ADOPTED RULES

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

TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.7

Introduction. The Texas Board of Nursing (Board) adopts amendments to §217.7, relating to Change of Name and/or Address, without changes to the proposed text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8701). The rule will not be republished.

Reasoned Justification. On June 15, 2020, the Board launched the Texas Nurse Portal. The Texas Nurse Portal is a paperless, online system that allows individuals to apply for nurse licensure by examination, endorsement, or renewal. In an effort to continue moving the Board's work flow to a paperless system, the adopted amendments require all name and address changes to be made online through the Texas Nurse Portal.

How the Section Will Function. Adopted §217.7(a) requires a nurse or applicant to notify the Board within ten days of a change of name by submitting a legal document reflecting the name change in the Texas Nurse Portal accessible through the Board's website.

Adopted §217.7(b) requires a nurse or applicant to notify the Board within ten days of a change of address by submitting the new address in the Texas Nurse Portal accessible through the Board's website.

Summary of Comments Received. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the authority of the Occupations Code §301.151. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

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 January 7, 2021.

TRD-202100103

Jena Abel
Deputy General Counsel
Texas Board of Nursing
Effective date: January 27, 2021
Proposal publication date: December 4, 2020
For further information, please call: (512) 228-1862

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.15

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020, adopted an amendment to §53.15, concerning Miscellaneous Fisheries and Wildlife Licenses and Permits. The amendment is adopted with changes to the proposed text as published in the September 25, 2020, issue of the *Texas Register* (45 TexReg 6707). The rule will be republished.

The amendment reorganizes the existing fee structure for controlled exotic species permits authorizing the possession of harmful or potentially harmful fish, shellfish, and aquatic plants and establishes fees for proposed, multi-year renewals of commercial aquaculture permits. The amendment is largely nonsubstantive (i.e., most current fee amounts would not be changed except for commercial aquaculture permits to account for the need for more frequent facility inspections).

The amendment establishes the fee structure and amounts for the issuance of multi-year permits for controlled exotic permits issued for commercial aquaculture. Current rules provide for a one-year period of validity for exotic species permits with the possibility of annual renewal thereafter. Under the current rules, the initial fee for permit issuance is $263, which consists of a $27 administrative fee and a one-time facility inspection fee of $236. In another rulemaking published elsewhere in this issue of the *Texas Register,* the department adopts new rules governing permits to possess controlled exotic species. Among other things, the new rules require all commercial aquaculture facilities to be inspected at least once every five years but also allow for the issuance of multi-year permit renewals (three years or five years)

to commercial aquaculture permit holders who are in good standing and have no history of violations for the preceding period of the same duration as the renewal period. The amendment to §53.15 updates the fee for a one-year renewal to $74, establishes a fee for a three-year renewal of a commercial aquaculture permit of $168, and establishes a fee for a five-year renewal of a commercial aquaculture permit of $263. These fees represent, in each case, $27 for the one-time administrative fee, plus a pro-rated annual inspection fee ($236 divided by the five-year interval period for inspections). Totals for the renewal fees for the multi-year permits were rounded to the nearest whole dollar amounts.

Changes to the rule between publication of the proposal and publication of the adopted rule text include restoration of subsection (h), which was omitted from the proposal, as well as non-substantive changes to make the rule style-consistent.

The department received one comment opposing adoption of the rule as proposed. The commenter stated that the new fee structure is unfair because it includes an inspection fee when inspections will be less frequent and therefore amounts to a doubling of fees. The department disagrees with the comment and responds that the rule as adopted neither doubles fees nor reduces the frequency of an activity for which a fee is required under current rule. Rather, the amendment pro-rates inspection fees according to the need for inspection and, in practice, increases the frequency of inspections. No changes were made as a result of the comment.

The department received one comment supporting adoption of the rule as proposed.

The amendment is adopted under the authority of Parks and Wildlife Code, §66.007, which authorizes the department to make rules necessary to authorize the import, possession, sale, or introduction of harmful or potentially harmful exotic fish.

§53.15. Miscellaneous Fisheries and Wildlife Licenses and Permits.

(a) Trap, transport and transplant permit application fees:

(1) nonrefundable application processing fee--$750 per release site; and

(2) nonrefundable application processing fee for amendment to existing permit--$30. If the amendment includes additional release sites, the fee prescribed by paragraph (1) of this subsection shall be imposed for each additional release site.

(b) Game bird and animal breeding licenses:

(1) game animal breeder's--$79;

(2) class 1 commercial game bird breeder's--$189; and

(3) class 2 commercial game bird breeder's--$27.

(c) Commercial nongame permits:

(1) resident nongame permit--$19;

(2) nonresident nongame permit--$63;

(3) resident nongame dealer permit--$63;

(4) nonresident nongame dealer permit--$252;

(5) nongame species sales permit--$210; and

(6) nongame species sales permit renewal--$210.

(d) Zoological collection permit application--$158;

(e) Scientific research permit application--$53;

(f) Educational display permit application--$53;

(g) Controlled Exotic Species (fish, shellfish and aquatic plants):

(1) water spinach culture permit--$263;

(2) exotic fish or shellfish commercial aquaculture permit:

(A) Initial issuance--$263;

(B) One-year renewal--$74;

(C) Three-year renewal--$168; and

(D) Five-year renewal--$263.

(3) triploid grass carp permit fee--$16, plus $2 per triploid grass carp requested (the $2 per fish fee is refundable if the permit application is denied);

(4) exotic species interstate transit permit:

(A) single-use--$27;

(B) one-year authorization--$105.

(5) research, biological control production, zoological display, and limited special purpose permits (other than for triploid grass carp); initial, renewal, or amendment requiring facility inspection--$263; and

(6) research, biological control production, zoological display, and limited special purpose permits (other than for triploid grass carp); initial, renewal or amendment not requiring facility inspection--$27.

(h) Miscellaneous fees:

(1) commercial plant permit--$50;

(2) aerial management permit--$210;

(3) broodstock permit application--$25;

(4) permit to introduce fish, shellfish, or aquatic plants--no fee;

(5) offshore aquaculture permit or renewal--$1,575;

(6) oyster lease application--$200;

(7) oyster lease renewal/transfer/sale--$200; and

(8) double-crested cormorant control permit--$13.

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 57. FISHERIES

SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL FISH, SHELLFISH, AND AQUATIC PLANTS

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020 adopted the repeal of 31 TAC §§57.112 - 57.137, an amendment to §57.111, and new §§57.112 - 57.128, concerning Harmful or Potentially Harmful Fish, Shellfish and Aquatic Plants. Section 57.125 is adopted with changes to the proposed text as published in the September 25, 2020, issue of the *Texas Register* (45 TexReg 6714). Sections 57.111 - 57.124 and 57.126 - 57.128 are adopted without change and will not be republished.

The change to §57.114, concerning Controlled Exotic Species Permits, inserts qualifying language in subsection (f)(1) to clarify that the provisions include limited special purpose permits for private pond stocking. The intent of the provision is established contextually by the applicability of other provisions; the change makes that applicability unambiguous.

The change to §57.125, concerning Reporting, Recordkeeping, and Notification Requirements adds language to subsection (b)(3)(B) to clarify that the exemption for reporting requirements by commercial aquaculture facility permit holders applies only to tilapia and not to any other species held under the permit. The change also alters the reporting deadline established in subsection (b)(2). The deadline as published was January 30. It should have been January 31. The changes are nonsubstantive.

The repeals, amendment and new sections are intended to reorganize to enhance readability by making location of the applicable rules more straightforward, updating current rules, and providing additional flexibility where possible to the regulated community while providing for the protection of native organisms and ecosystem from the potential threats posed by harmful and potentially harmful exotic species.

The amendment of §57.111, concerning Definitions, consists of several actions. The amendment eliminates the definitions of "aquaculturist or fish farmer" and "cultured species." The terms are not used in the new rules.

The amendment also eliminates the definitions of "harmful or potentially harmful exotic fish," "harmful or potentially harmful exotic shellfish," and "harmful or potentially harmful exotic plants." The current definitions are not actual definitions, but lists of organisms to which the provisions of the subchapter apply and more properly belong in the body of the rules rather than the section devoted to definitions.

The amendment also eliminates the definition of "immediately" because the department has determined that the common and ordinary meaning of the word is sufficient for the purposes of the new rules.

The amendment also eliminates the definition of "operator" because the word appears only once in the new rules and the department has determined that the common and ordinary meaning of the word is sufficient.

The amendment also eliminates the definition of "place of business" because the definition isn't useful in the context of the new rules.

The amendment also eliminates the definition of "private facility." The term is not used in the new rules.

Similarly, the amendment also eliminates the definition of "private facility effluent" because it is not used in the new rules.

The amendment also eliminates the definition of "public aquarium." The new rules do not require facilities applying for controlled exotic species permits for zoological display to have Association of Zoos and Aquariums (AZA) accreditation to be eligible for a permit.

The amendment adds new paragraph (1) to define "active partner" as "a governmental, quasi-governmental, or non-governmental organization or other entity that is currently engaged in department-coordinated efforts to monitor and/or manage controlled exotic species in Texas authorized by a letter of approval from the Director of the Inland Fisheries Division or Coastal Fisheries Division (or their designee) of the Texas Parks and Wildlife Department, as appropriate." This definition is needed to clearly specify eligibility for such approval with regards to provisions in new §57.113(c) and (m) that are intended to facilitate partnerships that support the mission of the department.

The amendment adds new paragraph (2) to define "agent" as "a person designated to conduct activities on behalf of any person or permit holder who is authorized by a controlled exotic species permit or other provision of this subchapter to conduct those activities. For the purposes of this subchapter, the term "permit holder" includes their agent. The definition is necessary to clarify the meaning of this term and specify that authorizations under the new rules are also applicable to an agent.

The amendment redefines "aquaculture" to reference, rather than repeat, the meaning of this term as defined in the Agriculture Code (§134.001(4)).

The amendment adds new paragraph (5) to define "biological control agent" as "a natural enemy or predator of a plant or animal that can be used to control the growth, spread, or deleterious impact of that plant or animal." This definition is needed to clarify the intent of new §57.113(d), which authorizes the production and sale of biological control agents under a controlled exotic species permit to support efforts to manage controlled exotic species on public and private waters.

The amendment amends the current definition of "Clinical Analysis Checklist" to clarify that the referenced document applies to shrimp.

The amendment adds new paragraph (8) to define "common carrier" as "a person or entity that is in the business of shipping goods or products and not a party to a transaction under a permit issued under this subchapter." Current rules (§57.115(3)) stipulate that such transport is limited to a "commercial shipper." This definition and concomitant changes in regulatory terminology from "commercial shipper" to the widely recognized, broader term "common carrier" is needed to ensure that department rules do not interfere with shipping businesses that transport controlled exotic species.

The amendment adds new paragraph (9) to define "controlled exotic species" as "any species listed in §57.112 of this title (relating to Exotic Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants)," for reasons discussed earlier in this preamble.

The amendment adds new paragraph (10) to define "Controlled Exotic Species Permit" as "any permit issued under this subchapter that authorizes the import, propagation, possession, purchase, sale, and/or transport of a controlled exotic species,"

which is necessary to clarify the ambit of the meaning of that term.

The amendment adds new paragraph (11) to define "conveyance" as "any means of transporting persons, goods, or equipment on the water," which is necessary to provide an unambiguous meaning for the term as it is used in the subchapter.

The amendment eliminates the definition of "gutted" because the common and ordinary meaning of the word is sufficient for the purposes of the subchapter.

The amendment adds new paragraph (16) to define "disease inspector" as "an employee of the Texas Parks and Wildlife Department who is trained to perform clinical analysis of shrimp disease." The current definition of "certified inspector" refers to "a department employee who has completed a department-approved course in clinical analysis of shellfish." The department has determined that a more generic definition is necessary to enable the department to task additional human resources to inspection duties in order to expedite permit issuance and monitoring activities while ensuring that such personnel are properly trained.

The amendment adds new paragraph (17) to define "disease specialist" as "a third-party person approved by the department that possesses the education and experience to identify shellfish disease, such as a degree in veterinary medicine or a Ph.D. specializing in shellfish disease." The new definition is needed to expand the limited pool of qualified shrimp disease specialists available to conduct analyses of exotic shrimp aquaculture required by the new rules.

The amendment adds new paragraph (18) to define "dock or pier" as "a structure built over and/or floating on water that is used to provide access to water and/or for the mooring of boats." This definition is necessary to provide a precise explanation of the meaning of the term as it is employed in new §57.113.

The amendment adds new paragraph (19) to define "emergency" as "a situation or event beyond the control of any person, including but not limited to a natural disaster, power outage, or fire." The new definition is needed to create a specialized meaning of the term for purposes of identifying specific situations that trigger actions required by the new rules to be performed by a permit holder.

The amendment adds new paragraph (20) to rename "harmful or potentially harmful exotic species exclusion zone" as "exotic shrimp exclusion zone," which is necessary to reflect the fact that, as used in the new rules, the term only apply to exotic shrimp.

The amendment alters the current definition of "exotic species" to be more technically accurate. The current definition refers to organisms "not normally found in the waters of the state," which is scientifically inaccurate. Therefore, the amendment refers to "any aquatic plant, fish, or shellfish nonindigenous to this state."

The amendment adds new paragraph (22) to replace the term "aquaculture facility" with the term "facility" and define that term as "infrastructure, including drainage structures, at a location where controlled exotic species are possessed, propagated, cultured, or sold under a controlled exotic species permit, excluding private waters permitted for triploid grass carp stocking in accordance with §57.116 of this title (relating to Special Provisions--Triploid Grass Carp)." The amendment clarifies that ditches not used for drainage of aquaculture ponds or tanks are not considered part of a permitted facility, that transport is not an activity that takes place at the facility, and that private ponds permitted for triploid grass carp stocking are not subject to the facility requirements of the new rules.

The amendment adds new paragraph (23) to replace the term "aquaculture complex" with the term "facility complex" and define that term as "a group of two or more facilities located at a common site and sharing water diversion or drainage structures." The intent of the new definition is to remove an ambiguity that could be interpreted to mean that each facility within a complex must be separately owned.

The amendment adds new paragraph (24) to define "gill-cutting" as "cutting through the base of the gills on the underside of the fish." The new definition is necessary to provide an explicit meaning for an additional method of killing controlled exotic fish that be allowable under the new rules.

The amendment alters the definitions of "nauplius" and "postlarva" to include the plurals of those terms as well as a reference to the phylum to which the definition applies, which is necessary for purposes of precision.

The amendment redefines "private pond" as "a pond or lake capable of holding controlled exotic species of tilapia and/or triploid grass carp in confinement wholly within private land for non-commercial purposes." The amendment is necessary to clarify the species to which the term applies and that ponds used for the purpose of commercial aquaculture are not private ponds for the purposes of the new rules.

The amendment also changes the definition of "public water" to "public waters" and adds a citation to the statutory definition for that term.

The amendment also alters the definition for "quarantine condition" to more precisely communicate that the term means the physical separation of affected stock from other stock, fish or shellfish, or water of the state, which is necessary to prevent misunderstandings that could lead to adverse ecological impacts.

The amendment adds new paragraph (30) to define "recirculating aquaculture system" as "a system for culturing fish that treats or reuses all, or a major portion of the water and is designed for no direct offsite discharge of water." The new definition is needed because the new rules allow persons to hold controlled exotic species of tilapia without a permit and the department believes that such operations should be reasonably biosecure.

The amendment adds new paragraph (32) to define "tilapia and triploid Grass Carp regulatory zones" as "geographic conservation priority zones identified by the department where special provisions apply" and lists "conservation zone" and "stocking zone" designations for each county in Texas. This definition is needed for the purposes of ease of understanding, compliance with, and enforcement of the new rules.

The amendment revises current §57.111(32) to refer only to "Triploid Grass Carp;" definition of triploid black carp is no longer necessary under the new rules.

The amendment also revises the current definitions of "waste" and "water in the state" to make legal citations consistent with prevailing conventions.

Finally, the amendment alters the definition of "wastewater treatment facility" to clarify that the term includes "associated infrastructure, including drainage structures," in order to eliminate any ambiguity as to infrastructure subject to regulation under the subchapter.

New §57.112, concerning Exotic Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants, identifies the species of fish, shellfish, and aquatic plants to which the new rules apply and provides for the applicability of the new rules to organisms in instances where taxonomical nomenclature for a species has changed as a result of scientific consensus.

New §57.112(a) provides that, with respect to any given species, the new rules apply to any hybrid, subspecies, eggs, juveniles, seeds, or reproductive or regenerative parts of that species, which is necessary to specifically delineate the applicability of the new rules to organisms in their various life stages and hybrids. Similarly, new subsection (b) provides that scientific reclassification or change in nomenclature of taxa at any level in taxonomic hierarchy not, in and of itself, result in removal from the list of exotic harmful or potentially harmful species in this section. From time to time, scientific consensus regarding biological classification of organisms results in reclassification based on new information. Because the process of amending the list of species in the rules requires commission rule action under the Administrative Procedure Act, it is time consuming. The department believes it should be clear that rules apply to specific organisms, regardless of changes to the taxonomic identity of that organism. Finally, new subsection (c) consists of the fish, shellfish, and aquatic plants currently designated by the department as harmful or potentially harmful, which are being relocated from current §57.111, concerning Definitions, for reasons discussed previously in this preamble, with the addition of new species as follows.

The new rule designates the stone moroko *(Pseudorasbora parva)* as a harmful or potentially harmful exotic fish. The stone moroko is currently listed as an injurious wildlife species under the federal Lacey Act. This species is known to prey upon native fishes and has been known to contribute to rapid declines and even localized extinctions of some minnows as well as serving as a fish disease and parasite vector. Although this species has not yet been documented in the U.S., it is considered to have potential to be introduced into the U.S. as an aquaculture or ornamental fish shipment contaminant "an introduction pathway documented elsewhere" and then spread to new areas. If introduced in Texas, climate match analysis suggests this species has a high potential for survival in much of the state (i.e., climate match ~7 out of 10).

The department also designates the Amur sleeper *(Perccottus glenii)* as a harmful or potentially harmful exotic fish. The Amur sleeper is currently listed as an injurious wildlife species under the Lacey Act. This species is a fast-growing, voracious predator with high reproductive potential. It is known to prey upon many aquatic species and contribute to declines and displacement of amphibians and fishes--particularly in small water bodies where it may replace them altogether. Although this species has not yet been documented in the U.S., it is considered highly likely to be accidentally transported internationally. If introduced in Texas, climate match analysis suggests this species has an intermediatepotential for survival in areas of the state (i.e., climate match ~5 out of 10), primarily in lakes, and it is highly adaptable to new environments.

The department also designates the European perch (also called redfin; *Perca fluviatilis)* as a "harmful or potentially harmful exotic fish." The European perch is currently listed as an injurious wildlife species under the Lacey Act. This species is a habitat generalist, thriving in habitats from streams to lakes and brackish waters and can survive a wide range of physicochemical conditions (e.g., oxygen, salinity, temperature). It poses a significant threat as a known host for three fish diseases reportable to the World Organisation for Animal Health, including epizootic haematopoietic necrosis virus, which can decimate native fish populations. This species has not yet been documented in the U.S., and its potential to be introduced into the U.S. is not well-known. It has been intentionally introduced in numerous other countries "legally or illegally" as a sport fish with widespread documentation of detrimental impacts on native fisheries. If introduced in Texas, climate match analysis suggests this species has a high potential for survival in much of the state (i.e., climate match 6-7 out of 10).

The department designates the Wels catfish *(Silurus glanis)* as a "harmful or potentially harmful exotic fish." This species is currently listed as an injurious wildlife species under the Lacey Act. This species is a voracious predator that can grow to over 16 feet in length and poses a significant risk to native species, particularly bottom-dwelling species including other catfishes and mussels. It poses a significant threat as a known host for a fish disease reportable to the World Organisation for Animal Health, spring viraemia of carp" which affect not only carp but also numerous other fish species including native catfish. Although this species has not yet been documented in the U.S., the Wels catfish has become somewhat notorious as a "monster fish" and is considered to have potential to be introduced into the U.S. illegally via the underground pet trade. Elsewhere outside the U.S., this species has been intentionally introduced and spread as a sport fish "legally and illegally." If introduced in Texas, climate match analysis suggests this species has a moderate potential for survival in much of the state (i.e., climate match 5-6 out of 10).

The department designates mud snails of the family Hydrobiidae as "harmful or potentially harmful exotic shellfish." This family includes highly invasive species such as the New Zealand mudsnail, *Potamopyrgus antipodarum.* This species is known to attain extremely high-density populations in excess of 300,000 snails per square meter and has potential to foul and impact facilities drawing water from infested lakes. This species is currently found in most western states "including nearby northern New Mexico and Colorado" as well as the Great Lakes region and several northeastern states. Potential for spread into Texas from adjacent states is high, particularly on boats, waders, and other equipment used in infested waters. If introduced in Texas, climate match analysis suggests this species has a moderately high potential for survival in much of the state (i.e., climate match 6-7 out of 10) and could become established and spread within the state.

The department designates the golden mussel, *Limnoperna fortunei,* as a "harmful or potentially harmful exotic shellfish." The negative impacts of this species are highly similar to those of the invasive dreissenid mussels "the zebra mussel and quagga mussel. These invasive mussels infest and damage water supply, hydroelectric, and other infrastructure, alter ecosystem food webs, and cover lake beaches and other colonized hard surfaces with razor-sharp shells. Although this species has not yet been documented in the U.S., it is considered highly likely to be introduced into the U.S. via ballast water of large, oceangoing ships "the same introduction pathway that is believed to be responsible for dreissenids invasions. If introduced in Texas, climate match analysis suggests this species has a high potential for survival in much of the state (i.e., climate match 6 - 7 out of 10) although, like dreissenids, calcium availability reduce the likelihood of invasion of East Texas lakes. Populations have been

documented elsewhere in waters with temperatures of 95 degrees Fahrenheit, suggesting that this species has greater potential than dreissenids to survive in power plant cooling lakes and impact these facilities.

The department designates crested floating heart, *Nymphoides cristata,* and yellow floating heart, *N. peltata,* as "harmful or potentially harmful exotic plants." Crested floating heart was first found in Texas in 2008 and has since formed infestations in Caddo Lake, Lake Conroe, Lake Athens, and the Lower Neches Valley Authority canals. Yellow floating heart was first detected in Texas in Moss Lake in 2010 and is also found on the Louisiana side of Toledo Bend Reservoir where there is high potential for eventual spread into Texas waters. These exotic floating hearts are rooted in the lake substrate with floating leaves and can form large, dense infestations that impede access for boating and other aquatic recreation. Management of these species is especially difficult due to their growth habit and, as with any invasive aquatic plant, can be costly. Regulation of these species as "harmful or potentially harmful" is needed to prevent transport and introduction into new water bodies, creating new infestations.

New §57.113, concerning General Provisions and Exceptions, sets forth numerous provisions generally applicable to the new rules and enumerate specific exceptions to the new rules.

New §57.113(a) establishes that nothing in the subchapter is to be construed to relieve any person of the obligation to comply with any applicable provision of local, state, or federal law. Other governmental entities have various legal authorities that impinge on the department's authority to regulate the possession and movement of certain fish, shellfish, and aquatic plants. The department wishes to be abundantly clear that a rehabilitation permit does not obviate any person's legal obligation to comply with such laws, when applicable.

New §57.113(b) recapitulates the statutory provisions of Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into the public water of this state of exotic harmful or potentially harmful fish or shellfish except as authorized by rule or permit issued by the department, and §66.0071, which prohibits the importation, possession, sale, or placement into the public water of this state of aquatic plants designated by the department as harmful or potential harmful except as authorized by rule or permit issued by the department. The new subsection further prohibits the export, purchase, propagation, and culture of species of fish, shellfish, and aquatic plants designated by the department as harmful or potentially harmful species, which is necessary to clearly describe the types of activities for which a permit is required. The new subsection also prohibits the take or possession of a live grass carp from public water where grass carp have been introduced under a permit issued by the department, unless the department has specifically authorized removal or the permit is no longer in effect, which is a provision of current rule §57.112(b)(2).

New §57.113(c) establishes the eligibility requirements and procedures for seeking "active partner" status. Under the new rules, active partner status exempts an entity engaged in department-coordinated efforts to monitor and/or manage controlled exotic species from the requirement to obtain a controlled exotic species permit to conduct the activity. The entity requesting active partner status be required to submit a letter of request to the department that describes the proposed engagement in department-coordinated efforts to monitor and/or manage controlled exotic species in Texas and measures to be taken to prevent introduction of controlled exotic species into public water. Active partner status must be granted by means of a letter of approval from the department. The provision is necessary because the department seeks to engage with other governmental, quasi-governmental, or non-governmental organization or entity to assist in department efforts to curb controlled exotic species.

New §57.113(d) establishes that an employee of the department in the performance of official duties is exempt from the permit requirements of this subchapter. Requiring a department employee to obtain a permit while engaged in the duties of the department be counterproductive and inefficient.

New §57.113(e) and (f) establish the conditions under which persons can be permitted to possess prohibited exotic species without a permit, retaining the provisions of current §57.113(b) - (d) and providing additional stipulations for fish or shellfish other than mussels or oysters to be possessed without a permit if they have been gill-cut, killed using another means, frozen, or packaged on ice, in addition to the current exception for beheaded or gutted individuals.

New §57.113(g) stipulates that no person may possess or transport live or dead controlled exotic species of mussels that are attached to any vessel, conveyance, or dock or pier and provides an exception for vessels that are travelling directly to a service provider for mussel removal or maintenance or repair following notification of the department. Zebra mussels and quagga mussels *(Dreissena bugensis)*, both of which are currently listed as harmful or potentially harmful exotic species, are considered to be among the most problematic invasive species in the world, and zebra mussels have already been proven to be highly damaging in Texas. Preventing the transport of invasive mussels attached to boats is paramount for preventing the spread of zebra mussels within the state and to other states, and for preventing the introduction of quagga mussels into this state. To minimize this risk, invasive mussels attached to boats must be killed; however, the viability of those mussels cannot be assessed rapidly with any certainty by laypersons. The new subsection creates an exception for the possession and transport of mussels attached to or contained within a vessel in situations where the vessel must be transported to a service provider for removal of mussels, repair, or maintenance, provided the department is notified. To ensure the risks of transport can be addressed and coordinated by the department if necessary, the new subsection stipulates that the notification include date of transport, contact information for the person or entity transporting the vessel, vessel registration number, water body of origin to determine if it is infested with mussels, service provider location and contact information, and the water body where the vessel will return after service to assess risk of new introductions resulting from transport.

