also rearranges the language for clarity.

An amendment to §219.32(c)(2)(A) requires the applicant to provide its customer identification number because the department cannot issue a permit without the customer's identification number. The applicant can obtain a customer identification number from the department at no cost. An amendment to §219.32(c)(2)(B) also rearranges the language for clarity. For these reasons, similar amendments were made to the following sections: §§219.33(b), 219.34(b), 219.35(b), and 219.36(b).

An amendment to re-lettered §219.32(h) clarifies that the city's curfew movement restrictions do not apply unless the department publishes the curfew movement restrictions. The department only publishes the curfew movement restrictions if TxDOT approves the restrictions. Currently, the department publishes the curfew movement restrictions on the department's website.

Amendments to §219.33(a), (c), and (d) delete reference to an emergency declared by the president of the United States under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, (42 U.S.C. §5121, *et seq.)* (Stafford Act) because Transportation Code, §623.341(a) and 23 U.S.C. §127(i) only authorize the federal disaster relief permit if the president of the United States issues a major disaster declaration. The federal disaster relief permit authorizes an overweight vehicle that will be used to deliver relief supplies to exceed legal weight up to the axle weights and gross weight listed in §219.33(c), even if the vehicle is transporting a divisible load. Subject to the restrictions and conditions in §219.33, the permitted vehicle is authorized to exceed legal weight on state highways, including the National System of Interstate and Defense Highways.

Although 23 U.S.C. §127(i) uses the term "emergency," §127(i)(1)(A) says a state may issue these special permits if the president has declared the emergency to be a "major disaster" under the Stafford Act. An emergency declaration is different than a major disaster declaration under the Stafford Act. Section 5170 of the Stafford Act provides the procedures for the president to declare a major disaster, which is defined in §5122 of the Stafford Act. Section 5191 of the Stafford Act provides the procedure for the president to declare an emergency, which is defined in §5122.

The Federal Highway Administration (FHWA) is a government agency within the United States Department of Transportation that supports state and local governments in the design, construction, and maintenance of the U.S. highway system. FHWA's website explains that through financial and technical assistance to state and local governments, FHWA is responsible for ensuring that America's roads and highways continue to be among the safest and most technologically sound in the world.

FHWA issued a memo on June 5, 2013, regarding the Public Law which enacted 23 U.S.C. §127(i) in which FHWA stated as follows: "Section 1511 of MAP-21 extends the States' authority to issue Special Permits to vehicles with divisible loads that are delivering relief supplies during a Presidentially-declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") (42 U.S.C. 5121 et seq.)." The memo, titled "MAP-21, Section 1511 - Special Permits During Periods of National Emergency Implementation Guidance, Revised," was available on FHWA's website as of October 31, 2023. FHWA's June 5, 2013, memo is from FHWA's Associate Administrator for Operations to the Division Administrators, Directors of Field Services, and Director of Technical Services. Although the department previously relied on FHWA's June 5, 2013, memo when enacting §219.33, the department amended §219.33(a), (c), and (d) to delete the reference to an emergency because Transportation Code, Section §623.341(a) and 23 U.S.C. §127(i) only authorize this special permit if the president issues a major disaster declaration for the reasons previously stated.

Amendments to §219.33(c)(3) and re-numbered (c)(4) were necessary to clarify that the city's curfew movement restrictions do not apply unless the department publishes the curfew movement restrictions. The department only publishes the curfew movement restrictions if TxDOT approves the restrictions. Currently, the department publishes the curfew movement restrictions on its website.

An amendment to re-numbered §219.33(c)(7) specifies that a permit will expire 120 days after the date of a disaster because the department's permitting system does not calculate the expiration date for each federal disaster relief permit. Under Transportation Code, §623.341(b) and 23 U.S.C. §127(i), the permit expires not later than the 120th day after the date the president declares a major disaster. The department's permitting system issues permits for 120 days after the major disaster declaration and does not print the expiration date on the permits. The amendment to re-numbered §219.33(c)(7) deleted language that said the expiration date is listed in the permit and replaced that language with language that says the permit will expire 120 days after the date of the major disaster declaration. The amended language is consistent with Transportation Code, §623.341(b) and 23 U.S.C. §127(i).