New §57.113(h) provides a qualified exception to permit requirements for licensed retail or wholesale fish dealers. Under current §57.113(k), a licensed retail or wholesale fish dealer is not required to possess a permit issued under the subchapter for certain species unless the retail or wholesale dealer is engaged in propagation of the species, provided the fish or shellfish have been gutted or beheaded. The new subsection clarifies that the fish dealer must obtain these species from a permit holder and provides additional methods that fish may be rendered inert. With respect to live Pacific blue shrimp *(Litopenaeus stylirostris)* or Pacific white shrimp *(L. vannamei)*, the new subsection

imposes the same clarification that the fish dealer must obtain these species from a permit holder.

New §57.113(i) recapitulates that the holder of a controlled exotic species permit may not place into public water, possess, import, export, sell, purchase, transport, propagate, or culture controlled exotic species unless authorized by the specific conditions of the permit. The new provision repeats for purposes of emphasis the prohibited acts articulated by Parks and Wildlife Code, §66.007 that are restated and elaborated upon in the new rules.

New §57.113(j) creates an exception to permit requirements for landowners (and their agents) who remove exotic plant species, zebra mussels, and applesnails of the genus Pomacea, provided the landowner or agent complies with the specific conditions sets forth for removal and transport. Invasive exotic plants frequently impede water access for lakefront landowners--particularly floating species such as giant salvinia and water hyacinth *(Eichhornia crassipes)*, which can continually reinvade cleared areas around shorelines and docks. Under current rules, a permit is required to possess these and other controlled exotic plants even for the purposes of disposal in addition to obtaining department approval of a nuisance aquatic vegetation treatment proposal. Invasive zebra mussels are also problematic, clogging and damaging water infrastructure and attaching their razor-sharp shells to shorelines and docks, posing a human health hazard. Under current rules, there are no provisions allowing unpermitted persons to possess and/or transport controlled exotic species of mussels removed from personal property, live or dead, for the purpose of disposal. Invasive applesnails are a common invader of both public water bodies and small private lakes and can decimate aquatic vegetation that provides important habitat for fish. Under current rules, there are no provisions allowing possession of the prohibited species of applesnails, live or dead, for the purposes of removal/disposal for population management. The new subsection allows the owner or manager of a property or their agent, except as provided by new §57.113(k), to without a permit possess and transport prohibited mussels of the genus Dreissena and prohibited applesnails of the genus Pomacea for the purpose of disposal provided that they are securely contained in black plastic bags (which accumulate heat that kills the organisms) prior to disposal. Inclusion of all species of Dreissena proactively provides for the potential need for removal and transport for disposal of invasive quagga mussels should they be introduced in Texas. Inclusion of all prohibited species of applesnails of the genus Pomacea is necessary due to difficulty distinguishing between some species without genetic analysis; however, it is believed that only *P. maculata* is currently found in Texas. For controlled exotic plants, the exception created by the new subsection also allows the option of drying fully prior to disposal in lieu of containment in bags.

New §57.113(k) requires a person, who in exchange for money or anything of value operates a mechanical plant harvester or otherwise physically removes controlled exotic species of plants from public water, to include persons who possess and transport controlled exotic plants following such removal operations, to possess a controlled exotic species permit. Under current rule, an exotic species permit is required to perform these activities; however, the new subsection explicitly requires a permit to be obtained by persons who do so for remuneration. The use of mechanical harvesters and other large-scale removal methods at a commercial scale could result in possession and transport of quantities of exotic plants in volumes exceeding those contemplated by the exception for permit requirement contained in new §57.113(j). Such volumes pose a greater biosecurity risk. By continuing to require a controlled exotic species permit for commercial activities, the department seeks to ensure that they are conducted in a verifiably biosecure manner.

New §57.113(l) creates an exception for the possession and transport of controlled exotic species for governmental or quasi-governmental agencies; operators of power generation, water control, or water supply facilities; private water intakes; entities removing garbage from public water bodies; or contractors working on their behalf performing standard operations, maintenance, or testing, provided the activities are in compliance with best management practices published by the department. The department recognizes that the enumerated entities may encounter the need to transport controlled exotic species for disposal under certain circumstances. Invasive exotic zebra mussels and some plants foul and clog intakes for facilities using or controlling raw surface water. Current rules do not address the periodic need for removal and disposal of these species. Zebra mussels attach to virtually any hard surface, including floating and submerged debris, and possession of such mussels is not explicitly addressed under current rule, which is problematic when mussels are attached to objects removed from public water bodies during river and lake clean-up events. The new subsection establishes an exception to address such situations. The best management practices will be developed and continually adapted as needed to provide practical guidelines that seek to minimize transport of viable organisms and thereby reduce biological risk.

New §57.113(m) provides an exception to permit requirements for persons who purchase, possess, or transport controlled exotic species of plants as hosts for biological control agents for the purpose of introduction for management of nuisance aquatic vegetation, provided that the identity of the plant species to be managed is confirmed by the department and the host plants and biological control organisms are obtained from the department, a biological control facility permitted under this subchapter, or an active partner, and the activities are in compliance with rules governing transport documentation and introduction of aquatic plants into public water, if applicable. The new subsection is intended to facilitate expansion of the use of biological control organisms to aid in management of controlled exotic plants such as giant salvinia and Alligatorweed *(Alternanthera philoxeroides)*. Introduction of biological control organisms often requires possession and transport of a small quantity of the prohibited host plant.

New §57.113(n) creates an exception to permit requirements for possession of specimens of controlled exotic mussels or plants provided they have been preserved using methods specified by rule for rendering the organisms nonviable. The current rules do not specifically provide for the possession of specimens for educational purposes at nature centers, school classrooms, or museum collections. The new subsection provides enhanced educational opportunities that could contribute to increased awareness of invasive species issues in Texas.

New §57.113(o) requires any person in possession of controlled exotic species to provide or allow the department take samples of any controlled exotic species for purposes of taxonomic or genetic identification and analysis by the department; furnish any documentation necessary to confirm controlled exotic species identity, the source of controlled exotic species, and eligibility to possess controlled species; make available for inspection during normal business hours any records required by the subchap-

ter as well as any retention location, facility, private pond, recirculating aquaculture system, or transportation vehicle or trailer used to conduct activities authorized under this subchapter; and demonstrate that activities are conducted in compliance with the requirements of the subchapter and in such a way as to prevent escape, release, or discharge of controlled exotic species. Under current rules (current §§57.119(a), (b), and (d), 57.131(c), and 57.132(b)), provisions governing inspections, reporting, and recordkeeping apply only to permit holders. For purposes of enforcement of the various new provisions of this section that create exceptions to permit requirements, the new subsection extends the responsibilities enumerated in those sections to all persons in possession of controlled exotic species.

New §57.113(p) establishes protocols for the disposition of controlled exotic species held by a person who is no longer legally permitted to be in possession of the controlled exotic species because of violations, permit renewal refusal, or cessation/discontinuation of permitted or otherwise authorized activities for any other reason. In the case of elective discontinuation of permitted operations, current rules (§57.119(c)) stipulate that all remaining inventory of the permitted species be lawfully sold, transferred, or destroyed. However, the current rules make no provisions for dealing with failure to comply with the rules or with unlawful possession, leaving the potential for persons to be in possession of large quantities of controlled exotic species (e.g., for aquaculture purposes). New §57.113(p) establishes a course of action for dealing with unlawful possession, failure to comply with rules pertaining to elective discontinuation of operation, and circumstances under which a permit holder is ordered to cease operation. Under the new rules, the department will prescribe, on a case by case basis, a disposition protocol for destruction, disposal, or transfer of controlled exotic species. The new subsection provides that if the disposition protocol is not implemented within 14 days of notification by the department, the department could implement a prescribed disposition protocol. Furthermore, in the event that a disposition protocol is implemented by the department, the new subsection mandates financial responsibility for all costs associated with the destruction, disposal, or transfer of controlled exotic species held in the facility be borne by the affected person. The new provisions are necessary to ensure that persons who are in unlawful possession of controlled exotic species and demonstrate an inability to dispose of such species in lawful compliance with department orders bear the costs of disposal rather than having the people of the state bear such costs.

New §57.114, concerning Controlled Exotic Species Permits, enumerates the various types of controlled exotic species permits governed under the subchapter.

New §57.114(a) provides for the issuance of a controlled exotic species permit for the culture, transport, and sale of water spinach *(Ipomoea aquatica)*--an exotic aquatic plant that is sold for human consumption.

New §57.114(b) provides for the issuance of controlled exotic species permits for the commercial aquaculture of triploid grass carp; blue tilapia *(Oreochromis aureus)*, Mozambique tilapia *(O. mossambicus)*, Nile tilapia *(O. niloticus)*, Wami tilapia *(O. hornorum)*, and hybrids; and Pacific white shrimp *(Litopenaeus vannamei)* or Pacific blue shrimp *(L. stylirostris)*, and stipulates that regulated activities must be performed by the permittee, an authorized person named on the permit, or a person supervised by an authorized person, which is necessary to ensure that all activities under a permit are conducted by someone lawfully liable for compliance with the provisions of the permit and the subchapter.

New §57.114(c) provides for the issuance of controlled exotic species permits for research that benefits indigenous species or ecosystems and/or provides insight on ecology, risks, impacts, or management approaches for controlled exotic species. Current rules provide that permits may be issued for department-approved research programs (§57.113(a)(1)). The new rule also stipulates that sale of controlled exotic species held under a research permit is prohibited unless authorized in writing by the Director of the Coastal Fisheries Division or Inland Fisheries Division (or their designee), which is a refinement of the provisions of current §57.113(a).

New §57.114(d) provides for the issuance of a controlled exotic species permit for the propagation of controlled exotic species of plants for the purposes of production of biological control agents for management of controlled exotic species of plants. Biological control agents such as salvinia weevils *(Cyrtobagous salviniae)* play an important role in the integrated pest management strategy for achieving control of invasive exotic species such as giant salvinia in Texas lakes.

New §57.114(e) provides for issuance of controlled exotic species permits for zoological display, which is a provision of current §57.113.

New §57.114(f) provides for the issuance of a controlled exotic species for specific limited purposes.

New §57.114(f)(1) provides for the issuance of a controlled exotic species permit to persons other than commercial aquaculturists who sell triploid grass carp or tilapia. The new provision allows permit holders to sell live triploid grass carp or tilapia purchased from a commercial aquaculture facility permit holder or lawful out-of-state source as well as for lawful out-of-state suppliers to obtain a Texas permit and prohibit persons holding a permit issued under the new paragraph from using the controlled exotic species for aquaculture or holding the controlled exotic species in a facility in Texas for more than 72 hours. The new provision is necessary to provide a mechanism for persons engaged in the business of buying tilapia and triploid grass cap for resale who do not have a facility.

New §57.114(f)(2) provides for the issuance of controlled exotic species permits for introduction into public water or private water of live triploid grass carp, which is a provision of current §57.125, concerning Triploid Grass Carp Permit; Application, Fee.

New §57.114(f)(3) provides for the issuance of controlled exotic species permits for interstate transit of controlled exotic species, which is addressed in new §57.121, concerning Transport of Live Controlled Exotic Species.

New §57.114(f)(4) provides for the issuance of controlled exotic species permits for the possession and disposal of controlled exotic plant species removed from public or private waters, the particulars of which are set forth in new §57.113, concerning General Provisions and Exceptions.

New §57.114(f)(5) provides for the issuance of controlled exotic species permits for possession of controlled exotic species of plants for wastewater treatment by a wastewater treatment facility, the particulars of which are set forth in new §57.113, the particulars of which are set forth in new §57.113,concerning General Provisions and Exceptions.

New §57.114(f)(6) provides for the issuance of permits for the possession, transport, and disposal of controlled exotic species related to activities not otherwise authorized by the provisions of new §57.113, concerning General Provisions and Exceptions, or new §57.114, concerning Controlled Exotic Species Permits.

New §57.115, concerning Special Provisions--Tilapia, prescribes the provisions of the subchapter that specifically apply to the possession of tilapia.

New §57.115(a) provides that no person may possess, import, export, sell, purchase, transport, propagate, or culture, or offer to import, export, sell, purchase, or transport tilapia unless the person is the holder of a valid controlled exotic species permit and is in compliance with the terms of the permit. The new subsection is specific to tilapia, but recapitulates the provisions of Parks and Wildlife Code, §66.007 and the new rules that the holder of a controlled exotic species permit may not place into public water, possess, import, export, sell, purchase, transport, propagate, or culture controlled exotic species unless authorized by the specific conditions of the permit, to include an offer to do any of those things.

New §57.115(b) requires private ponds stocked with tilapia to be designed and maintained such that escape, release, or discharge of tilapia into public water is not likely to occur. The current rules do not address design or maintenance requirements for private ponds. The department believes that it is important to require private ponds to be designed and maintained in such a fashion as to minimize the danger of escapement of controlled exotic species held under a permit.

New §57.115(c) establishes an exception to the provisions of the section for non-commercial aquaculture of four controlled exotic species of tilapia without a controlled exotic species permit. Under current rule §57.115(i), only one species of tilapia (Mozambique tilapia *(Oreochromis mossambicus)*, may be possessed for non-commercial aquaculture without a permit. Home aquaponics has increased in popularity in recent years, and other species have become desirable, particularly for consumption. Under the new subsection, no permit is required to purchase, possess, transport, or propagate blue tilapia (O. aureus), Mozambique tilapia, Nile tilapia *(O. niloticus)*, Wami tilapia *(O. hornorum)*, and hybrids between these species for non-commercial aquaculture purposes. The new provision requires tilapia to be purchased and transported in accordance with the provisions of the subchapter governing transport of live exotic species and the tilapia so held could not be sold, offered for sale, or exchanged for money or anything of value. Current rules (§57.115(i)) allow the purchase and transport of Mozambique tilapia without a permit, but the sale of such fish is prohibited without an exotic species or wholesale dealer permit. Under the new subsection, tilapia are required to be kept in a recirculating aquaculture system constructed such that escape, release, or discharge of tilapia into public water is not likely to occur. Additionally, the new subsection requires all recirculating aquaculture systems to be constructed such that no discharge of wastewater or waste into or adjacent to water in the state is likely to occur, and that they be equipped with adequate security measures in place to prevent unauthorized removal of tilapia. Finally, the new subsection requires all tilapia transferred to another person or disposed be killed in accordance with the provisions of new §57.113(f). The department has determined that recirculating aquaculture systems operated in compliance with the new provisions pose minimal risk of accidentally introducing tilapia into public waters of the state.

New §57.115(d) prescribes the requirements for the stocking of controlled exotic species of tilapia in private ponds. The new subsection is intended to minimize detrimental impacts of escapes on Texas' Fish Species of Greatest Conservation Need, as identified in the Texas Conservation Action Plan. Under current §57.113(i), Mozambique tilapia may be stocked in private ponds without a site evaluation by the department; however, many ponds in Texas are creek impoundments capable of overflow during rains, which could result in the escape of controlled exotic species of tilapia into public waters. As part of a strategic conservation planning framework used to develop the new rules, staff conducted a spatial conservation assessment informed by comprehensive review of the scientific literature and models of species distribution probability. The assessment identified key areas where escape of tilapia is likely to have detrimental impacts on fish designated as Species of Greatest Conservation Need. The assessment also identified areas of economic activity (comparatively high tilapia stocking) to balance potential conservation actions against potential economic impacts. Based upon this assessment, the rules establish two zones "a "conservation zone" and a "stocking zone."

New §57.115(d)(1) reiterates that no person holding regulated species of tilapia in a private pond without a controlled exotic species permit may sell, offer for sale, or exchange tilapia for money or anything of value, which is necessary to ensure that it is abundantly clear that commercial activity involving regulated species of tilapia without a controlled exotic species permit authorizing such activities is prohibited.

New §57.115(d)(2) stipulates that if a county designated as being within the stocking zone is subsequently designated as being within the conservation zone, the provisions of the new rules that govern conservation zones then apply to the county, which is necessary to make clear that rules governing conservation zones apply to counties in conservation zones.

New §57.115(d)(3) prescribes the provisions for stocking tilapia in private ponds within the conservation zone. New subparagraph (A) requires a landowner seeking to stock a pond located within a conservation zone to obtain approval from the department by submitting a completed application to the department at least 30 days prior to the prospective stocking (no associated fee). New subparagraph (B) provides for department approval of the stocking authorization upon finding that the pond is designed and will be maintained such that escape, release, or discharge of tilapia from the pond into public water is not likely to occur and that the stocking does not pose a significant risk to any species designated as endangered, threatened, or a Species of Greatest Conservation Need. New subparagraph (C) provides that a stocking authorization applies only to the specific pond for which it is issued, is transferrable, and will neither expire nor require renewal provided the pond is not modified in any way could result in increased risk of escape, release, or discharge of controlled exotic species into public water. A conservation zone is an area where the escape of tilapia into public water represents a significant potential negative impact to imperiled fishes. The department believes it is prudent to evaluate and approve prospective stocking activities within the conservation zone on a pond-by-pond basis. To ensure that there is sufficient time for the department to conduct an ecological assessment, the new paragraph requires an application to be submitted no less than 30 days before the intended date of stocking. Because the conservation zone reflects the area the department has determined is most ecologically vulnerable to accidental releases of exotic species of tilapia, the paragraph also predicates stocking au-

thorization on a department determination that the prospective stocking site is physically sufficient to make escapement unlikely and that the stocking does not pose a significant threat to species of concern on the landscape. Finally, the department considered that the ownership of private ponds can change as a result of a variety of factors (sale, gift, or inheritance, etc.) and has determined that so long as the pond in question is not modified in such a way as to enhance risk of escapement, there is no need to reauthorize or renew the stocking approval which is intended to preclude complications as a result of real estate transactions. Current rules provide a regulatory exception only for the stocking of Mozambique tilapia in private ponds. The new rules allow stocking of other species such as blue tilapia, Nile tilapia, Wami tilapia, and hybrids between these species within the conservation zone upon approval by the department.

New §57.115(d)(4) prescribes the provisions for stocking tilapia in private ponds within the stocking zone, requiring only that private ponds stocked with tilapia be compliant with new §57.115(b), which requires ponds to be designed and maintained such that escape, release, or discharge of tilapia from the pond into public water is not likely to occur, which is necessary for reasons discussed earlier in this preamble. A stocking zone is an area where stocking is common and there is a low potential negative ecological impact from accidental escapement.

New §57.115(d)(5) retains the requirement of current §57.113(i) that tilapia stocked in a private pond must be killed by one of the approved methods set forth in new §57.113(e) prior to transfer to another person.

New §57.115(d)(6) retains the recordkeeping requirements of current §57.116(d).

New §57.115(e) reiterates the specific requirements of new subsection (d) that prohibit the stocking of tilapia in private ponds within the conservation zone without the landowner or their agent first obtaining written approval from the department.

New §57.116, concerning Special Provisions--Triploid Grass Carp, sets forth the provisions governing the issuance of permits for stocking of triploid grass carp into public or private water.

New §57.116(a) provides for the issuance of a controlled exotic species permit for stocking triploid grass carp in public water upon a finding by the department that the stocking is not likely to affect threatened or endangered species or interfere with management objectives for other species or habitats, which are provisions of current rule (§57.126(a)(5) - (7)).

New §57.116(b) provides for the issuance of a controlled exotic species permit for stocking triploid grass carp in a private pond upon a finding by the department that the stocking is not likely to result in an introduction unlawful under Parks and Wildlife Code, §66.015. Under Parks and Wildlife Code, §66.015, a person commits a violation if fish, shellfish, or aquatic plants the person possesses or has placed in nonpublic water escape into the public water of the state and the person does not hold a permit issued by the department authorizing such release or escapement; therefore, the new subsection reiterates the statutory provision to clarify that permit issuance is conditioned on a determination by the department that escape is not likely to occur. The new subsection also reiterates current rules (§57.126(a)(5) - (7)) by requiring permit issuance to be conditioned on a department finding that the prospective stocking not affect threatened or endangered species, or interfere with management objectives for other species or habitats.

New subsection (c) requires an applicant for a triploid grass carp permit for private pond stocking to allow, upon request by the department, the inspection of the affected ponds or lakes by an employee of the department during normal business hours for the purposes of evaluating whether the private pond meets the criteria for permit issuance, which is a requirement of current §57.125(d).

New subsection (d) stipulates that the stocking rate authorized by the department in the terms of a controlled exotic species permit be determined by considering the surface area of the water body to be stocked and the extent of the vegetation to be managed. Current §57.126(c) stipulates that the department will consider the surface area of the pond or lake named in the permit application, and, as appropriate, the percentage of the surface area infested by aquatic vegetation. The new subsection replaces "the percentage of the surface area infested by aquatic vegetation" with "the extent of the vegetation to be managed." Because the degree of infestation for submerged aquatic vegetation species is a function of both the surface area and water depth of the infestation, the new provision liberalizes the factors considered by the department, such as the species of nuisance aquatic vegetation present and their vulnerability to triploid grass carp, in determining the appropriate number of fish to be stocked.

New subsection (e) enumerates the sources from which triploid grass carp may be lawfully obtained by stipulating that triploid grass carp may be purchased or obtained only from the holder of a permit that authorizes the sale or from a lawful out-of-state source. Under current §57.124(c), only exotic species permit holders are permitted to purchase triploid grass carp from a lawful out-of-state source. The new subsection allows purchase of triploid grass carp by anyone, provided the source is either a controlled exotic species permit holder authorized to possess and sell triploid grass carp or an out-of-state entity allowed to sell triploid grass carp. The change is intended to broaden the opportunities available for permitted persons to obtain triploid grass carp.

New subsection (f) authorizes the department to introduce triploid grass carp into public water in situations where the department has determined that there is a management need and when stocking will not affect threatened or endangered species or other important species or habitats. Current rules do not specifically authorize the department to stock triploid grass carp in public water, but Parks and Wildlife Code, §12.013, authorizes the department to regulate the introduction and stocking of fish, shellfish, and aquatic plants into the public water of the state; thus, the new subsection recapitulates existing

statutory authority.

New subsection (g) prescribes the requirements for the issuance of controlled exotic species permits to stock triploid grass carp in private ponds.

New subsection (g)(1) requires private ponds stocked with triploid grass carp to be designed and maintained such that escape, release, or discharge of triploid grass carp into public water is not likely to occur. Although current §57.117, concerning Exotic Species Permit: Application Requirement, requires an applicant for an exotic species permit to demonstrate to the department that an existing aquaculture facility, private facility, or wastewater treatment facility meet the requirements of current §57.129, concerning Exotic Species Permit: Private Facility Criteria, it is not clear that the provision is applicable to a private pond (although the current definition for "private

facility" includes private ponds). The new subsection eliminates possible ambiguity by, in tandem with the amendment to §57.111, specifically excluding private ponds from the definition of "facility" but specifically referencing triploid grass carp in the definition of "private pond." The intent of the new subsection is to clarify the department's authority to require private ponds to be designed and maintained in such a fashion as to minimize the danger of escapement of triploid grass carp.

New subsection (g)(2) requires a landowner seeking to stock triploid grass carp to obtain a permit for that purpose from the department. Under Parks and Wildlife Code, §66.007, no person may import, possess, sell, or place into the public water of this state exotic harmful or potentially harmful fish or shellfish except as authorized by rule or permit issued by the department. Similarly, new §57.113, concerning General Provisions and Exceptions, prohibits the introduction into public water, possession, importation, exportation, sale, purchase, transport, propagation, or culture of any species, hybrid of a species, subspecies, eggs, seeds, or any part of any species defined as a controlled exotic species. The department believes it is necessary to reproduce the same provisions with respect to triploid grass carp in the interests of emphasis.

New subsection (g)(3) stipulates that a permit authorizing the stocking of triploid grass carp is specific to the ponds on the property for which it is issued, is transferrable, and will neither expire nor require renewal provided the pond is not modified in any way that could result in increased risk of escape, release, or discharge of controlled exotic species into public water. It is axiomatic that the release of triploid grass carp exotic species is a cause of concern. Therefore, the new paragraph restricts stocking authorization to specific ponds. Additionally, the department considers the fact that ownership of private ponds can change as a result of a variety of factors (sale, gift, or inheritance, etc.) and has determined that so long as the ponds in question are not modified in such a way as to enhance risk of escapement, there is no need to reauthorize or renew the stocking approval, which is intended to preclude complications as a result of real estate transactions.

New subsection (g)(4) prohibits the sale, offering for sale, or exchange in return for money or anything of value of triploid grass carp held in a private pond, which is necessary because under current §57.124(a), triploid grass carp may be sold only to another person holding a permit authorizing possession of triploid grass carp. The new subsection is intended to ensure that it is abundantly clear that commercial activity involving triploid grass carp without a controlled exotic species permit authorizing such activities is prohibited.

New subsection (g)(5) stipulates that if a county designated as being within the conservation zone is subsequently designated as being within the stocking zone, the provisions of the new rules that govern the stocking zone then apply to the county, which is necessary to make clear that rules governing activities in the stocking zone apply to counties in the stocking zone.

New subsection (g)(6) stipulates that within a stocking zone, permit applications requesting ten or fewer triploid grass carp require administrative review only. The application shall be submitted at least 14 days prior to the intended stocking. The department believes that small-scale introductions of triploid grass carp within the stocking zone represent a relatively innocuous potential for ecological concern; thus, it is not necessary for such introductions to be the subject of exhaustive review. However, the department also believes that there should be sufficient time for the administrative review to take place; therefore, the new paragraph requires an application requesting ten or fewer triploid grass carp to be submitted no less than 14 days before the intended date of stocking.

New subsection (g)(7) prescribes recordkeeping requirements for persons in possession of live triploid grass carp stocked in a private pond. The new paragraph requires a person in possession of live triploid grass carp stocked in a private pond to possess and retain for a period of one year from the date the grass carp were obtained or as long as the grass carp are in the water, whichever is longer, either an exotic species transport invoice or an aquatic product transport invoice from a lawful out-of-state source and documentation that the grass carp have been certified as triploid by the Grass Carp Inspection and Certification Inspection Program operated by the U.S. Fish and Wildlife Service.

New subsection (g)(8) retains the requirement of current §57.113(i) that tilapia stocked in a private pond must be killed by one of the approved methods set forth in new §57.113(e) prior to transfer to another person.