Amendments to §219.33(d) were necessary because in practice, only the notice of the president's major disaster declaration is available on the White House website and the Federal Emergency Management Agency's website. The official declaration that is signed by the president does not appear to be readily available to the public, so the department should only require a person to carry a copy of the notice of declaration in the permitted vehicle, along with the permit. If the permittee is stopped by law enforcement, the documentation will help the peace officer determine whether the permit was issued under a major disaster declaration issued by the president and whether the permit is valid under §219.33 and Transportation Code, §623.341.

Amendments to §219.41(b) modified the application requirements to provide the department with the information it needs to process an application under Subchapter D of Chapter 219 and to contact the correct person if there are updates to the permit restrictions. An amendment to §219.41(b)(1) requires the applicant to provide its customer identification number because the department cannot issue a permit without the customer's identification number. The applicant can obtain a customer identification number from the department at no cost. An amendment to §219.41(b)(1) also deleted the requirement for the applicant to provide its telephone number and email address because an amendment to §219.41(b)(2) requires the applicant to provide the department with the name, telephone number, and email address for the applicant's contact person. The applicant could be a large corporation with different contact people for different permits. Having an email address for the

permittee's contact person enables the department to disseminate information more quickly and easily, including information that could impact the safety of the traveling public, such as a new permit restriction provided by TxDOT. Transportation Code, §623.145 requires the board of the Texas Department of Motor Vehicles (board) and the Texas Transportation Commission to consider the safety and convenience of the general traveling public when adopting rules regarding the issuance of permits for oil well servicing and drilling machinery under Subchapter G of Chapter 623 of the Transportation Code. An amendment to §219.41(b)(2) and (3) removed the year and make of the unit from paragraph (2) and combined this language with the language in paragraph (3) regarding the identification number of the unit. For these reasons, similar amendments were made to §219.61(b) regarding an application for a crane, which provisions apply to permit applications under Subchapter E of Chapter 219. Transportation Code, §623.195 requires the board and the Texas Transportation Commission to consider the safety and convenience of the general traveling public when adopting rules regarding the issuance of permits for cranes (a/k/a unladen lift equipment motor vehicles) under Subchapter J of Chapter 623 of the Transportation Code.

An amendment to §219.41 deletes subsection (e) regarding void permits because it overstates the language in Transportation Code, §623.146 regarding the ramifications of an owner's or an owner's representative's violation of a rule of the board or a violation of a condition placed on the permit. An amendment to §219.41 deleted subsection (g) regarding records retention because §219.102(b) already includes language that requires the permit to be kept in the permitted vehicle until the permit terminates or expires. Amendments to §219.41 re-lettered the remaining subsections due to the deletion of subsections (e) and (g).

Amendments to §219.43(f) and §219.63(a)(7) eliminated the implication that a hubometer serial number is required to be listed on the permit and conformed the language to current practice. An amendment to §219.43(f) and §219.63(a)(7) clarified that an amendment can be made to the hubometer serial number on the permit if a hubometer serial number is listed on the permit.

Transportation Code, §623.145 and §623.195 require the board to consult with the Texas Transportation Commission prior to the adoption of certain rules regarding oversize and overweight permits for the operation of oil well servicing and drilling machinery and unladen lift equipment motor vehicles. To comply with these statutory requirements, the board consulted with the Texas Transportation Commission on the amendments to 43 TAC §§219.41, 219.43, 219.61, and 219.63. The department provided the proposed amendments to the Texas Transportation Commission through TxDOT's staff. The Texas Transportation Commission considered the proposed amendments at its public meeting on October 26, 2023, and entered a Minute Order to document compliance with Transportation Code, §623.145 and §623.195.

SUMMARY OF COMMENTS.

No comments on the proposed amendments were received.

SUBCHAPTER B. GENERAL PERMITS

43 TAC §§219.11, 219.13, 219.14

STATUTORY AUTHORITY.