New §57.117, concerning Special Provisions--Shrimp Aquaculture and Health Certification, sets forth the special provisions governing shrimp aquaculture and the health certification of cultured shrimp, which differ from the current provisions of §57.114, concerning Health Certification of Harmful or Potentially Harmful Exotic Shellfish as noted, with numerous nonsubstantive changes to terminology to be consistent with other provisions of the new rules.

New §57.117(a) requires any facility containing controlled exotic species of shrimp to be capable of placing stocks into quarantine condition. Under current §57.129(d), an aquaculture facility containing harmful or potentially harmful exotic shellfish is required to be capable of segregating stocks of shellfish that have not been certified as free of disease from other stocks of shellfish on the aquaculture facility, which is essentially the same thing.

New §57.117(b) provides that a facility containing live Pacific blue shrimp *(Litopenaeus stylirostris)* be located outside the exotic shrimp exclusion zone. Current §57.113(k)(2) contains this requirement, but also stipulates that Pacific blue shrimp be cultured under quarantine conditions. Staff has determined that, under the requirements of new §57.117, pertaining to disease inspections and quarantine upon manifestations of disease, and location of facilities outside the exotic shrimp exclusion zone, this activity poses a minimal risk to the existing biological ecosystem and native shrimps, and quarantine conditions are not necessary.

New §57.117(c) requires disease certification to be conducted by a disease specialist, which is a provision of current rules under §57.114(a).

New §57.117(d) requires any person importing live controlled species of exotic shrimp to, prior to importation, provide documentation to the department that the controlled exotic species of shrimp to be imported have been certified as disease-free and receive written acknowledgment from the department that the requirements of for demonstrating disease-free status have been met. The new provision is a requirement of current §57.114(b).

New §57.117(e) requires any person in possession of controlled exotic species of shrimp for the purpose of production of post-larvae to provide to the department monthly documentation that nauplii and post-larvae have been examined and certified

to be disease-free. The new subsection further provides that if monthly certification cannot be provided, the shrimp must be maintained in quarantine condition until the department acknowledges in writing that the requirements for demonstrating stock is disease-free or conditions specified in writing by the department under which the quarantine condition can be removed have been met. The new provision is a requirement of current §57.114(c).

New §57.117(f) requires any person who possesses controlled exotic species of shrimp in a facility regulated under the subchapter who observes one or more of the manifestations of diseases of concern listed on the clinical analysis checklist provided by the department to place the entire facility under quarantine condition immediately, notify the department, and either request an inspection from a disease inspector or submit samples of the affected shrimp to a disease specialist for analysis and forward the results of such analyses to the department upon receipt. The new provision is a requirement of current §57.114(d).

New §57.117(g) provides that no more than 14 days prior to harvesting ponds or discharging any waste into or adjacent to water in the state, the permit holder must request an inspection from a disease inspector or submit samples of the shrimp from each pond or other structure containing such shrimp to a disease specialist for analysis and submit the results of such analyses to the department upon receipt, using the clinical analysis checklist. The new provision is a requirement of current §57.114(e).

New §57.117(h) provides that upon receiving a request for an inspection from a permit holder, a disease inspector may visit the facility, examine samples of shrimp from each pond or other structure from which waste will be discharged or harvest will occur, complete the clinical analysis checklist provided by the department, sample shrimp from or inspect any pond or structure the disease inspector determines requires further investigation, and provide a copy of the clinical analysis checklist and any other inspection reports to the permit holder. The new provision is a requirement of current §57.114(f).

New §57.117(i) provides that if the results of an inspection performed by a disease inspector indicate the presence of one or more manifestations of disease, the permit holder be required to immediately place or continue to maintain the entire facility under quarantine condition and submit samples of the controlled exotic species of shrimp from the affected portion(s) of the facility to a disease specialist for analysis. Results of such analyses be required to be forwarded to the department upon receipt. The new provision is a requirement of current §57.114(f).

New §57.117(j) stipulates that if the results of a required analyses performed by a disease specialist indicate the presence of disease, the permit holder be required to immediately place the entire facility under quarantine condition. The new provision is a requirement of current §57.114(h).

New §57.117(k) stipulates that if the results of inspections or analyses of controlled exotic species of shrimp from a facility placed under quarantine condition indicate the presence of disease, the facility shall remain under quarantine condition until the department removes the quarantine condition in writing or authorizes in writing other actions deemed appropriate by the department based on the required analyses. The new provision is a requirement of current §57.114(i).

New §57.117(l) provides that if the results of required inspections or analyses indicate the absence of any manifestations of disease, the permit holder may begin discharging from the facility. The new provision is a provision of current §57.114(j).

New §57.118, concerning Special Provisions--Water Spinach, sets forth the provisions regarding possession, cultivation, transport, and sale of water spinach, as well as providing for recordkeeping and reporting requirements. The new section represents a reorganization of current §57.136, concerning Special Provisions--Water Spinach with substantive differences as noted. Numerous nonsubstantive changes have been made to enhance clarity and change terminology to be consistent with other provisions of the new rules.

New §57.118(a) provides that except as authorized by a permit issued under the new section or otherwise provided by the subchapter, no person may culture water spinach or possess or transport water spinach in exchange for or with the intent to exchange for money or anything of value. Under current §57.136(a)(2), no person may grow water spinach or possess or transport water spinach for a commercial purpose unless that person possesses a valid exotic species permit issue by the department for that purpose. The new provision is nonsubstantive reformulation of those requirements.

New §57.118(b) provides that no permit is required to purchase or possess water spinach for personal consumption provided the water spinach was lawfully purchased or obtained and is not propagated or cultured. The new subsection is a mixture of provisions in current §57.136(a)(2) and (4).

New §57.118(c) sets forth the conditions under which water spinach could be purchased or obtained for sale or re-sale and consists of the provisions of current §57.136(a)(3), with one substantive change. Paragraph (2) of the new subsection reduces the record-retention time period stipulated in the current rule from two years to one. The department has determined that a one-year retention period is sufficient to allow the department to investigate the commercial pathways of water spinach commerce with respect to a single recipient.

New §57.118(d) prescribes facility standards for culture of water spinach. The new subsection consists of the provisions of current §57.136(c)(1) - (7) and one provision from current §57.119(a)(2), with nonsubstantive changes. The provision being relocated from §57.119(a)(2) specifies that a copy of the permit be prominently displayed at the facility for which it was issued. Several provisions of the new subsection are new. The requirements of current §57.136(d)(5) do not apply to greenhouses built before 2009. New §57.118(d)(7) removes that limitation to provide the department discretion to grant a modification of the 10-foot buffer width requirement based on the location of greenhouses built at any time. The department considers that in some instances, greenhouses built prior to permit application could be located within less than 10 feet of the property boundary and requiring an applicant to move or rebuild a greenhouse could be problematic. The new rule allows the department to evaluate such sites on a case-by-case basis to assess risk of escape and potentially grant a modification of the buffer width requirement to avoid imposing such a burden upon the applicant, where possible and consistent with the department's statutory obligation to protect native organisms and ecosystems.

New §57.118(d)(8) stipulates that greenhouses where water spinach is cultured be maintained at all times in such a way as to prevent escape or release of water spinach and requires notification of the department in the event that facility repairs

are necessary to prevent escape. In general, the current rules are obviously intended to protect native systems and organisms from potential deleterious effects of the escape of water spinach, and the new paragraph expressly states that intent in the form of a requirement governing maintenance obligations.

New §57.118(d)(9) requires a permit holder to demonstrate to the department, during annual facility inspections, that the activities authorized under the subchapter are conducted in compliance with the requirements of the subchapter and the facility is maintained in such a way as to prevent escape or release of water spinach. Current §57.119(b) provides for department inspection of permitted facilities at any time that permitted activities are ongoing. Additionally, under current §57.120(b)(2), all facilities for which a permit renewal is sought must be in compliance with all applicable facility requirements of the subchapter. The new paragraph implements the requirement for an annual inspection, which the department will conduct during the growing season when risk of escape is greatest, with the additional benefit of lessening administrative burdens by reducing both the number of renewal inspections that must be conducted at the end of each permit year and the permit renewal processing times.

New §57.118(e) requires all water spinach transported from a facility (including water spinach transported under an interstate transport authorization) to be packaged in a closed or sealed container having a volume no greater than three cubic feet, not mixed or commingled with any other material or substance, and identified such that each container of water spinach shall have a label placed on the outside of the container, clearly visible and bearing the legend "Water Spinach" in English. The new subsection is a requirement of current §57.136(d)(1) and (2).

New §57.118(f) is a revision of current §57.136(c)(6) regarding the processing of water spinach. The rule clarifies that all handling and packaging of water spinach must be done at the permitted facility within the vegetation-free buffer area and that all water spinach fragments must be collected and disposed as described in subsection (k) of the new section. Current rules simply require handling to be done at the permitted facility and in such a manner as to prevent dispersal. However, based upon activities observed during facility inspections, the department has determined that additional emphasis on appropriate biosecurity measures is needed to provide assurance that the potential dispersal of water spinach is minimized.

New §57.118(g) requires a transport invoice to accompany each sale or transfer of water spinach and prescribes the content of a transport invoice, all of which are contained in the provisions of current §57.118(3).

New §57.118(h) creates and provides for the content and use of a transport log for permit holders transporting water spinach to or from a permitted facility. The department, after investigating the nature of commercial water spinach production and distribution, determined that in the typical business model the point of sale is the buyer's location and not the facility where the water spinach was cultured. Current §57.136(d)(3) requires an individual transport invoice to be generated for each sale before the shipment leaves a culture facility, which the department has determined is somewhat problematic for the regulated community. Therefore, the new subsection creates a process to be used in lieu of the current process, one where documentation is based on the point of delivery rather than production. The new subsection requires a permit holder to execute a water spinach transport invoice for each receiver at the time the water spinach is delivered and maintain and possess a current and accurate daily transport log at all times during transport. The content of the daily transport log consists of the date and time of shipment; the permit holder's name, address, phone number, and exotic species permit number; the amount of water spinach in possession; the water spinach transport invoice number for each delivery, the receiver/supplier's name, address, and phone number; the type of transfer "delivery or receipt; the amount of water spinach transferred; and the amount of water spinach in possession upon return to the facility. The new subsection is intended to provide a more flexible method of documentation for the regulated community while preserving the department's ability to monitor the production and movement of a controlled exotic species through a chain of custody.

New §57.118(i) sets forth the record retention requirements for the new rule, requiring copies of each daily transport log, transport invoice, and receipt or documentation for water spinach obtained from an out-of-state source to be retained for one year. Current §57.136(e)(2) specifies a record retention period of two years, which applies to all records; thus, the new subsection reduces administrative burden on the regulated community by reducing the volume of documentation required to be maintained and the time period it must be retained. The new subsection also requires records and documents required by the subchapter to be provided to the department during normal business hours upon request of a department employee acting in the scope of official duties, which is a requirement of current §57.136(e)(3).

New §57.118(j) prescribes the reporting requirements for persons subject to the provisions of the new section, stipulating the dates of quarterly reports and clarifying that required reports must be submitted even for time periods during which no sales took place. The new subsection is a requirement under current §57.136(e)(1).

New §57.118(k) sets forth various provisions regarding requirements for the prevention of escape of water spinach from a facility.

New paragraph (1) specifies that water spinach may not be allowed to escape from a facility nor be released or spread outside the facility during cultivation, handling, packaging, processing, storage, shipping, or disposal. This provision reiterates the essential components of numerous current rules and statutes, such as Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into the public water of this state of exotic harmful or potentially harmful fish or shellfish except as authorized by rule or permit issued by the department, and §66.0071, which prohibits the importation, possession, sale, or placement into the public water of this state of aquatic plants designated by the department as harmful or potential harmful except as authorized by rule or permit issued by the department.

New paragraph (2) reiterates the provisions of current §57.136(a)(6) by prohibiting the use of water spinach to feed animals.

New paragraph (3) specifies that water spinach not sold, transferred, or consumed, and all fragments of water spinach not growing in soil or packaged must be placed into a secure container until packaged or transported to a secure waste or compost bin and composted, dried fully, or placed into black plastic bags prior to disposal. The department believes that reproductively viable water spinach should be handled and stored in such a manner as to reasonably prevent escape to native systems. Therefore, the new paragraph prescribes that all stock not grow-

ing in soil or package be containerized or otherwise rendered non-threatening.

New paragraph (4) requires the holder of a permit issued under this subchapter to notify the department within 72 hours of discovering the escape or release of water spinach from a facility or during transport. Current rules do not impose notification requirements on persons growing or transporting water spinach. The department believes it is prudent to do so, first to be consistent with similar provisions elsewhere in the subchapter, and second because it is intuitive that the release of water spinach, a harmful or potentially harmful species, should be reported quickly in order to provide the highest assurance of remediation.

New paragraph (5) requires a permit holder, in the event that a facility appears to be in imminent danger of flooding or other circumstance that could result in the escape or release of water spinach, to immediately begin implementation of emergency measures to prevent the escape or release of water spinach and notify the department of implementation of emergency measures in accordance with provisions specified in the permit. Current rules do not impose notification requirements on persons growing water spinach. The department believes it is prudent to do so, first to be consistent with similar provisions elsewhere in the subchapter, and second because it is intuitive that the potential unintended release of water spinach, a harmful or potentially harmful species, should be responded to immediately by the permit holder and reported quickly in order to provide the highest assurance of remediation.

New §57.118(k)(6) (current §57.136(f)) provides that, in the event that water spinach escapes or is released from a greenhouse or a facility, the facility permit holder is responsible for all costs associated with the detection, control, and eradication of free-growing water spinach resulting from such escape or release and subsequent dispersal. Additionally, the new paragraph clarifies that water spinach growing outside a greenhouse is considered to have escaped.

New §57.118(k)(7) stipulates that water spinach being cultured without a permit for whatever reason be subject to a department-prescribed disposition protocol, in accordance with new §57.113, concerning General Provisions and Exceptions. Although current rules specify disposition protocols for controlled exotic species other than water spinach, the department believes it is prudent to do so, first to be consistent with similar provisions elsewhere in the subchapter, and second because it is intuitive that water spinach being grown without a permit should be disposed of in a matter that precludes spread.

New §57.118(l) provides for the department to prescribe a disposition protocol for water spinach following a department decision to deny permit issuance or renewal, which is necessary to ensure that water spinach that can no longer be legally possessed is not disposed of in a way that constitutes a threat to native ecosystems.

New §57.119, concerning Minimum Facility Requirements, prescribes requirements for infrastructure and processes at facilities where controlled exotic species are possessed, propagated, cultured, or sold under a controlled exotic species permit, excluding private waters permitted for triploid grass carp.

New §57.119(a)(1) provides for general requirements for facilities other than those permitted for culture of water spinach (i.e., fish/shellfish aquaculture/holding facilities).

New §57.119(a)(1)(A) requires prominent display of a copy of the permit at the facility for which it was issued, which is required under current §57.119(a)(2).

New §57.119(a)(1)(B) stipulates that a facility must be maintained in compliance with the standards set forth in the section at all times unless the department has been notified that facility repairs are necessary. Under current §57.119(j), all devices required in the exotic species permit for prevention of discharge of exotic species from a facility are required to be in place and properly maintained. The new subparagraph retains those requirements but removes the potentially confusing reference to "all devices" to clarify that the intent of the current provision is to impose a general duty upon the permit holder to prevent discharge of controlled exotic species from a facility. Because the nexus of all aspects of facility infrastructure and process is the biosecurity of the facility, "devices" in the sense it used in the current rule is intended to refer to the entirety of the facility and the processes conducted within it.

New §57.119(a)(1)(C) requires permit holders to satisfactorily demonstrate to the department at intervals of no more than five years, unless longer intervals are approved by the department based on systematic risk analysis, that activities authorized at the permit holder's facility under a controlled exotic species permit are conducted in compliance with the requirements of the subchapter. The intent of the new provision is to protect native systems and organisms from the threat of escaped harmful or potentially harmful exotic species by enhancing biosecurity through periodic inspections of facilities to verify that permitted activities are being conducted in compliance with applicable rules. The new provision also provides for department discretion to assign longer inspection intervals for facilities with low risk of escape. For those facilities that either by virtue of their design or the relatively low escapement risk of the species being possessed, the department believes it is sensible to allow for longer inspection intervals.

New §57.119(a)(1)(D) prescribes training requirements for persons such as the employees and staff of facilities operated by permit holders. The provision requires permit holders to ensure that employees and staff are trained to understand and comply with permit conditions and requirements and to implement the facility's department-approved emergency plan, if necessary, to prevent escape, release, or discharge of controlled exotic species into public water during a natural disaster such as a hurricane or flood. The provision is necessary to ensure that all persons involved with the operation of a facility are aware of and have been trained to perform permitted activities, including emergency response activities.

New §57.119(a)(2) creates an exemption from facility requirements for limited special purpose permit holders who purchase, transport, and sell controlled exotic species for stocking in private ponds, but who do not hold the species in a facility. The new provision also provides that all required records and documentation be made available to department staff during normal business hours within 72 hours following a request by the department. The new provision is intended to address the special circumstances of those permit holders who act as intermediaries between sources and destinations and do not operate facilities where controlled exotic species are held. The record retention component of the new paragraph is necessary to enable the department to monitor and verify permit compliance and is consistent with similar provisions of the new rules that have been discussed previously in this preamble.

New §57.119(a)(3) requires facilities to be equipped with security measures to discourage unauthorized removal of controlled exotic species, which is a requirement of current §57.129(e). The current rule specifies that required security measures must prevent unrestricted or uncontrolled access and unauthorized removal of controlled exotic species. The department has determined that the rules should provide for greater flexibility with respect to security measures because absolute security is not realistic. Therefore, the provision modifies the current requirements to require any facility containing controlled exotic species to have security measures in place to reasonably minimize the risk of unauthorized removal of controlled exotic species, which allows the department to review security measures on a case-by-case basis.

New §57.119(a)(4) provides that the department may prescribe additional security measures on a case-by-case basis as a permit condition upon a determination that a particular facility cannot feasibly comply with the security requirements of the subchapter or the security measures contemplated or in place are not sufficient to minimize risk of escape, release, or discharge or impacts to native species and ecosystems. The new provision is necessary to address special situations in which customized security provisions are the only means of ensuring biosecurity and thus authorizing permitted activities to take place.

New §57.119(b) provides additional emphasis to the effect that facilities where water spinach is cultured are subject to the provisions of new §57.118, concerning Special Provisions--Water Spinach.

New §57.119(c) stipulates facility requirements for persons who operate or engage in operations at a commercial aquaculture facility under a controlled exotic species permit.

New §57.119(c)(1) requires permitted facilities to be designed to prevent escape, release, or discharge of controlled exotic species or unauthorized discharge of wastewater by means of appropriately designed and constructed screens, barriers, filters, recirculating aquaculture systems, or other methods that are approved by the department and that must be properly maintained at all times. The current rules (§57.129(b)) governing commercial facility infrastructure have been in place many years. The current rules specifically require the use of triple-screening at all facilities, which reflects an outmoded, one-size-fits-all approach to biosecurity. The current rules are based on a traditional facility layout of earthen ponds that drain through harvest structures into canals and then into public waters. However, not all facilities employ this model and appropriate biosecurity measures may vary. There are measures other than screening that are capable of providing efficacious biosecurity. For example, triple-screening is not useful at facilities that do not discharge wastewater or that make use of sand filtration systems. The new subsection restricts the applicability of the current requirement regarding screens to only those facilities that actually employ screens for purposes of biosecurity and creates an additional regulatory structure to afford flexibility to evaluate each facility on a case-by-case basis to develop and implement appropriate measures to prevent escape, release, or discharge of controlled exotic species, which be specified in the conditions of the permit. The new paragraph also specifies that all screens, barriers, or other approved devices intended to prevent escape, release, or discharge be properly maintained at all times, which is a provision of current §57.119(j).

New §57.119(c)(2) prescribes facility requirements to prevent escape, release, or discharge of controlled exotic species at commercial facilities subject to the new rules.

New §57.119(c)(2)(A)) specifies that if a facility employs screening for purposes of biosecurity, the mesh size of screening must be capable of preventing the passage of controlled exotic species at the smallest life stage present in the facility at the time of discharge. Current §57.129(b)(1) requires that mesh be "of an appropriate size for each stage of exotic species growth and development." The new subparagraph make clear that mesh size at any given time is predicated on the life stage of the controlled exotic species in the facility at the time of discharge, which is necessary to prevent misunderstandings that could result in the use of inappropriate mesh sizes and possible escapement.

New §57.119(c)(2)(B) requires that screens be redundant or otherwise designed and constructed such that the level of protection, as determined by the department, against escape, release, or discharge of controlled exotic species is not reduced if a screen is damaged or must be removed to accomplish cleaning, repair, or other maintenance. Current §57.129(b) specifies that a minimum of three screens be in place between any point in the aquaculture facility and the point of discharge from the facility. Additionally, current rules (§57.129(b)(2) and (3)) require the permanent affixation of a screen and backing material in front of the final discharge pipe in the harvest structure to remain in place while the pond is in use, that screens at facilities discharging into public waters be secured over the terminal end of the discharge pipe at all times, that a second screen be secured over the terminal end of the discharge pipe during harvest, and double screening of the point of discharge of all mechanical harvesting devices. As mentioned previously in this preamble, the current rules do not afford the flexibility to accommodate different modalities of effective biosecurity infrastructure. The department has determined that the installation of three screens may not be necessary or feasible at facilities where screens are only one component of an effective biosecurity strategy and that permanent affixation of screens poses difficulties for periodic cleaning necessary to ensure proper function. Similarly, the department has determined that the terminal end of a pipe is often difficult to access and that installation of screens at different points in the drainage system can be just as if not more effective because those locations are easier to access for maintenance. Therefore, the new paragraph eliminates specific infrastructure specifications in favor of a generalized requirement that screens be redundant or otherwise designed and constructed such that the level of protection against escape, release, or discharge of controlled exotic species is not reduced if a screen is damaged or must be removed to accomplish cleaning, repair, or other maintenance. The intent of the new paragraph is to allow greater flexibility to the regulated community for the selection and deployment of effective biosecurity measures by establishing a general standard and approving such measures on a case-by-case basis. Additionally, the new paragraph requires wastewater discharged from a facility to be routed through all screens in accordance with department approval prior to the point where wastewater leaves the facility, which restates a provision of current §57.119(k) to clarify that water cannot be diverted during discharge events in any way so as to bypass screens or locations where screens should be in place.

New §57.119(c)(3) prescribes biosecurity measures for facilities located in the 100-year floodplain and is a nonsubstantive revision of current §57.129(c).

New §57.119(c)(4) prescribes specific additional facility requirements for commercial aquaculture facilities that are part of a facility complex. A facility complex is a group of two or more facilities located at a common site and sharing water diversion or drainage structures. There are several facilities in Texas that are independent commercial entities with shared infrastructure.

New §57.119(c)(4)(A) requires each permit holder at a facility complex to maintain at least one screen or barrier capable of preventing the escape, release, or discharge of controlled exotic species into a common drainage and have authority to stop the discharge of wastewater from the entire complex in the event of escape, release, or discharge of controlled exotic species from the permit holder's facility. The provisions of the new subparagraph are provisions of current rule §57.129(f)(1) and (2).

New §57.119(c)(4)(B) stipulates the placement and content of signage to be installed at each of the permit holder's ponds or components within a facility complex. The signage required by the new provision must be legible, bear the name and permit number of the permit holder, be within 10 feet of the authorized pond or other facility component, and correspond to the location of the component as indicated on the map provided to the department as part of the permit application and facility approval/reapproval process. The new subparagraph is necessary to allow the department to quickly and easily distinguish the ponds and components belonging to a given permit holder from other ponds and components within a facility complex for purposes of administration, enforcement, and emergency response.

New §57.120, concerning Facility Wastewater Discharge Requirements, consists of the contents of current §57.134 (relating to Wastewater Discharge Authority) with nonsubstantive revisions to enhance clarity and readability. Subsection (a) of the current rule requires applicants for an initial permit to provide documentation of either authorization for or exemption from appropriate wastewater discharge requirements of the Texas Commission on Environmental Quality (TCEQ) or documentation adequate to demonstrate that the facility is designed and will be operated in a manner such that no discharge of waste into or adjacent to water in the state will, or is likely to occur. Subsection (b) of the current rule establishes provisions for applications for permit amendments and renewals, requiring either written documentation demonstrating that the applicant possesses or has timely applied for and is diligently pursuing the appropriate authorization or exemption from TCEQ in accordance with the Texas Pollutant Discharge Elimination System (TPDES) General Permit for concentrated aquatic animal production facilities TXG 130000, if the facility is designed such that a discharge of waste into or adjacent to water in the state will, or is likely to occur; or adequate documentation to demonstrate that the facility is designed and will be operated in a manner such that no discharge of waste into or adjacent to water in the state will, or is likely to occur. The new rule eliminates duplication and clarifies that documentation related to wastewater discharge and associated permits is only required for permit renewal or amendment for a facility or facility complex designed such that a discharge of waste into or adjacent to water in the state will, or is likely to occur.

New §57.121. Transport of Live Controlled Exotic Species, sets forth rules regarding the transport of controlled exotic species.

New §57.121(a) prohibits any person other than the holder of a controlled exotic species permit holder, an employee of the permit holder, a common carrier acting on their behalf, or a private pond owner transporting tilapia or triploid grass carp to a private pond for stocking purposes from transporting live controlled exotic species and prescribes the documentation requirements for such transport. Permit holders and employees of permit holders be required to possess a copy of the permit and a properly executed transport invoice. A private pond owner transporting tilapia or triploid grass carp be required to possess a properly executed transport invoice (if the fish were obtained from the holder of a controlled exotic species permit holder) or an aquatic product transport invoice as required by Parks and Wildlife Code, §47.0181 (if obtained from a lawful out-of-state source), and, for triploid grass carp, a copy of the department permit authorizing the stocking of triploid grass carp and documentation that the grass carp have been certified as triploid by the Grass Carp Inspection and Certification Inspection Program operated by the U.S. Fish and Wildlife Service. With respect to controlled exotic species being transported by common carrier, the new subsection requires possession of documentation of compliance with all applicable local source and destination, federal, and international regulations and statutes for shipments transported by aircraft from inside Texas to a point outside Texas and not moved overland within the state; otherwise, each shipment be required to be accompanied by a properly executed transport invoice obtained from the controlled exotic species holder from whom the shipment originated, and, for triploid grass carp obtained from a lawful out-of-state source transported to a private pond for stocking purposes, a copy of the department permit authorizing possession of the carp, the aquatic product transport invoice required by Parks and Wildlife Code, §47.0181, and documentation that the grass carp have been certified as triploid by the Grass Carp Inspection and Certification Inspection Program operated by the U.S. Fish and Wildlife Service. Various provisions of current rules (§57.115, §57.116) make the transport of exotic species without either a permit or a transport invoice unlawful, with specific exceptions for persons transporting Mozambique tilapia or triploid grass carp for use in private ponds, and prescribes the content of the transport invoice. The new subsection preserves the effect of those provisions while noting the applicability of Parks and Wildlife Code, §47.0181, which requires persons other than commercial fishing license holders transporting aquatic products for a commercial purpose without an invoice as prescribed in that statute.

New §57.121(b) references the transport requirements for water spinach prescribed elsewhere in the new rules and discussed earlier in this preamble.

New §57.121(c)(1) stipulates that a separate controlled exotic species transport invoice be generated by the permit holder for each delivery location in advance of transport (except as provided otherwise in the new rules and discussed earlier in this preamble) and accompany the controlled exotic species during transport. The department has determined that the current rule (§57.116(a)) does not adequately convey that intent.

New subsection (c)(2) prescribes the contents of a controlled exotic species transport invoice, which consist of information identifying the date of the shipment, the size and biological identity of the contents being shipped, the contact information and permit numbers, if applicable, of the source and destination of the shipment, and the type of transport. Current §57.116 prescribes the content of the transport invoice. The new subsection preserves the effect of those provisions while noting the applicability of Parks and Wildlife Code, §47.0181, which requires persons other than commercial fishing license holders transporting aquatic products for a commercial purpose without an invoice as prescribed in that statute.

New §57.121(d) sets forth the transport invoice requirements for the shipment of controlled exotic species from outside of Texas via a route through Texas to a point outside Texas. Under current rule (§§57.130 - 57.133), the transport of live exotic species originating outside the state of Texas through Texas to a destination outside of the state of Texas is prohibited except by the holder of an exotic species permit or an exotic species interstate transport permit. The current rules also require anyone transporting live harmful or potentially harmful exotic species to possess documentation accounting, collectively, for all such species being transported and provides for application, fee, and issuance processes. The new subsection preserves the requirements of current rule while adding provisions allowing for such a permit to be valid for either a single use or for one year. The new subsection also establishes the deadline for application before the initial instance of transport and sets forth specific obligations for a person transporting controlled exotic species under an interstate transit permit, all of which are provisions of the current rules at §§57.130 - 57.133. The new provision specifically stipulates a notification requirement of at least 24 hours prior to each intended transit and prescribes the contents of the notification. Current §57.132(c) requires notification by fax at least 72 hours prior to transit. The new subsection requires notice to accompany an application for a singleuse permit and at least 24 hours prior to each intended transit under an annual transit permit. The required notice consists of the dates and times that the permit holder expects to enter and depart the state, the common and scientific names of each controlled exotic species to be transported, the quantity of each controlled exotic species to be transported, the specific points of origin and destination of each controlled exotic species being transported, the specific route the transport will follow, including the locations where the transporter will enter and depart the state of Texas, a description of the make, model, and color of the vehicle, trailer, or other conveyance to be employed in transport and license plate numbers; and the name, driver's license number, and contact numbers of the driver or contact information for the commercial shipper transporting the controlled exotic species through the state of Texas, all of which the department has determined are necessary to enable the department to provide proper biosecurity for threats to natural systems and organisms by being able to monitor the transport of controlled exotic species across the state.

The new section eliminates several provisions of current rules in the interests of reducing regulatory complexity. The requirement of current rule that each transport invoice be submitted to the department, which the department has determined to be administratively problematic, is eliminated. The department has determined that current rules regarding possession and retention of transport invoices are sufficient for purposes of enforcement and compliance, given the department's inspection authority under current statute and rule. Similarly, the requirements of current §§57.116(a) that require the permit holder to include an invoice number that is unique, sequentially numbered, and not used more than once during any permit period is eliminated, because the department has determined that invoice numbers are not necessary to ensure compliance with transport invoice requirements.

Current §57.116(a) requires the transport invoice to include name, address, phone number, aquaculture license number, and controlled exotic species permit number, if applicable, for the "shipper." However, the intent of the rule is that contact information for the seller be provided; new §57.121(c)(2)(B) specifies that information must be provided for the "controlled exotic species permit holder from whom the controlled exotic species was obtained." Furthermore, the new section does not require the aquaculture license number of the permit holder because possession of a valid aquaculture license is a prerequisite for the controlled exotic species permit, the number of which must be provided.

Current §57.116(a) stipulates that information required for the receiver include the address of the receiver as well as the address of the destination of the exotic species, if different. New §57.121(c)(2)(C) specifically requires only the physical address where the controlled exotic species will be possessed if different from the mailing address; post office box addresses are specifically prohibited because the department must be informed as to the physical location where fish might be stocked. The new provision also requires that the destination county be included on the transport invoice to facilitate compliance with, and enforcement of, new §57.115(d)(3) and (e), concerning sales of tilapia for stocking in private ponds in counties within the conservation zone.

Current §57.116(a) stipulates that information required for the species being transported include number and total weight for each species. New §57.121(c)(2)(D) clarify that both the common and scientific name of the species are required. Common names are highly variable and thus pose difficulties with interpretation for enforcement personnel, whereas scientific names are unequivocal; however, including both is needed to aid in interpretation if scientific names are erroneous. The new rule also requires additional information concerning the number and total weight for each species by requiring number or weight, by size class. Fry and fingerlings are often sold by number, with weight unknown, whereas adult fish are often sold by the pound. Redundant count and weight information is not necessary for evaluating compliance; thus, requiring both weight and number on the invoice is unnecessary.

New §57.122, concerning Permit Application, Issuance, and Period of Validity, sets forth procedures to be followed by an applicant for a permit under the subchapter. The new section is a consolidation of provisions from various sections of current rules §57.117, concerning Exotic Species Permit: Application Requirements; §57.118, concerning Exotic Species Permit Issuance; §57.120, concerning Exotic Species Permit: Expiration and Renewal; and §57.125, concerning Triploid Grass Carp Permit: Application, Fee.

New §57.122(a) provides a crossreference to the application, issuance, and permit period of validity standards for interstate transport permits contained in new §57.121, concerning Transport of Live Controlled Exotic Species.

New §57.122(b) prescribes the conditions for applications for controlled exotic species permits other than for interstate transit, which are located in current §57.117(b) and (c).

New §57.122(b)(1) establishes a permit application submission deadline of 30 days prior to any prospective activity involving controlled exotic species, which is necessary to ensure adequate time for permit application review, facility inspections, and permit issuance.

New §57.122(b)(2) prescribes the specific information required by and contained in the application form, which is necessary for the department to assess the prospective activities and determine suitability for permit issuance.

New §57.122(b)(2)(D) provides for the specific instances for which the department waives fees for applications, all of which are provided for in current rule.

New §57.122(b)(3) prescribes additional required documentation. New subparagraph (A) clarifies that a copy of aquaculture or fish farm vehicle licenses required by the Texas Department of Agriculture (TDA) must be submitted with the permit application. Current §57.117(a)(1)(A) requires possession of an aquaculture license to be considered for an exotic species permit for aquaculture.

New subparagraph (B) requires applicants for commercial aquaculture facility permits to submit the documentation required by new §57.120, concerning Facility Wastewater Discharge Requirements, which is a requirement of current §57.134, concerning Wastewater Discharge Authority.

New §57.122(b)(3)(C) requires applicants for a permit to possess, transport, and dispose controlled exotic species of plants to submit the treatment proposal required by §57.932, concerning State Aquatic Vegetation Plan, which is necessary for the department to ensure that the applicant is compliance with the statutory requirements of Parks and Wildlife Code, §11.082, which mandates a state aquatic vegetation management plan.

New §57.122(b)(3)(D) requires submission of a facility map along with the permit application for commercial aquaculture facility permits, biological control production permits, zoological display or research permits with outdoor holding facilities, or limited special purpose permits for wastewater treatment. Current rules require an accurate-to-scale plat map; for smaller facilities, particularly those using recirculating aquaculture systems that consist of only small tanks, this requirement is cost-prohibitive. To provide greater flexibility to the regulated community, the new provisions allow for labeled, accurate maps or aerial photographs of the facility and only requires professionally surveyed maps for facilities within the 100-year floodplain that are constructed in such a way that escape might occur during flooding (e.g., outdoor, earthen ponds). The new rules also provide that maps are required for zoological display or research permits only when the application is for outdoor holding facilities, which is necessary for the department to evaluate the potential for escape of controlled exotic species.

New §57.122(b)(3)(E) consists of the revised content of current §57.117(d), concerning emergency plans. Current rules require emergency plans only for facilities located in the exotic shrimp exclusion zone. The new provision requires an emergency plan for all facilities, which the department has determined is necessary to ensure that appropriate measures are in place to prevent escape, release, or discharge of controlled exotic species into public water during a natural event such as a hurricane or flood. The rule also requires that the approved emergency plan be posted and maintained on file at the facility to ensure all staff members are familiar with and prepared to implement the plan, which is necessary to ensure the biosecurity of all facilities during such natural events and prevent inadvertent introductions of controlled exotic species into public waters.

New §57.122(b)(3)(F) requires submission of a research proposal by applicants for permits to conduct scientific research involving controlled exotic species and documentation of the qualifications of the applicant to conduct controlled exotic species research. Current rule requires only that an applicant have a department-approved research proposal to be considered for permit issuance. The department has determined that it is necessary to ensure that research permits are issued only to persons qualified to conduct scientifically valid research that will legitimately contribute to the knowledge, prevention, impact assessment/mitigation, and management of controlled exotic species.

New §57.122(b)(3)(G) establishes additional requirements for permits to culture controlled exotic species of plants as hosts for the purposes of production of biological control agents. The new provision requires submission of a biological control plan addressing the number of biological control agents to be collected from private waters, expected production of controlled exotic species of plants, and the intended use of and stocking locations for the biological control agents. The new provision is necessary to accommodate emerging technologies and methods to control exotic species.

New §57.122(c) sets forth the conditions under which the department issue a permit. Under current rule, the department may issue a permit when all application requirements of the rules have been met; the aquaculture facility operated by the applicant meets or will meet the design criteria stipulated in the rules, and the applicant has complied with all provisions of the Parks and Wildlife Code, §§66.007, 66.0072, and 66.015, and the subchapter during the one-year period preceding the date of application. The new subsection consolidates these provisions with other provisions regarding facility requirements (current §57.119 and §57.129) and inspection (current §57.119 and §57.125).

New §57.122(d) consists of the provisions of current §57.120(a) regarding the period of permit validity, altered to include an exception for activities authorized under §57.932, concerning State Aquatic Vegetation Plan, discussed earlier in this preamble.

New §57.123, concerning Permit Amendment and Renewal, prescribes the processes and requirements for amending and renewing permits issued under the subchapter. The new section is a consolidation of provisions from various sections of current §57.120, concerning Exotic Species Permit: Expiration and Renewal.

New §57.123(a) clarifies the requirements of current §57.119(m), which states that permits are not transferrable from site to site. The revised provision stipulates that a permit is valid only for the facility for which it issued and will not be amended to authorize activities at any other location or facility.

New §57.123 (b) enumerates specific activities that are prohibited without receiving an amended permit from the department. Current §57.121(b) requires an exotic species permit to be amended before a permittee may add or delete species of harmful or potentially harmful exotic fish, shellfish, or aquatic plants held pursuant to the permit; redistribute harmful or potentially harmful fish, shellfish, and aquatic plants into private facilities not authorized in the permit; change methods of preventing discharge of harmful or potentially harmful exotic fish, shellfish, and aquatic plants; change discharge of private facility effluent from aquaculture facilities or wastewater treatment facilities; or change an existing approved facility design. The new subsection simplifies and restates the current list of activities, adds a provision prohibiting the transfer of managerial or supervisory responsibilities to anyone other than the current permit holder, and specifically states that the activities are prohibited unless an amended permit has been received from the department. The new provision regarding transfer of supervisory or managerial responsibility is necessary to ensure that persons operating under a permit meet the requirements of the new rules for permitted activities.

New §57.123(c) provides for amendment or renewal of a permit provided the applicant has submitted an application for amendment or renewal at least seven days prior to transfer of managerial or supervisory responsibilities to a new person (if applicable); submitted the appropriate fee (if required) by the department; has complied with all permit provisions; and demonstrates that the facility is operated and maintained in a manner such that no escape, release, or discharge of controlled exotic species into public water or into facility ponds or drainage structures not meeting minimum facility requirements will or is likely to occur. Current §57.120(b) provides for the renewal of an exotic species permit upon finding that the applicant has met specified application requirements, the facility will meet all applicable facility design criteria, the applicant has complied with all provisions of the Parks and Wildlife Code, §§66.007, 66.0072, 66.015, and the subchapter during the one-year period preceding application for renewal; and the applicant has submitted a renewal application and all required annual reports. Current §57.121(a) provides that an exotic species permit may be amended provided the applicant has complied with all provisions of the Parks and Wildlife Code, §§66.007, 66.0072, 66.01, all provisions of the permit and the subchapter during the one-year period preceding the date of application; the applicant has met all applicable application requirements; and the facilities as altered will meet the required facility criteria. The new subsection allows for permit amendment or renewal upon finding that the applicant has submitted a written request for permit amendment or application for renewal prior to permit expiration or seven days prior to transfer of managerial or supervisory responsibilities; submitted the required fee; complied with all permit provisions; met minimum facility requirements (if applicable); and operated and maintained the facility in a manner such that no escape, release, or discharge of controlled exotic species into public water or into facility ponds or drainage structures not meeting minimum facility requirements will or is likely to occur.

New §57.123(d) introduces a new provision allowing for commercial aquaculture permits to be renewed for a period of greater than one year. Current §57.120(a) stipulates that all permits expire on December 31 of the year of issuance. The new section allows renewal of commercial aquaculture permits for a period of one, three, or five years provided the permit holder had complied with all provisions of this subchapter for a period equivalent to the renewal period. The new provision is intended to reduce the burden of permit administration on the department and the regulated community.

New §57.124, concerning Refusal to Issue; Review of Agency Decision to Refuse Issuance, consists of revised selected content from current §57.118, concerning Exotic Species Permit Issuance); §57.122, concerning Permit Denial Review; and §57.127, concerning Triploid Grass Carp Permit; Denial.

New §57.124(a)(1) provides for the department to refuse issuance or renewal, as applicable, of a permit to any person or for any facility if the department determines that a prospective activity constitutes a threat to native species, habitats, or ecosystems or is inconsistent with department management goals and objectives. Although numerous provisions of the new rules function individually and collectively to define the contexts or situations in which the department could refuse to issue or renew a controlled exotic species permit, the new section is a single statement of that authority.

New §57.124(a)(2) provides for refusal to issue, amend, or renew a controlled exotic species permit for any person who has been finally convicted of, pleaded nolo contendere to, received deferred adjudication, or been assessed an administrative penalty for a violation of: Parks and Wildlife Code, §§66.007, 66.0072, or 66.015; a provision of the Parks and Wildlife Code that is a Class A or B misdemeanor or felony; Penal Code, §37.10; the Lacey Act (16 U.S.C. §§3371-3378): or a violation of federal law applicable to grass carp. In addition, the new section allows the department to refuse permit issuance, amendment, or renewal to another person employed, authorized, or otherwise utilized to perform permitted activities by the applicant has been convicted of, pleaded guilty or nolo contendere to, or received deferred adjudication or pre-trial diversion for one of the listed offenses listed in the section and allow the department to prevent a person from acting on behalf of or as a surrogate for a person prevented from obtaining a permit.

The department has determined that the decision to issue a permit to hold controlled exotic species should take into account an applicant's history of violations involving harmful or potentially harmful fish, shellfish, and aquatic plants, major violations of the Parks and Wildlife Code (Class B misdemeanors, Class A misdemeanors, and felonies), violations of Penal Code, §37.10 (which creates the offenses relating to falsification and tampering governmental records), and Lacey Act violations. The department reasons that it is appropriate to deny the privilege of possessing controlled exotic species for any purposes to persons who exhibit a demonstrable disregard for agency regulations. Similarly, it is appropriate to deny the privilege of holding wildlife to a person who has exhibited demonstrable disregard for wildlife law in general by committing more egregious (Class B misdemeanors, Class A misdemeanors, and felonies) violations of conservation law.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported, or sold in violation of state law. Lacey Act prosecutions are normally conducted by the United States Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is often predicated on a violation of state law, the federal government needs only to prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction. Rather than expending resources and time conducting concurrent state and federal prosecutions, the department believes that it is reasonable to use a Lacey Act conviction or civil penalty as the basis for refusing to issue or renew a permit or allow a person so convicted to engage in permitted activities as an employee or assistant of a permittee. Because the elements of the underlying state criminal offense must be proven to establish a conviction or assessment of a civil penalty for a Lacey Act violation, the department reasons that such conviction or assessment constitutes legal proof that a violation of state law occurred and it is therefore redundant and wasteful to pursue a conviction in state jurisdiction to prove something that has already been proven in a federal court.

A department action taken as a result of an adjudicative status listed in the new section would not be automatic but be within the discretion of the department. Factors that may be considered by the department include, but are not limited to: the number of final convictions or administrative violations; the seriousness of the conduct on which the final conviction or administrative violation is based; the existence, number and seriousness of offenses or administrative violations other than offenses or violations that resulted in a final conviction; the length of time between the most recent final conviction or administrative violation and the cur-

rent time; whether the final conviction, administrative violation, or other offenses or violations were the result of negligence or intentional conduct; whether the final conviction or administrative violations resulted from the conduct committed or omitted by the applicant, an agent or employee of the applicant, or both; the accuracy of information provided by the applicant or employee of the applicant; whether the applicant agreed to any special provisions recommended by the department as conditions; and other aggravating or mitigating factors.

The new subsection also allows the department to deny permit renewal to any person not in compliance with applicable reporting or recordkeeping requirements, which is authorized under the provisions of current §57.120.

Additionally, the new provision also provides for department determination of the duration of denial or refusal under the new rules, not to exceed five years. The department does not intend for a refusal to issue or renew permit or disqualification for participation in permitted activities to be permanent; therefore, the new subsection allow the flexibility to impose a specific duration of denial, not to exceed five years.

New subsection (b) recapitulates the provisions of current §57.122, concerning Permit Denial Review, with several substantive changes. The current rule requires the department to conduct a review within 10 days of receiving a request for review. The new subsection requires the department to establish a date and time for the review within 10 working days of receiving a request for review and requires the department to conduct the review within 30 days of the date of request, unless another date is selected by mutual agreement. The new subsection also eliminates references to the specific titles of review panelists and instead simply requires panelists to be agency managers with relevant experience or knowledge.

New §57.125, concerning Reporting, Recordkeeping, and Notification Requirements, establishes the requirements for permit holder with respect to required records, reports, and notifications.

New §57.125(a) provides a cross-reference to new §57.118, concerning Special Provisions--Water Spinach, which prescribes the reporting, recordkeeping, and notification requirements for holders of water spinach culture facility permits.

New §57.125(b) prescribes reporting requirements for various classes of controlled exotic permit holders. Current §57.123(a) requires permit holders to account for importation, possession, transport, sale, transfer, or other disposition of any harmful or potentially harmful exotic species handled by the permittee, which in general provide useful information to the department but do not address the nuances of the various types of controlled exotic species permits currently issued or contemplated by the new rules. The new section would, among other things, tailor reporting requirements for the various classes of permits in order to provide the department with pertinent information and relieve permit holders, where possible, from having to track and report data that is irrelevant to the interests of the department.

New §57.125(b)(1) requires all reports to be submitted on department forms or in a format prescribed by the department, as applicable, which is an express or implied requirement of current rules regarding reports throughout the subchapter.

New §57.125(b)(2) requires annual reports to be submitted by January 31 of the year following the calendar year for which the permit was issued. The current deadline is January 10; however, the department believes that moving the deadline to a later date will facilitate compliance and administration by reducing time management conflicts resulting from the holiday season.

New §57.125(b)(3)(A) consists of the contents of current §57.123(a), with a clarification of the requirements for commercial aquaculture facility permit holders to the effect that reports must account for the quantity or weight of the controlled exotic species for each reportable activity, which is necessary for consistency with the requirements of new §57.121 discussed earlier in this preamble.

New §57.125(b)(3)(B) exempts holders of a commercial aquaculture facility permit authorizing aquaculture and sale of tilapia from the annual reporting requirement, which is necessary because tilapia are able to reproduce in captivity, which makes population calculations problematic if not impossible.

New §57.125(b)(4) establishes the annual reporting requirements for holders of controlled exotic species permits for biological control production. The annual report for this class of permit holder consists of values for host plant production, biological control agent production, number and locations of introduced organisms, collections and introductions, and number of sales if applicable, which is necessary for the department to effectively monitor activities with the potential to result in negative consequences for native organisms and ecosystems in the event or escape or release.

New §57.125(b)(5) prescribes the annual reporting requirements for the holders of a research permit. Researchers will be required to provide a description of research activities conducted for each species listed on the permit rather than the information required under current §57.123(a). The department has determined that the most useful information with respect to research activities is the extent to which the research benefits indigenous species or ecosystems and/or provides insight on ecology, risks, impacts, or management approaches for controlled exotic species.

New §57.125(b)(6) establishes the annual reporting requirements for the holders of a controlled exotic species permit authorizing zoological display. The new rule requires a permit holder to account for all controlled species in possession, obtained, transferred, or dispatched during the permit year, which be less burdensome than the current standard and more consistent with the parameters of zoological display activities.

New §57.125(b)(7) establishes the annual reporting requirements for various types of limited special purpose controlled exotic species permits.

New subparagraph (A) provides that the annual reporting requirements for persons holding a permit authorizing triploid grass carp sale for private pond stocking be the same as the reporting requirements for commercial aquaculturists under new §57.125(b)(3)(A), consisting of the total quantity or weight of triploid grass carp for all instances of purchase, transfer, sale, importation, exportation, or other disposition during the permit period. New subparagraph (B) waives annual reporting requirements for all other types of limited special purpose permits except as otherwise provided by permit conditions for permits issued for possession, transport, and disposal activities not otherwise authorized by the provisions of new §57.113, concerning General Provisions and Exceptions as provided in §57.114(f)(6), concerning Controlled Exotic Species Permits.

New §57.125(c) prescribes the recordkeeping requirements for various classes of controlled exotic permit holders other than

controlled exotic species permits for water spinach. New paragraph (1) requires the holder of a permit issued under the subchapter to maintain at the facility or record-keeping location and, upon the request of any department employee acting within the scope of official duties during normal business hours, promptly make available for inspection copies of transport invoices for the previous one year, permits or other records required by the subchapter, and documentation of current permits or authorizations required by the TDA and TCEQ. Current §57.119(a) requires a copy of the permit to be made available for inspection. The department has determined that the rules should also address required records and reports, which is also addressed in the requirements of new §57.113(o)(3).

New §57.125(d) prescribes the notification requirements for various classes of controlled exotic permit holders other than controlled exotic species permits for water spinach.

New §57.125(d)(1) provides a cross-reference to other provisions of the new rules that prescribes notification requirements for limited special purpose permits for interstate transport transit.

New §57.125(d)(2) requires permit holders to notify the department within 24 hours of discovering the escape, release, or discharge of controlled exotic species. Under current rule (§57.119(i)), a permit holder is required to notify the department within two hours of discovering the escape, release, or discharge of exotic species. The department has determined that in a notification is not meaningful unless it represents the results of a thorough assessment of an event and that two hours is insufficient for the execution of such an assessment; therefore, the new rule requires notifications to be made 24 hours following discovery of escape, release, or discharge from a facility or during transport.

New §57.125(d)(3) requires a permit holder to notify the department in the event that a facility or facility complex appears to be in imminent danger of overflow, flooding, or other circumstance that could result in the escape, release, or discharge of controlled exotic species into public water and begin implementation of an emergency plan, which is a provision of current rule under §57.119(e).

New §57.125(d)(4) requires the holder of a permit for controlled exotic species of shrimp to notify the department at least 72 hours prior to, but not more than 14 days prior to harvesting shrimp held under a permit, which is a provision of current rule under §57.119(f).

New §57.125(d)(5) requires the holder of a commercial aquaculture facility permit to notify the department not less than 72 hours prior to any instance of the import or export of triploid grass carp. The notification must include the number of grass carp being purchased, the source of grass carp, the ploidy level of grass carp, the final destination of grass carp, the name of the certifying authority who conducted triploid grass carp certification, and the name, address, and exotic species permit number and aquaculture license number (as applicable) of both the transporter and the receiver. With the exception of the reporting of ploidy level, the new section consists of the provisions of current §57.124, concerning Triploid Grass Carp; Sale, Purchase. The department has determined that ploidy data is necessary to appropriately assess activities that have the potential to negatively impact native organisms and ecosystems.

New §57.125(d)(6) specifies the notification requirements of the new rules that apply to prospective modifications of commercial aquaculture facilities, zoological display or research facilities (when live controlled exotic species are possessed), and biological control production facilities. The affected permit holders are required to notify the department at least 14 days prior to any modifications that affect methods of preventing escape, discharge, release, discharge of water/wastewater/waste, or required facility infrastructure. As part of the required notification, permit holders be required to provide photographs, maps, and diagrams of the prospective modifications. The new paragraph also provide for inspection at the department's discretion, which is a restatement of existing inspection authority under current §57.119(b) and numerous other provisions of the new rules.

New §57.126, concerning Discontinuation of Permitted Activities; Sale or Transfer of Permitted Facility, sets forth the powers of the department with regard to compelling a permit holder to cease permit activities and prescribing remedial or terminal directives to prevent or minimize threats to native organisms or ecosystems.

New §57.126(a) establishes the department's authority to order a permit holder in writing to cease possession, importation, exportation, sale, purchase, transportation, propagation, or culture of controlled exotic species and prescribes a disposition protocol in accordance with the provisions of new §57.113(m), concerning General Provisions and Exceptions. The new subsection provides for three circumstances under which cessation of permit activities could be ordered by the department. First, cessation could be ordered if the department determines that there is an imminent risk of escape, release, or discharge of controlled exotic species. Second, cessation could be ordered if a required permit, license, authorization, or exemption is revoked or suspended by the TCEQ or the TDA. Third, cessation could be ordered if any of the required permits, licenses, authorizations, or exemptions have expired or are otherwise no longer valid. The department has determined that the enumerated circumstances represent situations in which the intervention of the department is critical to prevent damages to public resources.