The department adopts amendments under Transportation Code, §621.008, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 621; Transportation Code, §622.002, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 622, including Transportation Code, §622.051, *et seq.* which authorize the department to issue a permit for transporting poles required for the maintenance of electric power transmission and distribution lines; Transportation Code, §623.002, which authorizes the board to adopt rules as necessary to implement Transportation Code, Chapter 623; Transportation Code, §623.004, which authorizes the department to deny a permit application if the applicant is subject to an out-of-service order issued by FMCSA or an order to cease issued by DPS; Transportation Code, §623.070, *et seq.* which authorize the department to issue a permit to an applicant to move certain equipment or commodities and prescribe the application requirements for such permits; Transportation Code, §623.074(d), which authorizes the department to adopt a rule to authorize an applicant to submit an application electronically; Transportation Code, §623.095(c), which authorizes the department to adopt rules concerning the requirements for a permit under §623.095(c) regarding an annual permit for a person authorized to be issued permits under Transportation Code, §623.094 for the transportation of new manufactured homes from a manufacturing facility to a temporary storage location not to exceed 20 miles from the point of manufacture; Transportation Code, §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; and the statutory authority referenced throughout the preamble.

CROSS REFERENCE TO STATUTE. The amendments implement Transportation Code, Chapters 621, 622, and 623; and Government Code, Chapter 2001.

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

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SUBCHAPTER C. PERMITS FOR OVER AXLE AND OVER GROSS WEIGHT TOLERANCES

43 TAC §§219.30 - 219.36

STATUTORY AUTHORITY.

The department adopts amendments under Transportation Code, §621.008, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 621; Transportation Code, §622.002, which authorizes the board to adopt rules that are necessary to

implement and enforce Transportation Code, Chapter 622; Transportation Code, §623.002, which authorizes the board to adopt rules as necessary to implement Transportation Code, Chapter 623; Transportation Code, §623.004, which authorizes the department to deny a permit application if the applicant is subject to an out-of-service order issued by FMCSA or an order to cease issued by DPS; Transportation Code, §623.342, which authorizes the board to adopt rules that are necessary to implement Subchapter R of Chapter 623 of the Transportation Code regarding federal disaster relief permits; Transportation Code, §623.411, which authorizes the department to adopt rules that are necessary to implement Subchapter U of Chapter 623 of the Transportation Code regarding the permit for intermodal shipping containers; Transportation Code, §623.427, which authorizes the department to adopt rules that are necessary to implement Subchapter V of Chapter 623 regarding the permit for fluid milk; Transportation Code, §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; and the statutory authority referenced throughout the preamble.

CROSS REFERENCE TO STATUTE. The amendments implement Transportation Code, Chapters 621, 622, and 623; and Government Code, Chapter 2001.

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SUBCHAPTER D. PERMITS FOR OVERSIZE AND OVERWEIGHT OIL WELL RELATED VEHICLES

43 TAC §219.41, §219.43

STATUTORY AUTHORITY.

The department adopts amendments under Transportation Code, §621.008, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 621; Transportation Code, §622.002, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 622; Transportation Code, §623.002, which authorizes the board to adopt rules as necessary to implement Transportation Code, Chapter 623; Transportation Code, §623.004, which authorizes the department to deny a permit application if the applicant is subject to an out-of-service order issued by FMCSA or an order to cease issued by DPS; Transportation Code, §623.145, which authorizes the board, in consultation with the Texas Transportation Commission, by rule to provide for the issuance of permits under Subchapter G of Chapter 623 of the Transportation Code regarding oil well servicing and drilling machinery; Transportation Code, §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; and the statutory authority referenced throughout the preamble.

CROSS REFERENCE TO STATUTE. The amendments implement Transportation Code, Chapters 621, 622, and 623; and Government Code, Chapter 2001.

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SUBCHAPTER E. PERMITS FOR OVERSIZE AND OVERWEIGHT UNLADEN LIFT EQUIPMENT MOTOR VEHICLES

43 TAC §219.61, §219.63

STATUTORY AUTHORITY.

The department adopts amendments under Transportation Code, §621.008, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 621; Transportation Code, §622.002, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 622; Transportation Code, §623.002, which authorizes the board to adopt rules as necessary to implement Transportation Code, Chapter 623; Transportation Code, §623.004, which authorizes the department to deny a permit application if the applicant is subject to an out-of-service order issued by FMCSA or an order to cease issued by DPS; Transportation Code, §623.195, which authorizes the board, in consultation with the Texas Transportation Commission, by rule to provide for the issuance of permits under Subchapter J of Chapter 623 of the Transportation Code regarding cranes; Transportation Code, §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures; and the statutory authority referenced throughout the preamble.

CROSS REFERENCE TO STATUTE. The amendments implement Transportation Code, Chapters 621, 622, and 623; and Government Code, Chapter 2001.

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