New §57.126(b) prescribes the actions required of a permit holder in the event that the permit holder no longer desires to engage in permitted activities. The new subsection requires permit holders who intend to discontinue permitted activities to notify the department of that intent at least 14 days prior to discontinuation of permitted activities or permit expiration. Current §57.119(c) requires the immediate lawful sale, transfer, or destruction of all controlled exotic species in the permit holder's possession and notification of the department within 14 days of cessation of permitted activities. The new subsection eliminates the current requirement for immediate destruction or transfer of inventory in possession upon discontinuation and replaces it with a requirement that such destruction or transfer be effected to prior to permit expiration date or the expected date that permitted activities cease, as reported to the department. The rule also stipulates that a final report that is compliant with the provisions of new §57.125 must submitted to the department within 30 days of discontinuation of activities.

New §57.126(c) sets forth the actions required of a permit holder in the event that the permit holder intends to sell a facility and controlled exotic species within the facility. The new subsection requires permit holders who intend to sell a permitted facility to notify the department of that intent at least 14 days prior to the expected closing date and again, in writing, with 72 hours of finalizing the sale. Current §57.119(l) requires immediate notification of the department in the event of a change of ownership of a permitted facility. Rather than requiring immediate notification, the

new subsection requires notification of intent to sell at least 14 days in advance of expected closing date to ensure the department is prepared to accommodate transitional operation needs in accordance with the provisions of new §57.126(d). The new subsection also requires the permit holder to notify the department within 72 hours of finalizing the sale of the facility, which include the name, address, and phone number of the purchaser.

New §57.126(d) provides for the transitional operation of a facility for the period of time between a change in ownership and the acquisition of a valid controlled exotic species permit by the new owner. The new subsection allows permitted operations to continue provided the facility is in compliance with the provisions of the subchapter, the new owner has submitted an application for a controlled exotic species permit and has obtained or is in the process of obtaining required TCEQ and TDA permits, and the department has authorized continued operation in writing, pending approval or denial of permits required by TCEQ and TDA. In the case of commercial aquaculture, existing stocks may be sold to the new owner along with the facility. The new provision is intended to facilitate changes in ownership with minimal disruptions while continuing to ensure lawful operation.

New §57.127, concerning Memorandum of Understanding between the Texas Parks and Wildlife Department, the Texas Commission on Environmental Quality, and the Texas Department of Agriculture, consists of the contents of current §57.135, which is being relocated for organizational purposes.

New §57.128, concerning Violations and Penalties, consists of the provisions of current §57.137, concerning Penalties, retitled to clarify that the section applies to violations as well as penalties and reworded to specifically tie the penalties for criminal conduct to the actions of a person.

The department received no comments opposing adoption of the rules as proposed.

The department received five comments supporting adoption of the rules as proposed.

31 TAC §§57.112 - 57.128

The repeals are adopted under the authority of Parks and Wildlife Code, §66.007, which authorizes the department to make rules necessary to authorize the import, possession, sale, or introduction of harmful or potentially harmful exotic fish.

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 January 7, 2021.

TRD-202100111
James Murphy
General Counsel
Texas Parks and Wildlife Department
Effective date: January 27, 2021
Proposal publication date: September 25, 2020
For further information, please call: (512) 389-4775

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31 TAC §§57.111 - 57.128

Statutory authority

The amendment and new rules are adopted under the authority of Parks and Wildlife Code, §66.007, which authorizes the department to make rules necessary to authorize the import, possession, sale, or introduction of harmful or potentially harmful exotic fish.

§57.125. Reporting, Recordkeeping, and Notification Requirements.

(a) Reporting, recordkeeping, and notification requirements for holders of water spinach culture facility permits are described in §57.118 of this title (relating to Special Provisions--Water Spinach).

(b) Reporting requirements.

(1) All reports will be submitted on department forms or in a format prescribed by the department, as applicable.

(2) All annual reports for permits other than for water spinach shall be due by January 31 of the year following the calendar year for which the permit was issued.

(3) Commercial aquaculture facility.

(A) The holder of a commercial aquaculture facility permit authorizing aquaculture and sale of controlled exotic species of shrimp or triploid grass carp shall submit to the department an annual report that accounts for the total quantity or weight of controlled exotic species of shrimp or triploid grass carp for all instances of purchase, transfer, sale, importation, exportation, or other disposition of any controlled exotic species during the permit period.

(B) The holder of a commercial aquaculture facility permit authorizing aquaculture and sale of tilapia is not required to submit an annual report for the tilapia.

(4) Biological control production. The holder of a permit for biological control production shall submit to the department a report of host plant production, biological control agent production, number and locations of collections and introductions, and number of sales if applicable.

(5) Research. The holder of a permit for controlled exotic species research shall submit to the department a report describing the research activities conducted on all species listed on the permit.

(6) Zoological display. The holder of a permit for zoological display shall submit a report accounting for all controlled species in possession, obtained, transferred, or dispatched during the permit year.

(7) Limited special purpose permits.

(A) The holder of a limited special purpose permit for tilapia and triploid grass carp sale for private pond stocking issued under §57.114(f)(2) of this title (relating to Controlled Exotic Species Permits) shall submit to the department an annual report that accounts for total quantity or weight of triploid grass carp for all instances of purchase, transfer, sale, importation, exportation, or other disposition during the permit period.

(B) Holders of limited special purpose permits for possession, transport, and disposal activities not otherwise authorized by the provisions of proposed §57.113 (relating to General Provisions and Exceptions) may be required to submit a report to the department in accordance with permit conditions.

(C) Reports are not required for other limited special purpose permits.

(c) Recordkeeping requirements for permits. The holder of a permit issued under this subchapter shall maintain at the facility or record-keeping location, and upon the request of any department employee acting within the scope of official duties during normal business hours, promptly make available for inspection:

(1) copies of transport invoices for the previous one year, generated in accordance with §57.121 of this title (relating to Transport of Live Controlled Exotic Species);

(2) any other permit or records required by this subchapter; and

(3) documentation of current permits or authorizations required as a prerequisite for any permits issued under this subchapter and issued under the authority of:

(A) Water Code, Chapter 26; and

(B) Agriculture Code, Chapter 134.

(d) Notification requirements for permits.

(1) Notification requirements for limited special purpose permits for interstate transit are described in §57.121(d) of this title.

(2) The holder of a permit issued under this subchapter shall notify the department within 24 hours of discovering the escape, release, or discharge of controlled exotic species from their facility or during transport.

(3) In the event that a facility or facility complex subject to a permit issued under this subchapter appears to be in imminent danger of overflow, flooding, or other circumstance that could result in the escape, release, or discharge of controlled exotic species into public water, the permit holder shall immediately:

(A) begin implementation of the emergency plan approved by the department to prevent the escape, release, or discharge of controlled exotic species into public water; and

(B) notify the department in accordance with permit provisions.

(4) Except in case of an emergency, the holder of a controlled exotic species permit authorizing possession of controlled exotic species of shrimp must notify the department at least 72 hours prior to, but not more than 14 days prior to any harvesting of permitted shrimp. In an emergency, notification of harvest must be made as early as practicable prior to beginning of harvest operations.

(5) The holder of a commercial aquaculture facility permit must notify the department not less than 72 hours prior to any instance of the import or export of triploid grass carp. The notification must include:

(A) number of grass carp being purchased;

(B) source of grass carp;

(C) ploidy level of grass carp;

(D) final destination of grass carp;

(E) name of certifying authority who conducted triploid grass carp certification; and

(F) name, address, and exotic species permit number and aquaculture license number (as applicable) of both the transporter and the receiver.

(6) The holders of permits for commercial aquaculture facilities, zoological display or research facilities when live controlled exotic species are possessed, and biological control production facilities shall:

(A) notify the department at least 14 days prior to making modifications:

(i) to the methods of preventing escape, release, or discharge of controlled exotic species approved under the current permit provisions;

(ii) affecting the discharge of water, wastewater, or waste from a facility; or

(iii) to the required facility infrastructure set forth under the permit provisions or §57.119 of this title (relating to Minimum Facility Requirements).

(B) The permit holder must furnish to the department photographs and revised maps of modifications. The department may conduct an onsite inspection upon a determination that the nature of a prospective modification requires further investigation.

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 January 7, 2021.

TRD-202100112
James Murphy
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION
SUBCHAPTER L. WORKFORCE DIPLOMA PILOT PROGRAM

40 TAC §§800.500 - 800.505

The Texas Workforce Commission (TWC) adopts the following new subchapter to Chapter 800, relating to General Administration, without changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7545):

Subchapter L. Workforce Diploma Pilot Program, §§800.500 - 800.505

These rules will not be republished.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Senate Bill (SB) 1055, 86th Texas Legislature, Regular Session (2019), added Texas Labor Code, Chapter 317, requiring TWC, in consultation with the Texas Education Agency (TEA), to create and administer a Workforce Diploma Pilot Program (Program). As outlined in Texas Labor Code, Chapter 317, the Program will allow eligible high school diploma-granting entities to be reimbursed for helping adult students obtain high school diplomas and industry-recognized credentials and develop technical career-readiness and employability skills.

SB 1055 stipulates that Texas Labor Code, Chapter 317 expires on September 1, 2025, and requires TWC to develop rules that:

--outline the application process to become a qualified provider;

--define the minimum performance standards for qualified providers, which include a graduation rate of at least 50 percent and a program cost per graduate of $7,000 or less for the previous calendar year; and

--develop formulas to make the appropriate calculations to determine the graduation rate and program cost per graduate.

SB 1055 includes the stipulation that TWC "is required to implement a provision of this Act only if the legislature appropriates money specifically for that purpose. If the legislature does not appropriate money specifically for that purpose, the Texas Workforce Commission may, but is not required to, implement a provision of this Act using other appropriations available for that purpose." TWC is developing rules to implement the Program upon allocation of funds for its implementation.

New Chapter 800, Subchapter L, Workforce Diploma Pilot Program, provides the rules for implementing new Texas Labor Code, Chapter 317, as added by SB 1055.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER L. WORKFORCE DIPLOMA PILOT PROGRAM

TWC adopts new Subchapter L:

§800.500. Purpose

New §800.500 provides the purpose of the Program, which is to reimburse qualified providers that provide assistance to adult students to obtain high school diplomas and attain industry-recognized credentials and to develop technical career-readiness and employability skills, to the extent that funding is available for this purpose.

§800.501. Definitions

New §800.501 provides the following definitions for Subchapter L:

--"Academic resiliency" is a student's ability to persist and academically succeed despite adversity.

--"Academic skill intake assessment" is a formal and/or informal assessment used at intake to gather information on a student's current knowledge and skills in specific academic areas (for example, literacy and numeracy). That information is then used to determine the student's appropriate instructional level as well as accommodations and/or remediation that the student needs.

--"Career Pathway" is a combination of rigorous and high-quality education, training, and other services that:

--aligns with the skill needs of industries in the economy of the state or regional economy involved;

--prepares an individual to be successful in any of a full range of secondary or postsecondary education options;

--includes counseling to help an individual achieve his or her education and career goals;

--includes, as appropriate, education offered concurrently with, and in the same context as, workforce preparation activities and training for a specific occupation or occupational cluster;

--organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates his or her educational and career advancement to the extent practicable;

--enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

--helps an individual enter or advance within a specific occupation or occupational cluster (29 USC §3102, Definitions).

--"Eligible participant" is an individual who is over the age of compulsory school attendance prescribed by Texas Education Code, §25.085 and who, as required by TWC:

--is a Texas resident;

--lacks a high school diploma;

--is authorized to work in the United States; and

--is able to work immediately upon graduation from the Program.

--"Employability skills certification program" refers to a certification in general skills that are necessary for success in the labor market at all employment levels and in all industry sectors. Employability skills include problem-solving, collaboration, organization, and adaptability.

--"Half credit" is based on the Carnegie Unit, which refers to the standard award of credit given for a course that lasts one semester. When determining credits, qualified providers should consider instructional time plus the amount of time that the student would take to complete the coursework in a high school semester or academic year. In traditional education models, a student typically attends a class for 55 to 60 minutes a day for four or five days a week, in addition to studying independently.

--"High school diploma" is a credential awarded by an entity based on completion of all state graduation requirements as outlined in Texas Education Code, §28.025 and §39.023 and 19 Texas Administrative Code (TAC) Chapter 74, Curriculum Requirements, and Chapter 101, Assessment.

--"Industry-recognized credential" is a state-approved credential that verifies an individual's qualifications and competence and is issued by a third party with the relevant authority to issue such credentials (US Department of Labor, 2010). Industry-recognized credentials offered by qualified providers must align with TWC's mission to target high-growth, high-demand, and emerging occupations that are crucial to state and local workforce economies and must reflect the target occupations for the local workforce development areas (workforce areas) in which services will be provided. Qualified providers may also reference the list of industry-based certifications for public school accountability that TEA publishes.

--"Learning Plan Development" is the process by which an individualized learning plan is developed after student intake; it is maintained through coaching and mentoring.

--"One credit" is based on the Carnegie Unit, which refers to the standard award credit given for a course that lasts a full academic year. When determining credits, qualified providers should consider instructional time plus the amount of time that the student would take to complete the coursework in a high school semester or academic year. In traditional education models, a student typically attends a class for 55 to 60 minutes a day for four or five days a week in addition to studying independently.

--"Program" refers to the Workforce Diploma Pilot Program set forth in Texas Labor Code, Chapter 317.

--"Qualified provider" that may participate in the Program and receive reimbursement is a provider that:

--is a public, nonprofit, or private entity that is:

--authorized under the Texas Education Code or other state law to grant a high school diploma, or

--accredited by a regional accrediting body, as established by the US Secretary of Education pursuant to 20 USCS §1099b, Recognition of Accrediting Agency or Association;

--has at least two years of experience providing dropout reengagement services to adult students, including recruitment, learning plan development, and proactive coaching and mentoring, leading to the obtainment of a high school diploma;

--is equipped to:

--provide:

--academic skill intake assessment and transcript evaluations;

--remediation coursework in literacy and numeracy;

--a research-validated academic resiliency assessment and intervention;

--employability skills development aligned to employer needs;

--career pathways coursework;

--preparation for the attainment of industry-recognized credentials; and

--career placement services; and

--develop a learning plan that integrates academic requirements and career goals; and

--offers a course catalog that includes all courses necessary to meet high school graduation requirements in Texas, as authorized under 19 TAC Chapter 74, Subchapter B, Graduation Requirements.

--"Regional accrediting body" must meet the criteria established by the US Secretary of Education pursuant to 20 USCS §1099b, Recognition of Accrediting Agency or Association, and appear on the US Secretary of Education's list of federally recognized accrediting agencies in the *Federal Register* as stated in 34 CFR §602.2. A copy of the list may be obtained from the US Department of Education.

§800.502. Request for Qualifications and List of Qualified Providers

New §800.502 describes the Program's Request for Qualifications (RFQ) provisions, as outlined in Texas Labor Code, Chapter 317, to the extent that TWC funding is available.

Texas Labor Code, Chapter 317 requires TWC to publish an RFQ no later than October 15th of each year to identify Program providers. New §800.502 outlines the application process for qualified providers as follows:

TWC will identify qualified providers to participate in the Program through a statewide RFQ process conducted in accordance with state requirements.

Potential providers will apply directly to TWC using the RFQ process, and, once identified as a qualified provider, must meet all deadlines, requirements, and guidelines set forth in the published RFQ.

TWC will publish a list of qualified providers by November 15th of each year to participate in the Program the next calendar year.

Each provider on the qualified provider list will be eligible to receive monthly reimbursements for this Program based on monthly invoices submitted to TWC, as prescribed in the RFQ's terms.

Each year, TWC will review and update the list of qualified providers. Qualified providers that do not meet the minimum performance standards outlined in §800.503 will be placed on probation for the remainder of the calendar year. Failure to meet both minimum performance standards for two consecutive years will result in disqualification from the Program.

TWC's determinations in the RFQ process will be based on the affirmation of the qualified provider to effectively perform all services and activities outlined in Texas Labor Code, Chapter 317.

§800.503. Minimum Performance Standards

As required by Texas Labor Code, Chapter 317, new §800.503 describes the minimum performance standards needed for qualified providers to remain on the qualified provider list.

New §800.503(a) states that the minimum performance standards for the calendar year must include a:

--graduation rate of at least 50 percent; and

--program cost per graduate of $7,000 or less.

New §800.503(b) provides the requirements for TWC actions if a qualified provider fails to maintain minimum performance standards. Section 800.503(b) requires TWC to annually review data from each participating provider to ensure that the services offered by the provider are meeting the minimum performance standards. If TWC determines that a provider did not meet the minimum performance standards in the previous calendar year, TWC shall place the provider on probationary status for the remainder of the current calendar year.

New §800.503(c) requires TWC to remove any provider that does not meet the minimum performance standards for two consecutive calendar years from the published provider list, as authorized by Texas Labor Code, §317.005.

§800.504. Graduation Rate and Graduate Cost Formulas

As required by Texas Labor Code, Chapter 317, new §800.504(a) and (b) describe the formulas for calculating the graduation rate and Program cost per graduate.

Graduation rate is defined as and determined by dividing the number of students who received a high school diploma from the qualified provider by the number of students for whom the qualified provider sought and received reimbursements.

New §800.504(b) provides the Program cost per graduate formula as the product of the number of students who received a high school diploma during the previous calendar year multiplied by $7,000; that product may not exceed the total annual cost (reimbursements paid) to the qualified provider for the total number of services provided.

§800.505. Reimbursement Rates

New §800.505 provides the reimbursement amounts that a qualified provider may receive (to the extent that funding is available).

Pursuant to Texas Labor Code, §317.006, those reimbursement rates will be as follows:

--$250 for completion of a half credit

--$250 for completion of an employability skills certification program equal to at least one credit or the equivalent

--$250 for the attainment of an industry-recognized credential requiring not more than 50 hours of training

--$500 for the attainment of an industry-recognized credential requiring at least 50 but not more than 100 hours of training

--$750 for the attainment of an industry-recognized credential requiring more than 100 hours of training

--$1,000 for the obtainment of a high school diploma

Additionally, §800.505 clarifies that a provider may not be reimbursed twice for one attainment of an industry-recognized credential.

TWC hereby certifies that the rules have been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENTS

The public comment period ended on November 23, 2020. No comments were received.

PART IV.

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of Texas Labor Code, Chapter 317.

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 803. SKILLS DEVELOPMENT FUND

Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 803, relating to the Skills Development Fund:

Subchapter A. General Provisions Regarding the Skills Development Fund, §803.1 and §803.2

Subchapter B. Program Administration, §803.11 and §§803.13 - 803.15

TWC adopts the following new section of Chapter 803, relating to the Skills Development Fund:

Subchapter A. General Provisions Regarding the Skills Development Fund, §803.4

The amendments to §§803.1, 803.11, 803.13, and 803.15, and new §803.4 are adopted *without changes* to the proposed text as published in the November 13, 2020, issue of the *Texas Register* (45 TexReg 8118). The rules will not be republished. The amendments to §803.2 and §803.14 are adopted *with changes* to the proposed text as published. The rules will be republished.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 803 rule changes is to implement statutory changes related to the Skills Development Fund (SDF) program.

House Bill (HB) 700, 86th Texas Legislature, Regular Session (2019), amended sections of Texas Labor Code, Chapter 303, relating to the SDF program. HB 700 amended Texas Labor Code, §303.001(a) to add Local Workforce Development Boards (Boards) to the list of entities that are eligible to use SDF grants as an incentive to provide customized assessment and training.

Additionally, HB 108, 85th Texas Legislature, Regular Session (2017), amended the Texas Labor Code to add §303.0031 regarding the use of SDF grants to encourage employer expansion and recruitment. Texas Labor Code, §303.0031 allows SDF grants to provide "an intensive and rapid response to, and support services for, employers expanding in or relocating their operations to this state, with a focus on recruiting employers that will provide complex or high-skilled employment opportunities in this state."

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

TWC adopts the following amendments to Subchapter A:

§803.1. Scope and Purpose

Section 803.1(a) is amended to provide a broad statement on the purpose of the SDF. This language reflects the statutory purpose in the Texas Labor Code, §303.001 and includes business expansion and relocation purpose in the Texas Labor Code, §303.003. The amended language removes references to required partnerships for community-based organization as this eligibility requirement is described in §803.2.

Section 803.1(a) is also amended to add Boards to the list of entities eligible to receive SDF grants to provide customized assessment and training pursuant to Texas Labor Code, §303.001. TWC notes that Texas Government Code, §2308.264 prohibits Boards from directly providing workforce training or one-stop workforce services unless the Board requests and is approved for a waiver based on the lack of an existing qualified alternative for delivery of workforce services in the local workforce development area (workforce area). Texas Labor Code, Chapter 303 (as amended by HB 700) allows Boards to apply for and use SDF funds:

--as an incentive to provide customized training;

--to develop customized training; and

--to sponsor small and medium-sized business networks and consortiums for job training purposes.

Texas Labor Code, Chapter 303 does not state that Boards must provide the training directly and, therefore, does not conflict with Texas Government Code, §2308.264.

Section 803.1(a) is also amended to add "A&M" to complete the name of the Texas Engineering Extension Service, which reflects the language in Texas Labor Code, §303.001.

§803.2. Definitions

Definitions in §803.2 are amended as follows:

--Section 803.2(1) is amended to include a Board as a design partner in the definition of a "customized training project."

--Section 803.2(2) is added to define "eligible applicant."

--Section 803.2(3) is added to define "executive director."

--Subsequent definitions are renumbered accordingly to accommodate the added definitions.

--Section 803.2(4) is amended to include a Board in the definition of a "grant recipient."

--Section 803.2(6) is amended to remove "person" to alleviate any ambiguity or confusion with the word in the definition of "private partner." At adoption, "Boards" is added to the definition for clarification.

--Section 803.2(9) is amended to add "A&M" to the defined term "Texas Engineering Extension Service."

--Section 803.2(11) is amended to include a Board contractor in the definition of a "training provider."

In response to comment, §803.2(2) and (3) are added to define "eligible applicant" and "executive director" to clarify the use of those terms in adopted §803.14.

§803.4. Use of Funds to Encourage Employer Expansion and Recruitment

New §803.4 is added to implement Texas Labor Code, §303.0031, relating to the use of the SDF to support employers expanding in or relocating to Texas. The rule language reflects the statutory language in Texas Labor Code, §303.0031.

Section 803.4(a) reflects the statutory language in the Texas Labor Code that the SDF may be used to provide an intensive and rapid response to, and support services for, employers expanding in or relocating their operations to Texas, with a focus on recruiting employers that will provide complex or high-skilled employment opportunities in the state.

New §803.4(b) reflects the statutory language in the Texas Labor Code that the SDF grand funds may be used to:

--provide leadership and direction to, and connections among, out-of-state employers, economic development organizations, Boards, public community colleges, and public technical colleges to support employers' recruitment and hiring for complex or high-skilled employment positions as necessary to facilitate the employers' relocation to or expansion of operations in Texas; and

--award grants to public community colleges or public technical colleges that provide workforce training and related support services to employers that commit to establishing a place of business in Texas.

New §803.4(c) reflects the statutory language in the Texas Labor Code that the SDF grant funds may be used to develop:

--customized workforce training programs for an employer's specific business needs;

--fast-track curriculum;

--workforce training--related support services for employers; and

--instructor certification necessary to provide workforce training.

New §803.4(d) reflects the statutory language in the Texas Labor Code that SDF grant funds may also be used to acquire training equipment necessary for instructor certification and employment. The rule language clarifies that the use of funds for this purpose is permitted only for SDF grants that are funded under §803.4 to support employers expanding in or relocating to Texas.

Texas Labor Code, §303.0031 allows TWC to require grant recipients, as a condition of receiving grant funds under this section, to agree to repay the amount received and any related interest if TWC determines that the grant funds were not used for the purposes for which the funds were awarded. New §803.4(e) includes this option.

SUBCHAPTER B. PROGRAM ADMINISTRATION

TWC adopts the following amendments to Subchapter B:

§803.11. Grant Administration

Section 803.11(3) is amended to correct the citation for Agency Monitoring Activities to Chapter 802, Subchapter D.

§803.13. Program Objectives

Section 803.13(2) is amended to promote collaboration of workforce activities in workforce areas as an SDF program objective. The amended language removes collaboration solely with Boards and expands the promotion of collaboration and awareness of workforce activities to a broader partnership of entities.

§803.14. Procedure for Requesting Funding

Section 803.14 is amended to clarify the language stating that SDF applicants obtain the review and comments of the Board in the applicable workforce areas where there is a significant impact on job creation or incumbent worker training.

TWC notes that collaboration between grant applicants and Boards during the SDF project development review and evaluation process ensures that the needs of local industry and the workforce are being met effectively and efficiently.

In response to comment, adopted §803.14 is amended to add subsections (a) - (c) to clarify language for the requirement that Boards review and comment on SDF applications before the applications are submitted to TWC.

The subsequent subsections are relettered accordingly to accommodate the added subsections.

Section 803.14(h)(6) is amended to include Boards, along with the entities currently in rule, in the signed agreement outlining each entity's roles and responsibilities if a grant is awarded.

Section 803.14(h)(8) is amended to require grant applicants to include a comparison of costs per trainee for customized training projects for similar Board instruction in the grant application in order to align with the current requirement for comparison of costs with instruction at community and technical colleges or TEEX.

§803.15. Procedure for Proposal Evaluation

Section 803.15(b) is amended to remove the requirement that TWC must notify the Board in the applicable workforce area

when it is evaluating an SDF application. The amended section adds the requirement that TWC must notify all eligible grant applicants when it is evaluating an SDF application. The intent of the amended language is that this notification is to promote collaboration and awareness of potential workforce activities in the workforce area.

TWC Chapter 802, Subchapter G, Corrective Actions, allows TWC to impose corrective actions when a Board or TWC grantee--defined in §802.2(1) to include SDF grantees--has failed to comply with contract requirements.

TWC contends that if an entity has failed to comply with past contract requirements and continues to be on corrective action for this noncompliance at the time of the entity's application, the entity should not be eligible for an SDF grant. Therefore, §803.15(d) is added to prohibit SDF applicants on corrective action as described in Chapter 802, Subchapter G, from receiving an SDF grant.

TWC hereby certifies that the rules have been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENT

The public comment period closed on December 14, 2020. Comments were received from Blinn College and Texas Association of Workforce Boards (TAWB).

§803.14. Procedure for Requesting Funding

Comment: Blinn College stated that "[b]oth the local workforce boards and community colleges play a key role in training the next generation of Texans. Further, the College has no issue with the continued involvement of the local workforce development boards in the review/approval process of SDF grant applications when local boards are not submitting their own SDF grant applications. However, when a local workforce board is submitting their own SDF grant application, their simultaneous involvement in the review/approval process of competing SDF grant applications should not be allowed."

Response: The Commission agrees that simultaneous involvement in the review and approval process of competing SDF grant applications should not be allowed and therefore revises the language in §803.14 as described in the response to the next comment.

Comment: TAWB provided language to ensure compliance with legislative intent and to allow Boards to retain their leadership role and local authority of employer-driven workforce development Boards by continuing to require review of non-Board SDF grant applications. TAWB provided the following language:

(a) A qualified applicant shall present to the executive director or his or her designee, an application including a proposal requesting funding for a customized training project or other appropriate use of the fund, after obtaining the review and comments of the Board in the applicable workforce area(s) in which there would be a significant impact on job creation or incumbent worker training as a result of the proposal, and including those comments with the proposal, except as provided in subsection (b) below.

(b) A qualified applicant is not required to obtain or provide the comments of any Board that is submitting a grant application that targets development of the same skills for employers in the same industry.

Response: The Commission agrees that Boards may continue to review applications submitted by eligible applicants, and to clarify this process, the Commission adds the following language to §803.14:

(a) An eligible applicant shall present to the executive director or his or her designee, an application for funding, in order to acquire grant funds for the provision of customized training as may be identified by the eligible applicant. Except as provided in subsection (b) of this section, the eligible applicant will request the review and comments of the Board in the applicable workforce area(s), where there is a significant impact on job creation or incumbent worker training, and submit these comments to the executive director or his or her designee with the application for funding.

(b) An eligible applicant is not required to obtain or provide the comments if the Board informs the applicant that the Board is preparing an application or has submitted an application that has not been approved or rejected. A Board is not required to comment on its own applications.

(c) An eligible applicant shall submit any updates to the original application for funding in accordance with subsections (a) and (b) of this section.

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

40 TAC §§803.1, 803.2, 803.4

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§803.2. Definitions.

In addition to the definitions contained in §800.2 of this title, the following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Customized training project--A project that:

(A) provides workforce training, with the intent of either adding to the workforce or preventing a reduction in the workforce, and is specifically designed to meet the needs and special requirements of:

(i) employers and employees or prospective employees of the private business or business consortium; or

(ii) members of the trade union; and

(B) is designed by a private business or business consortium, or trade union in partnership with:

(i) a public community college;

(ii) a technical college;

(iii) TEEX;

(iv) a Board; or

(v) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(2) Eligible applicant--An entity identified in Texas Labor Code, Chapter 303, as eligible to apply for funds:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a Board; or

(E) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(3) Executive director--The executive director of the Texas Workforce Commission.

(4) Grant recipient--A recipient of a Skills Development Fund grant that is:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a Board; or

(E) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(5) Non-local public community and technical college--A public community or technical college providing training outside of its local taxing district.

(6) Private partner--A sole proprietorship, partnership, corporation, association, consortium, or private organization that enters into a partnership for a customized training project with:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a Board; or

(E) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(7) Public community college--A state-funded, two-year educational institution primarily serving its local taxing district and service area in Texas and offering vocational, technical, and academic courses for certification or associate's degrees.

(8) Public technical college--A state-funded coeducational institution of higher education offering courses of study in vocational and technical education, for certification or associate's degrees.

(9) Texas A&M Engineering Extension Service (TEEX)--A higher education agency and service established by the Board of Regents of the Texas A&M University System.

(10) Trade union--An organization, agency, or employee committee in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(11) Training provider--An entity or individual that provides training, including:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a community-based organization only in partnership with the public community or technical college or TEEX; or

(E) An individual, sole proprietorship, partnership, corporation, association, consortium, governmental subdivision, or public or private organization with whom a Board, public community or technical college, or TEEX has subcontracted to provide training.

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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Les Trobman
General Counsel
Texas Workforce Commission
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SUBCHAPTER B. PROGRAM ADMINISTRATION

40 TAC §§803.11, 803.13 - 803.15

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§803.14. Procedure for Requesting Funding.

(a) An eligible applicant shall present to the executive director or his or her designee, an application for funding, in order to acquire grant funds for the provision of customized training as may be identified by the eligible applicant. Except as provided in subsection (b) of this section, the eligible applicant will request the review and comments of the Board in the applicable workforce area(s), where there is a significant impact on job creation or incumbent worker training, and submit these comments to the executive director or his or her designee with the application for funding.

(b) An eligible applicant is not required to obtain or provide the comments if the Board informs the applicant that the Board is preparing an application or has submitted an application that has not been approved or rejected. A Board is not required to comment on its own applications.

(c) An eligible applicant shall submit any updates to the original application for funding in accordance with subsections (a) and (b) of this section.

(d) TEEX, or the public community or technical college that is a partner to a training proposal for a grant from the Skills Development Fund, may be non-local.

(e) The training proposal shall not duplicate a training project available in the workforce area in which the private partner or trade union is located.

(f) Proposals shall disclose other grant funds sought or awarded from the Agency or other state and federal entities for the proposed job training project.

(g) Applicants shall indicate whether they are submitting concurrent proposals for the Skills Development Fund and the Texas Enter-

prise Fund. For the purposes of this subsection, "concurrent proposal" shall mean:

(1) a proposal for the Skills Development Fund that has been submitted and is pending at the time an applicant submits a proposal for the Texas Enterprise Fund; or

(2) a proposal for the Texas Enterprise Fund that has been submitted and is pending at the time an applicant submits a proposal for the Skills Development Fund.

(h) Proposals shall be written and contain the following information:

(1) The number of proposed jobs created and/or retained;

(2) A brief outline of the proposed training project, including the skills acquired through training and the employer's involvement in the planning and design;

(3) A brief description of the measurable training objectives and outcomes;

(4) The occupation and wages for participants who complete the customized training project;

(5) A budget summary, disclosing anticipated project costs and resource contributions, including the dollar amount the private partner is willing to commit to the project;

(6) A signed agreement between the private partner or trade union and the Board, public community or technical college, or TEEX outlining each entity's roles and responsibilities if a grant is awarded;

(7) A statement explaining the basis for the determination that there is an actual or projected labor shortage in the occupation in which the proposed training project will be provided that is not being met by an existing institution or program in the workforce area;

(8) A comparison of costs per trainee for the customized training project and costs for similar instruction at the public community or technical college, TEEX, and the Board;

(9) A statement describing the private partner's or trade union's equal opportunity employment policy;

(10) A list of the proposed employment benefits;

(11) An indication of a concurrent proposal as required by subsection (e) of this section; and

(12) Any additional information deemed necessary by the Agency to complete evaluation of a 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.

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CHAPTER 806. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

The Texas Workforce Commission (TWC) adopts the following amendments to Chapter 806, relating to Purchases of Products and Services from People with Disabilities:

Subchapter A. General Provisions Regarding Purchases of Products and Services from People with Disabilities, §806.2

Subchapter D. Community Rehabilitation Programs, §806.41

Subchapter E. Products and Services, §806.53

TWC adopts the following new sections to Chapter 806, relating to Purchases of Products and Services from People with Disabilities:

Subchapter B. Advisory Committee Responsibilities, Meeting Guidelines, §806.23

Subchapter D. Community Rehabilitation Programs, §806.42

Subchapter J. Transition and Retention Plans, §§806.100 - 806.104

The amendments to §806.2 and §806.53 and new §§806.23, 806.42, and 806.100 - 806.104 are adopted without changes to the proposed text as published in the November 27, 2020, issue of the *Texas Register* (45 TexReg 8499). These rules will not be republished.

The amendments to §806.41 are adopted with changes to the proposed text as published. These rules will be republished.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the amendments to Chapter 806 is to implement Senate Bill (SB) 753, 86th Texas Legislature, Regular Session (2019); and provide program clarification and improvement opportunities.

Senate Bill 753

SB 753 amended the Texas Human Resources Code, Chapter 122, relating to the Purchasing from People with Disabilities (PPD) program, by adding the following sections:

--Section 122.0075, which requires Community Rehabilitation Programs (CRPs) that participate in the PPD program and that pay subminimum wage to develop, with the assistance of TWC, a Transition and Retention Plan (TRP) to increase the wages of their workers with disabilities to the federal minimum wage by September 1, 2022, and to address specifically how they will retain workers after the increase in wages to at least the federal minimum wage

--Section 122.0076, which requires all CRPs that participate in the PPD program to pay each worker with a disability at least the federal minimum wage

Transition and Retention Plan

Texas Human Resources Code, §122.0075 requires TWC to assist CRPs that currently pay subminimum wage in developing their TRPs and to provide:

--information about certified benefits counselors to ensure that workers are informed of work incentives and the potential impact that the increase in wages may have on a worker's eligibility for pertinent federal or state benefit programs; and

--a referral to a certified benefits counselor to any worker with a disability who requests a referral.

Texas Human Resources Code, §122.0075 requires the TRP to ensure, to the fullest extent possible, that each worker with a disability is retained by the CRP after the program increases wages to at least the federal minimum wage. The section also requires CRPs that cannot retain all workers with a disability after the wage increase to work with TWC and other relevant governmental entities to obtain job training and employment services to help the workers find other employment that pays at least the federal minimum wage. The section further allows TWC, at the worker's request, to help the worker who is not retained by the CRP to secure employment that pays at least the federal minimum wage.

Additionally, Texas Human Resources Code, §122.0075(f) allows, but does not require, TWC to extend the period for compliance with the minimum wage requirements in Texas Human Resources Code, §122.0076 for not more than 12 months if the CRP:

--requests the extension by March 1, 2022;

--has demonstrated to TWC that an extension would be in the best interest of the CRP's employees with disabilities;

--has worked with TWC to develop a TRP and made meaningful progress toward meeting the minimum wage requirements; and

--submits a revised plan to TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

TWC must decide on the request for an extension no later than May 1, 2022. The requirements of Texas Human Resources Code, §122.0075 expire on September 1, 2023.

CRP Minimum Wage Requirements

Texas Human Resources Code, §122.0076(a) requires all CRPs participating in the PPD program to pay each worker with a disability at least the federal minimum wage for any work relating to products or services purchased by the CRP through the PPD program. Texas Human Resources Code, §122.0076(d) states that the minimum wage requirement does not apply to a CRP's eligibility before the later of:

--September 1, 2022; or

--the date of the extension granted by TWC under Texas Human Resources Code, §122.0075(f).

Texas Human Resources Code, §122.0076(b) allows, but does not require, TWC to exempt a CRP worker with a disability from the minimum-wage requirements if TWC determines, based on the worker's circumstances, that requiring the minimum wage would result in the:

-- CRP not being able to retain the worker with a disability;

--worker not being successful in obtaining work with a different employer; and

--worker not being able to obtain employment at a higher wage than the CRP could pay.

Program Clarification and Improvement Opportunities

Workforce Innovation and Opportunity Act Referrals to CRPs

The Chapter 806 rule amendments address issues related to the percent of a CRP's direct labor hours that must be performed by individuals with disabilities, particularly in relation to Workforce Innovation and Opportunity Act (WIOA) of 2014 referrals.

Texas Human Resources Code, §122.013(c)(3) requires TWC to establish, by rule, the minimum percentage of employees with disabilities that an organization must employ to be considered a CRP for the PPD program. Section 806.53 requires CRPs to certify compliance with the requirement that, for each contract, individuals with disabilities perform 75 percent of each CRP's total hours of direct labor that are necessary to deliver services and products.

WIOA and its implementing regulations established that employment outcomes in the Vocational Rehabilitation (VR) program must be in competitive integrated employment (CIE). The components of a CIE setting are defined further in 34 Code of Federal Regulations (CFR) Part 361. Successful employment outcomes that are reported by state VR agencies under WIOA must meet the definition of CIE.

Based on these WIOA provisions, an employer that must meet a requirement that 75 percent of its direct labor hours be performed by individuals with disabilities will have difficulty meeting the integrated location criteria in WIOA. The VR program may not refer customers to PPD CRPs for employment opportunities unless the opportunities meet WIOA requirements.

Similarly, the 75 percent requirement limits a CRP's options to offer CIE opportunities to workers with disabilities who wish to work in an integrated setting.

Chapter 806 will maintain the 75 percent of direct hours requirement. However, these rule amendments allow the Commission to approve a percentage different from 75 percent at the time of the CRP's initial certification and subsequent re-certifications for a CRP that proposes to participate in the PPD program and offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE or such other reasons.

Other Program Clarification and Improvement Opportunities

The Chapter 806 rule amendments also address:

--CRP's compliance with state law and regulations;

--communication with the PPD Advisory Committee;

--Commission approval of products and services;

--determination of a worker with a disability;

--use of contract labor; and

--clarifying appreciable contribution and value added by individuals with disabilities.

Rule Review

Texas Government Code, §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC has assessed whether the reasons for adopting or readopting the rules continue to exist. TWC finds that the rules in Chapter 806 are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist, therefore, TWC proposes to readopt Chapter 806, Purchases of Products and Services from People with Disabilities, with the amendments described in this rulemaking.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

TWC adopts amendments to Subchapter A, as follows:

§806.2. Definitions

Section 806.2 is amended to add the following definitions:

Individual with Disabilities is defined as an individual with a disability recognized under the Americans with Disabilities Act and employed by a CRP or an entity selected by a CRP.

Minimum wage is defined as the wage under Section 6, Fair Labor Standards Act of 1938 (29 USC §206).

SUBCHAPTER B. ADVISORY COMMITTEE RESPONSIBILITIES, MEETING GUIDELINES

TWC adopts amendments to Subchapter B, as follows:

§806.23. Submitting Reports and Input to the Commission

Current §806.21 addresses the role of the PPD Advisory Committee and requires the committee to provide input and recommendations to the Commission on the PPD program. However, §806.21 does not address how the PPD Advisory Committee's advice, activity, or recommendations that result from its meetings will be communicated to the Commission.

New §806.23 establishes requirements for the PPD Advisory Committee for submitting reports and input to the Commission. The new section requires the PPD Advisory Committee to:

--meet semiannually, with at least one meeting each fiscal year to review and, if necessary, recommend changes to program objectives, performance measures, and criteria established under §806.21(b); and

-- prepare and submit to the Commission a report containing any findings and recommendations within 60 days of the completion of the meeting.

SUBCHAPTER D. COMMUNITY REHABILITATION PROGRAMS

TWC adopts amendments to Subchapter D, as follows:

§806.41. Certification and Recertification of Community Rehabilitation Programs

Several provisions of §806.41 are amended relating to the certification and recertification of CRPs.

Compliance with State Laws and Regulations

Section 806.41 is amended to add the requirement that CRPs maintain compliance with Unemployment Insurance tax, wage claims, and state licensing, regulatory, and tax requirements.

New §806.41(q) requires CRPs to:

--be clear of any debts related to Unemployment Insurance taxes or wage claims; and

--meet the state licensing, regulatory, and tax requirements applicable to the CRP.

Additionally, §806.41(e) is amended to add a reference to this new requirement and add that failure to maintain compliance shall result in revocation of the CRP's certification to participate in the PPD program. Section 806.41(i) is also amended to add a reference to this requirement for continuation in the program.

Determinations of an Individual with a Disability

Section 806.41(e)(2) requires CRPs to provide documentation of approved disability determinations. However, Chapter 806 does not address the qualifications of individuals who make the determination that a worker has a disability. As a result, standards are inconsistent among CRPs regarding the determination of an individual who qualifies as a worker with a disability. Additionally, some CRPs make their own determination of whether an individual meets the definition of a worker with a disability.

Section 806.41(e)(5) is added to require that a CRP must ensure that disability determinations are or were conducted by a medical professional, vocational rehabilitation professional, local education agency, Social Security Administration, or other individual who:

--has demonstrated the qualifications necessary to make such determinations; and

--is an independent, non-CRP individual.

The intent of this change is to require that a determination that a worker has a disability be made by an independent, non-CRP individual, including a medical professional, vocational rehabilitation professional, local education agency, Social Security Administration, or another individual who has expertise in diagnosing or providing services to individuals with disabilities.

Direct Labor Hours

Section 806.41(f)(9) is amended to include in the CRP's notarized statement that the CRP will comply with the Commission's approved percentage different from 75 percent of the CRP's total direct labor hours. Section 806.41(f)(9) is also amended to remove the waiver provisions of the 75 percent requirement as a waiver is no longer necessary if the CRP requests and is approved for a different percentage.

Section 806.41(f)(10) is added to state that if the CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor for a contract, the CRP must submit the request with their application for approval. The request must include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) as applicable.

Section 806.41(i) is amended to include the requirements of §806.41(f)(10) in the recertification process.

Other Changes

Additionally, new §806.41(e)(6) adds the requirement that a CRP must provide all communication, training, and planning materials to employees in an accessible format.

§806.42. Minimum Wage and Exemption Requirements

New §806.42 sets forth the requirements of Texas Human Resources Code, §122.0076(b) (as added by SB 753) related to the minimum wage. Texas Human Resources Code, §122.0076(b) allows, but does not require, TWC to exempt a CRP worker with a disability from the minimum wage requirements if TWC determines, based on the worker's circumstances, that requiring the minimum wage would result in the:

--CRP not being able to retain the worker with a disability;

--worker not being successful in obtaining work with a different employer; and

--worker not being able to obtain employment at a higher wage than the CRP is able to pay.

SB 753 prohibited the minimum wage requirement from applying to a CRP's eligibility to participate in the PPD program before the later of:

--September 1, 2022; or

--the date an extension of the minimum wage as allowed under the new §806.103.

New §806.42 reflects the requirements of SB 753.

New §806.42(a) requires that a CRP participating in the PPD program shall pay each worker with a disability employed by the program at least the minimum wage for any work relating to any products or services purchased from the CRP through the program.

New §806.42(b) allows TWC to exempt a CRP from the requirements of §806.42 with respect to a worker with a disability if TWC determines an exemption is warranted. TWC may consider the following factors in making the determination:

--requiring the CRP to pay the worker at the minimum wage would result in:

--the CRP not being able to retain the worker with a disability;

--the worker would not have success obtaining work with a different employer;

--the worker, based on the worker's circumstances, would not be able to obtain employment at a higher wage than the CRP would be able to pay the worker notwithstanding the requirements of §806.42;

--the CRP's efforts to retain the worker;

--the CRP's efforts to asset the worker in finding other employment, including other employment at a higher wage than the CRP will pay;

--whether the exemption is temporary or indefinite;

--whether employment services provided by other entities that serve individuals who have significant intellectual or developmental disabilities are available and could assist the worker to obtain employment at or above minimum wage.

New 806.43(c) states that the minimum wage requirements do not apply to a CRP's eligibility to participate before the later of:

--September 1, 2022; or

--the date an extension granted under §806.103.

SUBCHAPTER E. PRODUCTS AND SERVICES

TWC adopts amendments to Subchapter E, as follows:

§806.53. Recognition and Approval of Community Rehabilitation Program Products and Services

Approval of Products and Services

Section 806.53(a) is amended to remove the requirement that the Commission approve a CRP's products and services. The amended section assigns the approval of products and services to TWC's executive director or deputy director.

The intent of the rule change is to streamline and shorten the period for review and approval and support timelier deployment of a CRP's products and services. The Commission will continue to provide guidance on products and services but will delegate the actual approval of a CRP's products and services to the executive director or deputy executive director.

Direct Labor Hours

Section 806.53(a) and (b) are amended to allow the Commission to establish a percentage different from 75 percent after considering factors including but, not limited to, a CRP's proposal to participate in the PPD program and offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE at the time of the CRP's initial certification and subsequent re-certifications.

Clarifying Appreciable Value Added by Individuals with Disabilities

Section 806.2(1) defines appreciable contribution as "...the substantial work effort contributed by individuals with disabilities in the reforming of raw materials, assembly of components or packaging of bulk products in more saleable quantities, by which value is added into the final product offered for sale or through which the individuals with disabilities develop new job skills that have not been previously attained through other jobs."

Section 806.2(11) defines value added as "The labor of individuals with disabilities applied to raw materials, components, goods purchased in bulk form resulting in a change in the composition or marketability of component materials, packaging operations, and/or the servicing tasks associated with a product. Pass-throughs are not allowed; therefore, solely affixing a packaging label to a commodity does not qualify."

Section 806.53(b)(2) states that "Appreciable contribution and value added to the product by individuals with disabilities must be determined to be substantial on a product-by-product basis, based on requested documentation provided to the Agency upon application for a product to be approved for the state use program."

Section 806.53(e) is added to provide criteria for determining if duties performed by individuals with disabilities qualify as value added as required under §806.53(b)(2). New §806.53(e) requires that before the inclusion of a product or service in the program, a CRP must describe the product or service that will be provided though the program in sufficient detail for TWC to determine the item's suitability for inclusion in the program.

Rule language further states that TWC may consider those factors deemed necessary to the determination of the program suitability of a product or service, including, but not limited to, state and federal statutes governing state agencies, geographic saturation of CRPs providing like products and services, and whether the products and services will generate sufficient demand to provide employment for individuals with disabilities.

SUBCHAPTER J. Transition and Retention Plans

TWC adopts new Subchapter J, as follows:

New Subchapter J sets forth rules for TRPs required by SB 753.

§806.100. Scope and Purpose

New §806.100 provides the scope and purpose of Subchapter J.

New §806.100(a) states that the purpose of the subchapter is to set forth the rules relating to a CRP's TRP, as required by Texas Human Resources Code, §122.0075, to meet the minimum wage requirements of Texas Human Resources Code, §122.0076.

New §806.100(b) states that the subchapter applies to a CRP that is participating in the state use program and pays workers with disabilities employed by the CRP wages that are less than

the federal minimum wage under Section 6, Fair Labor Standards Act of 1938.

New §806.100(c) includes the expiration date of September 1, 2023, for the subchapter, which mirrors the expiration date of Texas Human Resources Code, §122.0075.

§806.101. Requirements for Transition and Retention Plans

SB 753 requires TWC to assist CRPs in developing the TRP by providing workers with information about and referrals to VR counselors to ensure that workers are informed of work incentives as well as the potential impact that the increase in wages may have on eligibility for federal and state benefit programs.

However, SB 753 did not specify requirements for the TRP regarding the milestones, documentation, resources, or reports needed to demonstrate that the CRP is making progress toward meeting the minimum wage and staff retention requirements--a necessary component of granting extensions, as discussed in new §806.102.

New §806.101 includes due dates and other requirements of the TRP.

New §806.101(a) requires that a CRP subject to Subchapter J shall submit a TRP no later than sixty days from the effective date of these rule.

New §806.101(b) requires that the TRP include the full transition goal, including full retention of workers, placement of workers in job training, and fully assisting workers in need of placement goal to meet the wage requirements no later than January 1, 2022.

It is the intent of the Commission that CRPs have full retention of workers with disabilities at the minimum wage or above the placement of workers in job training, or full assistance to workers in need of placement. CRPs not meeting this goal should consider requesting an extension.

New §806.101(c) requires that the TRP contain the following elements:

--Worker Assessment (Employee Receiving Subminimum Wages), including:

--Wage difference / Minimum Wage pay gap

--Line of business employed

--Current skills

--Person-Centered Planning and Career Counseling

--Disability Benefits Impact Analysis based on wage increase

--Opportunities to transfer skills to other state use contract with CRP

--Participation in the assessment by the employee's VR counselor, if the employee is a participant in the VR program at the time of the assessment.

-- Goals, including:

--Raise wages for worker paid subminimum wage to Federal minimum wage or more by September 1, 2022

--Retain workers of the CRP as the CRP moves through the transition plan

-- Milestones: Achieved by reporting progress in reaching specific actions in the TRP through benchmarks and strategies:

--Benchmarks to include the following:

--Number and percentage of workers provided wage increases by a designated point in time

--Number and percentage of workers provided assessment and counseling by a certain date

--Number and percentage of workers entering and completing training

--Strategies necessary to achieve goals including:

--CRP evaluation of existing line of business for price and added value adjustment consider increasing price to pay for increase in wages

--Requesting assistance from WorkQuest in developing new lines of business to provide employment opportunities to workers receiving sub minimum wage

--CRP pursuing partnerships to expand lines of business and increase wages of workers paid subminimum wages.

--Reports: Monthly or quarterly

--Retention status

--Progress on benchmarks and strategies

--Wages

--Hours Worked

In accordance with Texas Human Resources Code, §122.0075(b)(2), new §806.101(d) requires TWC to assist the CRP in developing the TRP by providing information about certified benefits counselors and by providing a referral to a certified benefits counselor for any CRP employee who requests a referral.

New §806.101(e) requires TWC to review the progress of each TRP at intervals established by TWC and provide technical assistance as necessary and upon request from the CRP.

§806.102. Extensions for Transition and Retention Plans

SB 753 allows, but does not require, TWC to extend the deadline for compliance with the minimum wage requirements for no more than 12 months if the CRP requests the extension by March 1, 2022, and TWC approves by May 1, 2022.

For TWC to grant an extension, SB 753 requires that the CRP:

--has demonstrated to TWC that an extension would be in the best interest of the CRP's employees with disabilities;

--has worked with TWC to develop a TRP and made meaningful demonstrable progress toward meeting the minimum wage requirements; and

--has submitted a revised plan to TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

Extensions may not be for more than 12 months; therefore, the Commission has the option to grant extensions of fewer than 12 months or grant extension dates specifically requested by a CRP. To ensure consistent implementation of TRPs, the Commission may grant a standard 12-month extension from May 1, 2022, to April 30, 2023, to CRPs requesting and meeting the requirements for an extension.

New §806.102(a) contains the statutory requirement that no later than March 1, 2022, a CRP may request an extension of the TRP.

New §806.102(b) requires TWC to approve or deny all extension requests no later than April 1, 2022. The April 1 date is chosen to

allow a CRP to request a reconsideration of a denial, and to have the denial decision resolved, by the statutorily required date of May 1, 2022.

New §806.102(c) states the requirements for granting an extension as required in SB 753, namely that the CRP shall:

--demonstrate that an extension would be in the best interest of the CRP's employees with disabilities;

--have requested assistance and worked with the TWC before requesting an extension;

--have made meaningful progress toward meeting the minimum wage requirement;

--have submitted a revised TRP to the TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

Finally, SB 753 does not address whether a CRP may appeal if TWC does not grant an extension. TWC's Chapter 823 Integrated Complaints, Hearings, and Appeals rules do not apply to the PPD program.

New §806.102(d) establishes a separate informal reconsideration process to grant a CRP additional time to demonstrate that an extension is warranted. The new rule language allows a CRP to request that TWC reconsider extension denials provided the request is made no later than April 10, 2022.

New §806.102(e) requires the TWC executive director to review and make a determination on reconsideration requests.

New §806.102(f) requires TWC to make a final decision on all reconsideration requests no later than May 1, 2022.

§806.103. Withdrawal from the Program

New §806.103 provides the requirements for a CRP to notify TWC of its intent to withdraw from the PPD program if a CRP does not intend to meet the minimum wage requirements and determines that it will not seek any exemptions under Texas Human Resources Code, §122.0076, if eligible.

New §806.103(a) states that a CRP shall notify TWC no later than March 1, 2022, if the CRP intends to voluntarily withdraw from the program.

New §806.103(b) states that any CRP that has not withdrawn voluntarily from the program, does not have an extension or approved exemptions in place and is not meeting the minimum wage requirements on September 1, 2022, or by the granted extension date, will be involuntarily removed by revocation of the CRP's certification to participate in the program

The effective date of the withdrawals will be September 1, 2022, which is the statutory deadline for CRPs to meet the minimum wage requirement. This time frame allows for a transition period for transferring contracts under the PPD.

§806.104. New CRPs during the TRP Period

Texas Human Resources Code, §122.0076(d) states that the requirement in Texas Human Resources Code, §122.0076(a) that all CRPs pay at least the minimum wage does not apply to a CRP's eligibility to participate in the PPD program before September 1, 2022, or to the extension date granted by TWC, whichever date is later. However, any entity applying for CRP certification before September 1, 2022, during the TRP period must either pay at or above the minimum wage or have a plan to pay at or above the minimum wage by September 1, 2022, unless the workers employed by the CRP are eligible for an exemption, as described §806.102.

CRPs paying subminimum wage and entering the PPD program after the proposed implementation start date in July 2020 will have less time to transition and retain workers effectively to meet the September 1, 2022, statutory deadline.

New §806.104 requires all CRPs not meeting minimum wage requesting certification after the date to request an extension pursuant to §806.102(a)--March 1, 2022--shall be required to meet the minimum wage requirements no later than September 1, 2022.

TWC hereby certifies that the rules have been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENTS

The public comment period closed on December 28, 2020. Comments were received from Goodwill Industries of Fort Worth, Work Services Corporation, and one individual.

§806.41. Certification and Recertification of Community Rehabilitation Programs

Comment: A commenter stated that proposed §806.41(e)(5) will impose an undue burden on CRPs. Proposed §806.41(e)(5) will increase lag time for filling temporary assignments for state agencies as additional time will be required to obtain a signature from a non-CRP entity. Individuals at the commenter's organization are highly experienced in working with individuals with disabilities, are highly trained to document a disability, and have been credentialed by UNTWISE.

Response: The Commission understands the concern with the potential impact of the change on CRP operations. However, the intent of the change is to avoid a real or perceived conflict of interest on the part of the CRPs. An effective way to avoid this is to have a qualified, independent third party certify an individual's disability. Many individuals applying for employment with a CRP will have been previously determined to have a disability by a qualified individual and may submit the documentation from the prior disability determination to the CRP for review.

Comment: A commenter stated that proposed §806.41(e)(5)(A) fails to define necessary qualifications.

Response: The proposed preamble included a sample listing of qualified individuals including medical professionals and VR Counselors. At adoption, this list is expanded to clarify the inclusion of disability determination documentation from the Social Security Administration and schools complying with the Individuals with Disabilities Education Act. In response to this comment, the Commission revises §806.41(e)(2) and (5) to clarify and incorporate the listing into the rule language.

Comment: A commenter stated that the intent of proposed §806.41(e)(5)(A) is to achieve proper and appropriate disability determinations; however, the rule oversimplifies the disability determination process.

Response: The Commission disagrees with the comment. The intent of the proposed change with respect to disability determination addresses only that determination. Determining an individual's disability should not be nuanced by the context of the environment in which that individual is or will be expected to function. The decision whether an individual can or cannot function in a specific work environment should be made independent of the disability determination and not be part of the disability de-

termination process. No changes were made in response to this comment.

Comment: A commenter stated that proposed §806.41(e)(5)(B) will result in CRPs restructuring their process in a way that may not achieve the independence intended by the rule and will result in hiring delays and/or increased expenses for CRPs who place individuals with disabilities into jobs.

Response: The Commission understands the concern with the potential impact of the change on CRP operations. However, the intent of the change is to avoid a real or perceived conflict of interest on the part of the CRPs. An effective way to avoid this is to have a qualified, independent third party certify an individual's disability. Many individuals applying for employment with a CRP will have been previously determined to have a disability by a qualified individual and may submit the documentation from the prior disability determination for review. No changes were made in response to this comment.

Comment: A commenter stated that §806.41(e)(5)(B) could be interpreted to obligate VR Counselors to make disability determinations on behalf of CRPs, increasing the VR Counselor workload while creating a conflict of interest related to his or her case management.

Response: The Commission disagrees with this comment. The intent of the change is not to obligate TWC's VR Program to make disability determinations on the part of CRPs. However, VR Counselors may be a resource for providing certifications if the individual is receiving VR services. No changes were made in response to this comment.

Comment: A commenter stated that §806.41(e)(5)(B) reduces control, oversight, and accountability of disability determinations.

Response: The Commission disagrees with this comment. The adopted rules provide a means for improved consistency in disability determinations and therefore, improved accountability. No changes were made in response to this comment.

Comment: A commenter recommended the Commission not adopt §806.41(e)(5), and if widespread noncompliance exists concerning disability determinations, the Commission should create a disability determination credentialing program.

Response: The Commission does not foresee any changes to its review procedures of the program and will review the program to ensure compliance with the adopted rule requirements. No changes were made in response to this comment.

Comment: A commenter stated that paying an outside individual to determine qualification will add to CRP costs.

Response: The Commission understands the concern with the potential impact of the change on CRP operations. However, the intent of the change is to avoid a real or perceived conflict of interest on the part of the CRPs. An effective way to avoid this is to have a qualified, independent third party certify an individual's disability. Many individuals applying for employment with a CRP will have been previously determined to have a disability by a qualified individual and may submit the disability determination to the CRP for review. No changes were made in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §806.2

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

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 January 5, 2021.

TRD-202100069
Les Trobman
General Counsel
Texas Workforce Commission
Effective date: January 25, 2021
Proposal publication date: November 27, 2020
For further information, please call: (512) 936-6478

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SUBCHAPTER B. ADVISORY COMMITTEE RESPONSIBILITIES, MEETING GUIDELINES

40 TAC §806.23

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

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 January 5, 2021.

TRD-202100071
Les Trobman
General Counsel
Texas Workforce Commission
Effective date: January 25, 2021
Proposal publication date: November 27, 2020
For further information, please call: (512) 936-6478

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SUBCHAPTER D. COMMUNITY REHABILITATION PROGRAMS

40 TAC §806.41, §806.42

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.41. Certification and Recertification of Community Rehabilitation Programs.

(a) No applicant for certification may participate in the state use program prior to the approval of certification.

(b) The Commission may recognize programs that are accredited by nationally accepted vocational rehabilitation accrediting organizations and approve CRPs that have been approved by a state's habilitation or rehabilitation agency.

(c) The Commission may delegate the administration of the certification process for CRPs to a CNA.

(d) An applicant for CRP certification must be a government or nonprofit private program operated under criteria established by the Commission and under which individuals with severe disabilities produce products or perform services for compensation.

(e) A certified CRP must:

(1) maintain payroll, human resource functions, accounting, and all relevant documentation showing that the employees who produce products or perform services under the state use program are individuals with disabilities;

(2) ensure that documentation includes a disability determination that identifies the individual and documents the presence of a disability, in addition to determining program eligibility, and that shall be subject to review at the request of the Agency or the CNA under authority from the Commission, with adherence to privacy and confidentiality standards applicable to such CRP and employee records;

(3) maintain and dispose of records or documents required by the Agency, including contracts with other entities, in accordance with generally accepted accounting principles, and all laws relevant to the records;

(4) maintain compliance with requirements in subsection (q) of this section, related to Unemployment Insurance tax, wage claims, state licensing, regulatory, and tax requirements. Failure to maintain compliance shall result in revocation of the CRP's certification to participate in the PPD program;

(5) ensure that disability determinations conducted under paragraph (2) of this subsection are or were conducted by a medical professional, vocational rehabilitation professional, local education agency, Social Security Administration, or other individual who:

(A) has demonstrated the qualifications necessary to make such determinations; and

(B) is an independent, non-CRP individual; and

(6) provide all communication, training, and planning materials to employees in an accessible format.

(f) An applicant for certification must submit a completed application and the required documents to the Agency through the CNA for the state use program. Upon receipt, the CNA will verify the completeness and accuracy of the application. No application will be considered without the following documents:

(1) Copy of the IRS nonprofit determination under §501(c), when required by law;

(2) Copy of the Articles of Incorporation issued by the Secretary of State, when required by law;

(3) List of the board of directors and officers with names, addresses, and telephone numbers;

(4) Copy of the organizational chart with job titles and names;

(5) Proof of current insurance coverage in the form of a certificate of insurance specifying each and all coverages for the CRP's liability insurance, auto insurance for vehicles owned or leased by the CRP for state use contract purposes, and workers' compensation insurance coverage or legally recognized equivalent coverage, if applicable. Such insurance shall be carried with an insurance company authorized to do business in the State of Texas, and written notice of cancellation or any material change in insurance coverage will be provided to the CNA 10 business days in advance of cancellation or change;

(6) Fire inspection certificate issued within one year of the formal consideration of the CRP application, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(7) Copy of the building inspection certificate or certificate of occupancy, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(8) Copy of the wage exemption certificate (WH-228) if below minimum wages will be paid to customers or to individuals with disabilities who will be employed, and a statement of explanation of circumstances requiring subminimum wages;

(9) Notarized statement that the CRP agrees to maintain compliance with either the 75 percent minimum percentage or other approved minimum percentage approved by the Commission. The required percentage being that percentage of the CRP's total hours of direct labor, for each contract, necessary to perform services or reform raw materials, assemble components, manufacture, prepare, process and/or package products that will be performed by individuals with documented disabilities consistent with the definition set forth in this chapter.

(10) If a CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor for a contract, the CRP must submit the request, which shall include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) of this chapter as applicable, with their application for approval; and

(11) An applicant for certification must attest that it either has already developed or will develop, within 90 days of certification, a person-centered plan for each individual with a disability it employs that clearly documents attainable employment goals and describes how the CRP will:

(A) help the individual reach his or her employment goals; and

(B) match the individual's skills and desires with the task(s) being performed for the CRP.

(g) The Agency shall review each complete application and all required documentation and, if acceptable, forward its recommendations to the Commission for approval. Once approved, the Agency

will notify the CRP in writing and assign the CRP a certification number.

(h) A CRP may protest a recommendation of non-approval pursuant to the Agency's appeal process in §806.61 of this chapter.

(i) To continue in the program, each CRP must be recertified by the Commission every three years. The recertification process requires submission of all previously requested documentation, a review of reports submitted to the CNA, and a determination that the CRP has maintained compliance with the stated requirements of the state use program, including requirements described in subsection (q) of this section relating to compliance with unemployment taxes, wage claims, and state licensing, regulatory, and tax requirements. If a CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor, the CRP must submit the request, which shall include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) of this chapter as applicable, with their recertification. The Commission shall establish a schedule for the recertification process and the CNA shall assist each CRP as necessary to attain recertification. The CRP, after notification, shall submit within 30 days the application for recertification and required documents to the CNA. If the CRP fails to do so, the Agency may request a written explanation and/or the appearance of a representative of the CRP before the Agency. If the CRP fails to respond in a timely manner, the Agency may consider the suspension of all state use program contracts until the recertification process has been completed and approval has been attained.

(j) The CRP shall submit quarterly wage and hour reports to the CNA. These reports are due no later than the last day of the month following the end of the quarter. If the CRP fails to submit reports on time, the Agency may request a representative of the CRP to appear before the Agency. The Agency may consider the suspension of the CRP's state use program contracts if compliance is not achieved in a consistent and timely manner.

(k) CRPs shall maintain compliance with the state use program regarding percentage requirements related to administrative costs, supply costs, wages, and hours of direct labor necessary to perform services and/or produce products. Compliance will be monitored by the CNA and/or the Agency, and violations will be reported promptly to the Agency. A violation will result in a warning letter from the CNA or Agency, which will then offer assistance as needed to achieve compliance. A CRP that fails to meet compliance requirements, without a waiver from the Agency, for two quarters in any four-quarter period, shall submit a written explanation and a representative of the CRP will be requested to appear before the Agency. State use program contracts may be suspended and/or certification revoked if compliance is not immediately and consistently maintained. To attain reinstatement, the CRP must apply for recertification following the procedures outlined in this chapter.

(l) The Agency may review or designate a CNA or third party to review any CRP participating in the state-use program to verify compliance with the requirements outlined in this chapter.

(m) A CRP must not serve, in whole or part, as an outlet or front for any entity whose purpose is not the employment of individuals with disabilities.

(n) A CRP shall report to the Agency any state agency that is not using the program to benefit individuals with disabilities.

(o) A CRP shall promptly report any conflict of interest or receipt of benefit or promise of benefit to the Agency. The Agency will consider such reports on an individual basis. Verified instances of conflict of interest by a CRP may result in suspension of the CRP's eligibility to participate in the state use program and/or revocation of certification.

(p) The Commission, the Agency, individual members, the State of Texas, or any other Texas state agency will not be responsible for any loss or losses, financial or otherwise, incurred by a CRP should its product or services not be approved for the state use program as provided by law.

(q) A CRP shall:

(1) be clear of any debts related to Unemployment Insurance taxes or wage claims; and

(2) meet the state licensing, regulatory, and tax requirements applicable to the CRP.

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 January 5, 2021.

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Les Trobman
General Counsel
Texas Workforce Commission
Effective date: January 25, 2021
Proposal publication date: November 27, 2020
For further information, please call: (512) 936-6478

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SUBCHAPTER E. PRODUCTS AND SERVICES

40 TAC §806.53

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

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

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SUBCHAPTER J. TRANSITION AND RETENTION PLANS

40 TAC §§806.100 - 806.104

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt,

amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

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 809. CHILD CARE SERVICES

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 809, relating to Child Care Services, without changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7551):

Subchapter A. General Provisions, §809.2

Subchapter B. General Management, §§809.12, 809.13, and 809.18

Subchapter E. Requirements to Provide Child Care, §809.91 and §809.93

Subchapter G. Texas Rising Star Program, §§809.130 - 809.134

TWC adopts amendments to the following sections of Chapter 809, relating to Child Care Services, with changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7551):

Subchapter B. General Management, §809.16 and §809.19

TWC adopts the following new sections to Chapter 809, relating to Child Care Services, without changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7551):

Subchapter B. General Management, §809.22

Subchapter E. Requirements to Provide Child Care, §809.96

Subchapter G. Texas Rising Star Program, §809.136

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 809 rule changes is to implement a contracted slots option for child care services, clarify the allowable uses of Child Care Quality (CCQ) funds, update how the parent co-payment is determined, align the child transfer policy with industry practices, and implement changes to Texas Rising Star policy based on recommendations that arose from the Texas Rising Star four-year review.

House Bill 680

House Bill 680 (HB 680), 86th Texas Legislature, Regular Session (2019), amended the Texas Government Code and the Texas Labor Code regarding TWC's Child Care program. To fully implement HB 680 requirements, Chapter 809 requires amendments to clarify allowable uses of Local Workforce Development Boards' (Boards) CCQ funds to allow Boards to engage in child care provider contract agreements for reserved slots, and to allow direct referrals for eligible children participating in recognized public/private partnerships.

Allowable Uses of Boards' Child Care Quality Funds

HB 680, Section 1 amends Texas Government Code, §2308.317, by adding a new subsection requiring each Board, to the extent practicable, to ensure that any professional development for child care providers, directors, and employees using the Board's allocated quality improvement funds:

--be used toward the requirements for a credential, certification, or degree program; and

--meet the Texas Rising Star program's professional development requirements.

Section 809.16, Quality Improvement Activities, outlines rules related to quality improvement activities that are allowable for Boards. Section 809.16 currently allows Boards to expend quality funds on any quality improvement activity described in 45 Code of Federal Regulations (CFR) Part 98. TWC adopts requiring Boards to align expenditures for child care professional development with applicable state statute and the activities described in the Child Care Development Fund (CCDF) State Plan.

Child Care Provider Contract Agreements

HB 680, Section 5 adds Texas Labor Code, §302.0461, Child Care Provider Contract Agreements, allowing Boards to contract with child care providers to provide subsidized child care. This is congruent with §658E(c)(2)(A) of the Child Care and Development Block Grant (CCDBG) Act of 2014, which authorizes states to offer financial assistance for child care services through grants and contracts. Specific guidance from the US Department of Health and Human Services' Office of Child Care confirms that:

"States can award grants and contracts to providers in order to provide financial incentives to offer care for special populations, require higher quality standards, and guarantee certain numbers of slots to be available for low-income children eligible for Child Care and Development Fund (CCDF) financial assistance. Grants and contracts can provide financial stability for child care providers by paying in regular installments, paying based on maintenance of enrollment, or paying prospectively rather than on a reimbursement basis."

HB 680 requires that any such contract includes the number of slots reserved by a provider for children who participate in the subsidized child care program.

To be eligible for a contract, HB 680 requires that a child care provider be a Texas Rising Star 3- or 4-star provider and meet one of the following priorities:

--Be located in an area:

--where the number of children under age six with working parents is at least three times greater than the capacity of licensed child care providers in the area; or

--determined by TWC to be underserved with respect to child care providers

--Have a partnership with local school districts to provide prekindergarten (pre-K)

--Have a partnership with Early Head Start (EHS) or Head Start (HS)

--Have an increased number of places reserved for infants and toddlers by high-quality child care providers

--Satisfy a priority identified in the Board's plan.

HB 680 also requires that Boards choosing to contract with providers submit a report to TWC no later than six months after entering into the contract, and every six months thereafter, determining the contract's effect on the following:

--Financial stability of providers participating in the contract

--Availability of high-quality child care options for participants in TWC's subsidy program

--Number of high-quality providers in any part of the local workforce development area (workforce area) with a high concentration of families with a need for child care

--Percentage of children participating in TWC's subsidized child care program at each Texas Rising Star provider in the Board's workforce area

In December 2019, TWC's Child Care & Early Learning Division assembled a workgroup consisting of TWC staff, Board staff, and Board child care services contractor staff to discuss implementation recommendations related to contracted slots. Recommendations from the contracted slots workgroup informed the revisions described.

Reserved Slots

Currently, §809.93(g) prohibits a Board or its child care contractor from paying providers for holding spaces (slots) open. However, if a Board chooses to contract with child care providers for a specific number of spaces, also known as a Contracted Slots model, the Board would continue payment for reserved slots during the transition time between one child leaving and another child being placed in the slot. TWC adopts allowing transition times to hold slots open for another child participating in the subsidy program and requiring the slots to be filled one month following the month of the vacancy. Adding new §809.96 to define the child care provider contract agreement rules and requirements will clarify the policy and require that Boards choosing to use contracted slots include the program in the Board plan.

Waiting Lists and Priorities

TWC prioritizes services for veterans and foster youth and former foster children in accordance with Texas Labor Code, §302.152 and Texas Family Code, §264.121(a)(3). When providing child care subsidies, Boards are required to prioritize these groups, subject to the availability of funds. Furthermore, §809.18 requires Boards to maintain waiting lists for families that are waiting for child care services. Because HB 680 authorizes Boards to contract with child care providers to reserve a set number of child care slots, the contracted slots workgroup has identified complications with continuing to use the current waiting list system for filling open slots for providers with contracts.

Currently, the Board's waiting list for the subsidy voucher system is for the entire workforce area. Families are contacted in order of priority to select any participating provider in the Board's workforce area. Section 809.43 details the priority groups as follows:

The first priority group is assured child care services and includes children of parents eligible for the following:

--Choices child care

--Temporary Assistance for Needy Families Applicant child care

--Supplemental Nutrition Assistance Program Employment and Training child care

--Transitional child care

The second priority group is served subject to the availability of funds and includes the following, in the order of priority:

--Children requiring protective services child care

--Children of a qualified veteran or qualified spouse

--Children of a foster youth

--Children experiencing homelessness

--Children of parents on military deployment whose parents are unable to enroll in military-funded child care assistance programs

--Children of teen parents

--Children with disabilities

The third priority group includes any other priority adopted by the Board.

With a Contracted Slots model, the slots need to be filled quickly to avoid Boards paying for vacant reserved slots. TWC is considering allowing families to indicate ZIP code preferences for location of child care and prioritizing children with preferences matching ZIP codes with an available contracted slot.

Eligible Geographic Locations

One of the qualifying priorities identified in HB 680 to allow contracted slots is that the child care provider be located in an area of high need and low capacity, that is, an area:

--where the number of children under age six with working parents is at least three times greater than the capacity of licensed child care providers in the area; or

--that TWC has determined to be "underserved with respect to child care providers."

TWC is considering using data from the state demographer to analyze and publish annual information about geographic areas that meet the requirements described in HB 680 and requiring Boards to use this data to identify providers that are in areas of high need and low capacity.

Direct Referrals from Public Prekindergarten and Head Start/Early Head Start Partnerships HB 680 explicitly authorizes contracts for Texas Rising Star providers engaged in partnerships with public pre-K or HS/EHS. Additionally, HB 3, 86th Texas Legislature, Regular Session (2019), supports expansion of pre-K partnerships.

Children served through these partnerships are dually enrolled in both early childhood programs. When a child is dually enrolled in child care services and either public pre-K or HS/EHS, part of the cost to CCDF is offset. Through these partnerships, eligible children can receive the full-day, full-year care that working parents require at a lower cost to the Child Care Services program.

Eligible children served through these partnerships receive early care and education from multiple funding sources. However, each funding source prioritizes certain populations slightly differently (such as a low-income individual, a foster child or child of a foster youth, a veteran or active duty service member, a child with a disability, or a child experiencing homelessness).

These variations can lead to mismatches of when a child is able to access services despite being simultaneously eligible for both programs in a partnership. Operationally, not being able to combine funding for dually eligible children can impact the enrollment efficiency and financial stability of the partnership and limits TWC's ability to implement the contracted slots agreements provisions of HB 680 and to support the pre-K partnership provisions of HB 3.

Chapter 809 does not currently allow for a separate path for enrolling eligible children who are directly referred from a partnering program. Because of this structure, eligible children from partnering programs must be placed on a Board's waiting list despite the federal, state, and local policies that support partnerships and dual enrollment.

TWC adopts creating a separate path for enrollment to support more stable partnerships, maximize available funding to serve more children, and provide improved customer service to participating families.

With a separate enrollment path for partnership direct referrals, services for eligible children who are in TWC's second or third priority group, as defined in §809.43, Priority for Child Care Services, would still be served subject to the availability of funding. Additionally, if the number of referrals from a partnership exceeds the subsidized spots available at a single partnership site, §809.43 would be applied, and any children who did not receive subsidized care through the referring partnership would be placed on the Board's waiting list.

Parent Share of Cost for Part-Time Referrals

A technical change is needed related to how the parent co-payment is determined. Families participating in child care subsidies are responsible for a co-payment, known in Texas as the "parent share of cost," that covers a portion of their child's care and education. Boards assess the parent share of cost on a sliding-fee scale based on income, family size, and other appropriate factors to ensure that the cost is affordable and is not a barrier to families receiving services.

The CCDBG Act of 2014 led to significant changes in the administration of child care services in Texas. In September 2016, TWC adopted amendments to Chapter 809 to align with the new federal requirements and §809.19, Assessing the Parent Share of Cost, was affected. In compliance with federal requirements and guidance, TWC amended §809.19 to limit the basis of the sliding-fee scale to family size and income, including the number of children in care.

With this rule change, Boards were no longer able to offer "discounts" for part-time care, as doing so could have been perceived as using the cost of care or amount of subsidy payment to determine parent share of cost.

The CCDF State Plan template for Federal Fiscal Years 2019 - 2021 (released after the final federal rule) allows the number of hours the child is in care, in addition to the family's income and size, to be considered when determining parent share of cost.

TWC adopts rule changes authorizing Boards to assess the parent share of cost at the full-time rate and allow reductions for families with part-time referrals with the goal of reducing the financial burden on families that need part-time child care. If a child's referral changes from part-time to full-time care, the family will no longer qualify for the reduction and must revert to the original parent share of cost assessment amount.

Child Transfer Policies

The CCDBG Act includes provisions to ensure equal access to child care for families receiving subsidies, as compared to families that do not receive subsidies. To support equal access, the final federal rule, 45 CFR §98.45(3), requires states to ensure that payments for subsidized child care "reflect generally accepted payment practices of child care providers that serve children who do not receive CCDF subsidies." Additionally, 45 CFR §98.45(5) requires states to ensure that child care providers receive prompt notice of changes to a family's status, which may impact payment.

Providers commonly have policies for private-pay families that require families to give notice before withdrawing their child from the program. Typically, these policies range from two weeks to a full month. These waiting periods help providers to manage their enrollment efficiently and ensure that they have adequate time to fill empty spots.

Section 809.13(c)(10) requires Boards to establish a policy for transfer of a child from one provider to another. However, the rule does not require Boards to establish a waiting period for families that request to transfer a child.

TWC adopts requiring Boards to institute a waiting period as part of their transfer policy to support better alignment with CCDBG and greater stability for subsidy providers.

Texas Rising Star Four-Year Review Recommendations

Texas Government Code, §2308.3155(b)(2) requires TWC to adopt a timeline and a process for regularly reviewing and updating the Texas Rising Star quality standards. The statute also requires TWC's consideration of input from interested parties regarding the quality standards.

To meet this requirement, on February 23, 2016, TWC's three-member Commission (Commission) adopted §809.130(e)(1), which requires staff to facilitate a review of the Texas Rising Star guidelines every four years.

Beginning in May 2019, TWC convened a workgroup to review the Texas Rising Star guidelines and recommend revisions. The workgroup included early learning program directors from around the state, early childhood advocacy organization representatives, professional development providers, Board staff, and representatives from TWC, the Texas Education Agency, the Texas Health and Human Services Commission's (HHSC) Child Care Regulation Division (formerly Child Care Licensing (CCL)), and the State Center for Early Childhood, Children's Learning Institute (CLI).

Over an eight-month period, the workgroup met regularly to review the Texas Rising Star guidelines in detail and to engage in a collaborative effort to improve guidelines' standards. On January 21, 2020, the Commission approved the publication of the workgroup's recommendations for public comment. During February 2020, TWC partnered with Boards to host seven public stakeholder meetings across the state. Throughout the review process, TWC also provided the public with a website to view materials related to the review and a dedicated email address to offer input.

The revisions in this adopted rulemaking consider the recommendations of the workgroup as well as stakeholder input received during public meetings or provided to TWC in writing.

Workforce Registry

The Texas Early Childhood Professional Development System (TECPDS) includes the Workforce Registry (WFR), a web-based system for early childhood professionals to track their experience, education, and training. The WFR offers benefits to programs and teachers by streamlining record-keeping of staff qualifications and professional development. The WFR:

--reduces reliance on paper files and ensures reliable access to an employee's professional development records;

--allows teachers to easily share their training records and to see a holistic view of their portfolio of training and education;

--reduces administrative costs and simplifies processes for directors and owners;

--facilitates validation of compliance with CCL standards and documentation of Texas Rising Star points; and

--allows for more efficient and strategic professional development planning.

TWC adopts integrating the WFR into Texas Rising Star, requiring programs applying for certification to agree to participate in the WFR and encourage their staff to participate as well. For all programs, adopting and maintaining use of the WFR will be included in ongoing technical assistance and Continuous Quality Improvement Plans (CQIPs).

During public stakeholder meetings, many child care providers expressed concerns that the WFR could allow competitors to "steal" staff. TWC notes that the WFR does not have a searchable database of teachers or their qualifications. A teacher's record is only available to others when the teacher actively makes it available to a specified provider--typically the teacher's current employer. Additionally, based on comments received, TWC requested that the WFR be modified to no longer include job postings. This functionality is duplicative of the TWC-funded WorkInTexas.com online job-matching portal.

Creating a Pre-Star Provider Designation

TWC adopts a new Pre-Star provider definition in §809.2(18), and a requirement that all CCL-regulated subsidy providers be designated as Pre-Star in §809.91(a)(1). Pre-Star designations are outside of the statutorily defined Texas Rising Star quality-based rating system set forth in Texas Government Code, §2308.3155 and will not receive an enhanced reimbursement rate. Programs wishing to enter the Texas Rising Star system and apply for star-level certification must first meet Pre-Star designation. Pre-Star designations are based upon a child care program's demonstration that they do not have significant licensing findings, as set forth in the Screening Criteria for Subsidized Child Care and defined in the CCDF State Plan.

TWC will:

--outline implementation and rollout plans in more detail in the CCDF State Plan;

--solicit additional input from stakeholders on Pre-Star implementation details during the development of the State Plan;

--host stakeholder webinars during State Plan development; and

--post the draft CCDF State Plan for formal public comment.

Continuous Quality Improvement Framework

Another recommendation from the Texas Rising Star four-year review was that TWC develop a framework for CQIPs and require certified programs to engage in a formal CQIP process. Early childhood programs and their mentors use CQIPs to identify areas for program and staff improvement. The Texas Rising Star CQIP framework will provide targeted technical assistance and customized coaching to set specific improvement goals and monitor progress.

New Training and Certification Requirements for Texas Rising Star Staff

TWC currently defines requirements for educational background, work experience, and minimum annual training hours for Texas Rising Star mentors and assessors. However, there are no uniform training requirements for mentors or assessors to learn the standards, how to consistently measure them, or how to coach programs to improve.

The four-year review recommendations include new requirements for Texas Rising Star assessor and mentor training and certification to ensure valid and consistent star-level certifications across all Texas Rising Star programs and to improve mentoring and coaching to support the CQIP framework.

Based on these recommendations, TWC adopts that assessors be required to take the Texas Rising Star standards training and to obtain the Texas Rising Star Assessment Certification. Additionally, TWC adopts that assessors be required to pass quarterly reliability checks.

TWC also adopts more robust training requirements for mentors. Increasing the number of programs that attain and retain higher levels of quality will require strong mentoring support, and successful implementation of a CQIP framework will depend on skillful coaching from Texas Rising Star mentors. Specifically, TWC adopts requiring mentors to take the Texas Rising Star standards training and to participate in competency-based professional development designed to improve coaching practices.

Streamlining and Reweighting Categories of Texas Rising Star Measures

Section 809.130 defines the five categories of Texas Rising Star measures defined by previous Texas Rising Star guidelines development efforts. Texas Rising Star categories currently are: (1) Director and Staff Qualifications and Training, (2) Caregiver-Child Interactions, (3) Curriculum, (4) Nutrition and Indoor and Outdoor Activities, and (5) Parent Involvement and Education.

Many of the current measures are repetitive across categories or not well-correlated to the category being measured. TWC adopts reorganizing measures under the following four categories: (1) Director and Staff Qualifications and Training, (2) Teacher-Child Interactions, (3) Program Administration, and (4) Indoor/Outdoor Environments.

TWC will change the Texas Rising Star guidelines to adjust the relative weight of each category in recognition of the categories that are most closely correlated with child outcomes. The workgroup specifically recognized the importance of teacher-child interactions in child development, also noting that the TWC-funded "Strengthening Texas Rising Star Implementation Study" established validity and reliability for measures within this category. The teacher-child interactions category will be assigned a weight of 40 percent, with the remaining three categories weighted at 20 percent each.

Impact of Certain Deficiencies on Texas Rising Star Certification

Section 809.132 defines the impact of certain child care licensing deficiencies on programs' Texas Rising Star certification status. Certain deficiencies or accumulation of total deficiencies may

result in a decrease in star level or loss of certification. Because enhanced reimbursement rates are tied to star-level certification, the result can be a significant reduction in reimbursements for affected programs.

Stakeholders, including early learning program directors, have observed that financial instability is a barrier to maintaining and increasing quality. The workgroup recommended providing Texas Rising Star programs that receive certain licensing deficiencies with an opportunity to remedy those deficiencies within a six-month probationary period. The workgroup also recommended increasing technical assistance for programs at risk of losing or dropping their Texas Rising Star certification level. Stakeholders that commented on the revisions strongly supported these recommendations.

A review of Texas Rising Star data from 2017 to 2019 showed that almost half of the 300 programs that lost a star level or dropped out of Texas Rising Star did so due to licensing deficiencies. Eighty percent of star-level drops were due to licensing deficiencies, and of those programs that lost their Texas Rising Star certification completely, 54 percent became disqualified for certification due to licensing deficiencies.

TWC adopts a revised structure for considering licensing deficiencies for both new Texas Rising Star applicants and existing certified programs. The revised structure will continue to provide a high level of accountability for the most critical licensing issues but will also provide opportunities for providers to correct issues that are less correlated with the quality of care children receive.

Minimum Eligibility Requirements for Providers Serving CCDF Subsidized Children

Under federal regulations 45 CFR §98.30(g) regarding Parental Choice, the Administration for Children and Families explicitly allows states to establish policies that requires subsidy providers to meet higher standards of quality, as long as those requirements do not effectively limit parental choice. TWC adopts a new Pre-Star provider designation, indicating those child care programs that demonstrate that they do not have significant licensing findings. Pre-Star designations are outside of the statutorily defined Texas Rising Star quality-based rating system and will not receive an enhanced reimbursement rate. As previously described, programs that meet the criteria for Pre-Star, and would like to enter the Texas Rising Star quality rating improvement system, are eligible to apply for star-level certification.

The Pre-Star designation reviews a provider's licensing findings, as is currently done through the Texas Rising Star Screening Form that is included in the Texas Rising Star guidelines. The new Screening Criteria for Subsidized Child Care criteria have been adapted and included in a proposed amendment of the CCDF State Plan, which is available for public comment (see meeting materials for October 6, 2020, Commission Meeting). Additionally, based on feedback from the four-year review, the total number of licensing deficiencies allowed has increased from 10 to 15.

TWC will establish a five-year timeline for all subsidy providers to achieve at least a Pre-Star designation. TWC will develop a plan to roll out this requirement across the state and will codify the details of this plan in the CCDF State Plan. TWC's rollout plan will consider potential supply challenges, such as those in rural areas of the state which face a potential shortage of child care providers. Additionally, TWC will:

--outline the Pre-Star implementation and rollout plans in more detail in the CCDF State Plan;

--solicit additional input from stakeholders on Pre-Star implementation details during the development of the State Plan;

--host stakeholder webinars during State Plan development; and

--post the draft CCDF State Plan for formal public comment.

During regional stakeholder meetings, many commenters supported this strategy as an effort to ensure that public funds are being invested in child care programs that do not have significant issues with basic licensing requirements and to create a framework for placing these programs on a path to higher quality. At the same time, a few stakeholders also expressed concerns regarding the cost of administering a new Pre-Star designation. TWC notes that the Pre-Star designation may be determined through an automated process that reviews a program's licensing history, as published by Child Care Regulation, and automatically makes the determination of whether a provider may be designated as Pre-Star. Therefore, this adopted change does not require a significant investment of staff resources. Additionally, TWC is also considering the implementation of a continuous quality improvement framework to enhance mentoring and coaching; these resources would be available to Pre-Star programs that would like to enter the state's quality rating improvement system and apply for star-level certification.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

TWC adopts the following amendments to Subchapter A:

§809.2. Definitions

Section 809.2 is amended to add a definition for "Pre-Star provider."

SUBCHAPTER B. GENERAL MANAGEMENT

TWC adopts the following amendments to Subchapter B:

§809.12. Board Plan for Child Care Services (Includes New Regulations)

Section 809.12 is amended to require Boards to include their strategies to use contracted slots agreements, if applicable, in their plans.

§809.13. Board Policies for Child Care Services (Includes New Regulations)

Section 809.13 is amended to require Boards to develop:

--a two-week waiting period policy for a child to transfer to a new provider;

--policies and procedures for contracted slots agreements, if applicable; and

--policies supporting direct referrals from recognized pre-K or HS/EHS partnerships.

§809.16. Quality Improvement Activities

Section 809.16 is amended to allow Boards to expend child care funds in accordance with quality improvement activity described in applicable state laws and the CCDF State Plan. The amendment to §809.16(a) is intended to note that Boards take into ac-

count all federal and state requirements regarding quality improvement activities. In addition, any quality improvement activities that are undertaken at the state or local level must be acknowledged in the state's CCDF State Plan.

§809.18. Maintenance of a Waiting List

Section 809.18 is amended to add an allowable exemption from the waiting list for children who are referred directly from a recognized pre-K or HS/EHS partnership to a child care provider to receive services in the contracted partnership program.

§809.19. Assessing the Parent Share of Cost

Section 809.19 is amended to allow Boards to implement a policy to reduce the parent share of cost amount assessed pursuant to §809.19(a)(1)(B) upon the child's referral for part-time care. In response to comment, §809.19(k)(2) is amended to clarify that parent share of cost reductions are for parents who qualify for the reduction based on the Board's policy.

§809.22. Direct Referrals to Recognized Partnerships (New Regulation)

New §809.22 adds a requirement for Boards to establish policies and procedures to enroll eligible children who are directly referred by recognized pre-K or HS/EHS partnerships and exempting these children from the waiting list.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

TWC adopts the following amendments to Subchapter E:

§809.91. Minimum Requirements for Providers (Includes New Regulations)

Section 809.91(a)(1) is amended to reference new subsection (g), which requires that all CCL-regulated child care providers be designated as Pre-Star based upon meeting TWC's Screening Criteria for Subsidized Child Care. The Screening Criteria for Subsidized Child Care is removed in §809.131(a) and (b) as a Texas Rising Star eligibility requirement.

Section 809.91 is also amended to add new subsection (h) to provide additional details regarding Pre-Star designations. The Screening Criteria for Subsidized Child Care will be defined in the CCDF State Plan, as will a statewide rollout plan. TWC will carefully consider how to implement the new requirement for all subsidy providers to be Pre-Star designated to ensure that parent choice is not impacted. TWC plans to roll out this requirement over a five-year period; this is intended to provide child care programs with ample time to ensure that they can attain Pre-Star designation. The new Screening Criteria for Subsidized Child Care criteria are included in a proposed amendment of the CCDF State Plan, which is available for public comment (see meeting materials for October 6, 2020 Commission meeting). TWC will:

--outline the Pre-Star implementation and rollout plans in more detail in the CCDF State Plan;

--solicit additional input from stakeholders on Pre-Star implementation details during the development of the State Plan;

--host stakeholder webinars during State Plan development; and

--post the draft CCDF State Plan for formal public comment.

§809.93. Provider Reimbursement

Section 809.93 is amended to add the option for Boards to pay child care providers for holding spaces open if they have a valid contracted slots agreement.

§809.96. Contracted Slots Agreements (New Regulation)

New §809.96 adds detailed requirements for Boards that use contracted slots agreements.

SUBCHAPTER G. TEXAS RISING STAR PROGRAM

TWC adopts the following amendments to Subchapter G:

§809.130. Short Title and Purpose

Section 809.130(d)(1) is amended to denote that Texas Rising Star measures align with the following four categories:

--Director and Staff Qualifications and Training

--Teacher-Child Interactions

--Program Administration

--Indoor/Outdoor Environments

§809.131. Eligibility for the Texas Rising Star Program (Includes New Regulations)

Section 809.131 is amended to remove §809.131(b), as all CCL-regulated subsidy providers will now be required to be designated as Pre-Star under §809.91(a)(1). Additionally, §809.131 is amended to require Texas Rising Star applicants to agree to participate in the WFR and to encourage staff to create accounts within the WFR.

§809.132. Impact of Certain Deficiencies on Texas Rising Star Certification (Includes New Regulations)

Section 809.132 is amended to add compliance requirements for current Texas Rising Star providers and amends the consequences of certain child care licensing deficiencies for certified Texas Rising Star programs and applicants.

§809.133. Application and Assessments for the Texas Rising Star Program (Includes New Regulations)

Section 809.133 is amended to require all programs to participate in the creation of an online-generated CQIP that focuses on growth and evolving adherence to higher-quality standards and to require Boards to ensure that CQIPs are implemented and supported as described in the Texas Rising Star guidelines.

§809.134. Minimum Qualifications for Texas Rising Star Staff (Includes New Regulations)

Section 809.134 is amended to require all Texas Rising Star staff to complete the Texas Rising Star standards training, require Texas Rising Star assessors to attain and maintain the Texas Rising Star Assessor Certification, and require Texas Rising Star mentors to pursue the coaching micro-credential through the attainment of competency badges over a time period defined by TWC.

Section 809.134 is also amended to move §809.134(d) and (e) to new §809.136.

§809.136. Roles and Responsibilities of Texas Rising Star Staff

New §809.136 defines the separate roles and responsibilities of Texas Rising Star assessors and mentors, including separation of roles; cross-functional collaboration and coordination; and mandated reporting requirements related to observed licensing violations.

New §809.136(4) and (5) clarify the separation of roles and professional development of Texas Rising Star staff.

PART III. PUBLIC COMMENTS

The public comment period ended on December 11, 2020. Comments were received from:

--A Habitat for Learning

--Alamo Workforce Development Board

--Children at Risk, on behalf of:

--Austin/Travis County Success By 6 Coalition

--Big Thought

--Child Care Partners

--Children at Risk

--Creative Corners

--Dallas College School of Education

--Early Matters Dallas

--Emergent ED. Child Care Consulting Inc.

--Gingerbread Kids Academy

--King Steps Academy

--Loving Touch Child Care

--Our Little Red Schoolhouse

--Paso del Norte Children's Development Center

--Pye's Day Care Center

--San Antonio Chapter of TXAEYC

--San Jacinto Christian Academy

--Shirley White, Director, Healy Murphy Child Development Center

--Silver Star Academy

--Texans Care for Children

--United Way of Metropolitan Dallas

--YWCA El Paso del Norte Region

--Country Home Learning Center

--Dallas Early Education Alliance

--Golden Crescent Workforce Development Board

--North Central Workforce Development Board

--Play and Learn Christian Academy

--Tiny Town Day Care Center

--West Central Workforce Development Board

--One Individual

SUBCHAPTER B. GENERAL MANAGEMENT

§809.13. Board Policies for Child Care Services

Comment: Three Boards supported the rule related to the two-week waiting period policy for a child to transfer to a new provider. One Board agreed that this practice aligns with child care industry practices. Another Board stated that it has implemented this procedure and received positive feedback.

Response: TWC appreciates the comments.

§809.16. Quality Improvement Activities

Comment: One Board opposed the language change in §809.16(a) and requested to continue to have the flexibility to offer the full range of quality improvement activities as was intended by federal regulation. This flexibility will allow the Board to offer a wider range of activities that more fully meets the unique needs of local providers in the area.

Response: The proposed language regarding the Board's expenditure of quality improvement funds was not intended to limit a Board's flexibility in determining how to design and deliver quality improvement activities. The amendment to §809.16(a) is intended to note that Boards are to take into account all federal and state requirements regarding quality improvement activities.

Under Texas Government Code, §2308.317(c), Boards shall use at least two percent of their allocation on quality improvement activities and directs Boards to give priority to quality child care initiatives that benefit child care providers that are working toward Texas Rising Star certification or are Texas Rising Star-certified providers working toward higher certification levels. The statute further directs Boards, to the extent practicable, to ensure that professional development funds for child care providers, directors, and employees be used toward the requirement for a credential, certification, or degree program, and that the training meets the requirements of the Texas Rising Star program. In addition, any quality improvement activities that are undertaken at the state or local level must be acknowledged in the state's CCDF State Plan.

The language in §809.16(a) is changed to clarify this intent.

§809.18. Maintenance of a Waiting List

Comment: Two Boards supported the rule regarding direct referrals for children referred from a recognized Prekindergarten, Head Start, and Early Head Start partnership. One Board stated that this change will allow the Board to fill slots within the one-month timeframe for contracted slots.

Response: TWC appreciates the comments.

Comment: One Board stated that the Board was unsure if it will be able to consistently fill vacant slots within the one-month timeframe for other target populations due to their status on the waitlist.

Response: TWC acknowledges that contracted slots must be managed in concert with a Board's existing waiting list. Under current state statutes, Boards are required to prioritize specific populations, and TWC does not have the flexibility to allow an exception for contracted slots. Therefore, the current procedures for managing enrollments using the Board's waiting list remain applicable for contracted slot vacancies, with the noted exception for Prekindergarten and Head Start/Early Head Start.

No changes were made in response to this comment.

§809.19. Assessing the Parent Share of Cost

Comment: Two Boards supported the rule allowing flexibility related to parent share of cost discounts for part-time referrals. One Board stated that the discounts will make child care more affordable for low-income families and demonstrates flexibility and consideration for families with unique child care needs.

Response: TWC appreciates the comments.

Comment: One Board appreciated the flexibility to establish a policy to reduce the parent share of cost for children referred for part-time care. The Board requested clarification regarding when the parent share of cost would change if the parent is re-

ferred to full-time care, specifically if the change would be effective at the beginning of the first full month after the referral change or at the end of the 12-month eligibility period. The Board also requested clarification regarding whether the Board is now being required to offer a reduction in parent share of cost for selecting a Texas Rising Star-certified provider, as referenced in §809.19(k)(2).

Response: Section 809.19(k) allows a Board to establish a policy to reduce the parent share of cost amount assessed on the child's referral for part-time care. The timing of the parent share of cost amount change will be determined by the Board's policy. Boards may consider a policy to implement a parent copay change effective at the beginning of the first full month after the referral is effective.

If the Board establishes a policy described in §809.19(k), the policy must ensure that parents who qualify for a reduction based on both part-time care and selecting a Texas Rising Star provider receive the greater of the two discounts.

Section 809.19(k)(2) is modified to clarify that discounts are for parents who qualify for the reduction based on the Board's policy.

§809.22. Direct Referrals to Recognized Partnerships

Comment: One Board supported the concept of making direct referrals from recognized partnerships. However, the Board stated that more guidance is needed for successful implementation.

Response: TWC appreciates the comment and will work with Boards to provide guidance and technical assistance as needed.

No changes were made in response to this comment.

SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

§809.43. Priority for Child Care Services

Comment: One individual requested that children of child care workers be included in the first priority group of children in which are mandatory to be served.

Response: TWC appreciates the comment; however, this requested change is outside the scope of the proposed rulemaking.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

§809.91. Minimum Requirements for Providers

Comment: One Board agrees with the rule requiring all subsidy providers to deliver quality care. However, the Board requested clarification on the following questions:

--Will Pre-Star program be required to move forward and apply for Texas Rising Star certification?

--How will equal access be ensured, especially in rural areas with a limited number of child care programs and the likelihood that the limited number of programs in the area may not meet the Pre-Star level?

Response: Regarding the requirement to apply for Texas Rising Star certification, under Texas Government Code, §2308.3155, participation in the Texas Rising Star program is voluntary. Therefore, TWC does not have statutory authority to require subsidy providers to participate in Texas Rising Star.

Regarding equal access, TWC plans to have a five-year implementation period, with the details of this to be outlined in the CCDF State Plan. TWC understands that rural areas may face challenges with the available supply of child care, and want to ensure that is taking into consideration. TWC anticipates that in areas with limited supply, waivers of the Pre-Star requirement may be needed.

TWC will be collecting and analyzing data within the first year or two to better understand the impact of the Pre-Star designation requirement. TWC also wants to consider how providers with licensing deficiencies are afforded an opportunity to address those deficiencies while also considering providers that continue to have critical deficiencies cited by Child Care Regulation.

No changes were made in response to this comment.

Comment: Two Boards requested clarification as to the consequences for providers that meet Pre-Star provider designation initially but receive a licensing citation that would result in the provider no longer meeting the Pre-Star designation and potentially not eligible to provide subsidized child care services.

Response: TWC wants to carefully consider how negative licensing findings on Pre-Star providers should be considered. TWC wants to ensure it considers the consequences for providers that have quickly addressed and corrected issues, versus consequences for providers that do not, and those that have repeated and continual Pre-Star licensing deficiencies.

The rules implement this Pre-Star requirement and that the implementation be detailed in the CCDF State Plan. The CCDF State Plan is currently under development and is due to the Administration for Children and Families by June 30, 2021. TWC will engage with stakeholders in the CCDF State Plan Development, and the draft State Plan will be available for public comment.

No changes were made in response to these comments.

Comment: Several providers and advocacy groups expressed concerns that the Pre-Star requirement does not meet a goal of all subsidy providers participating in Texas Rising Star. Their goal is to ensure that child care providers that participate in the child care subsidy program are able to offer high-quality services to families. To reach that goal, the group supports an approach that requires all subsidy providers to participate in Texas Rising Star, provides them with the necessary supports to improve and reach certification, and phases in requirements to participate and to reach higher levels of quality.

Response: TWC appreciates the comment. However, TWC points out that under Texas Government Code, §2308.3155, participation in the Texas Rising Star program is voluntary. Therefore, TWC does not have statutory authority to require subsidy providers to participate in Texas Rising Star.

No changes were made in response to these comments.

Comment: Several providers and advocacy groups expressed concerns regarding the very long ramp-up period that does not set up providers for Texas Rising Star participation. They advocate for a relatively short timeline for providers to participate in Pre-Star and then a few years for providers to obtain a minimum certification level to continue to participate in the state's subsidy program. The current five-year implementation proposal for Pre-Star is not consistent with that approach.

Response: It is TWC's intent to have the majority, if not all, of subsidy providers designated as Pre-Star prior to the five-year deadline. However, the timeline of five years will allow TWC to ensure that equal and equitable access to child care is

available across the state, specifically in those areas with child care deserts. In addition, TWC wants to ensure that it takes time to carefully consider how to structure consequences for providers that receive licensing deficiencies denoted in Pre-Star. Following the adoption of the rule, TWC will use a portion of this five-year period to work out the details regarding consequences for providers that have quickly addressed and corrected issues, versus consequences for providers that do not, and for those that have repeated and continued Pre-Star licensing deficiencies. These details will be in the CCDF State Plan, which will be available for public comment.

In addition, under Texas Government Code, §2308.3155, participation in Texas Rising Star is voluntary; therefore, programs may choose to participate in certification at their discretion.

No changes were made in response to these comments.

Comment: One Board supported the creation of a Pre-Star provider designation. The Board encouraged TWC to consider offering incentives to Pre-Star providers to achieve Texas Rising Star designation quickly, including offering a declining incentive to encourage earlier adoption by providers.

Response: Boards may utilize CCDF Quality funds to incentivize programs to obtain Texas Rising Star certification.

No changes were made in response to this comment.

Comment: One advocate organization supported the inclusion of a subsidy provider mandatory entry level. The organization is hopeful that, in the future, the Pre-Star designation will become an official part of the Texas Rising Star system and that providers will be mandated to move up through a single system.

The organization stated that Pre-Star providers should receive supports such as information and access to online resources that do not detract from resources available to Texas Rising Star providers. The organization expressed agreement with the decision not to provide enhanced reimbursement rates for Pre-Star programs. The organization also stated that Pre-Star providers should progress to higher levels of quality on a more aggressive timeline. Considering the minimal requirements of Pre-Star and even two-star Texas Rising Star levels, all providers should be mandated to enter into the Pre-Star or Texas Rising Star system within 18 months of the rule change. The organization also recommended that adequate supports should be provided once providers enter into the Texas Rising Star system, and that they should be required to continue to progress to higher levels in order to continue receiving subsidy funding.

Response: Boards will provide information about Texas Rising Star to all early learning programs designated as Pre-Star and the supports and resources that are available to them. Pre-Star designated programs that are working toward Texas Rising Star certification are provided a mentor. Boards may choose to allow Pre-Star designated programs that are not currently working toward Texas Rising Star certification to participate in local initiatives, receive other mentoring services, or participate in the continuous quality improvement process. Timelines for progressively higher-quality ratings are determined by the early learning program. In addition, under Texas Government Code, §2308.3155, participation in Texas Rising Star is voluntary; therefore, TWC cannot mandate entry into Texas Rising Star.

No changes were made in response to this comment.

§809.93. Provider Reimbursement

Comment: One individual requested that TWC's reimbursement model be more similar to how non-subsidized families pay for child care, primarily by paying providers prior to services being provided.

Response: TWC appreciates the comment; however, this requested change is outside the scope of the proposed rulemaking.

§809.96. Contracted Slots Agreements

Comment: One Board supports the rule; however, requested that the payments to providers with contracts be part of an automated system as making payments outside of the current automated system is not a sound accounting function and could cause disallowed costs.

Response: TWC appreciates the comment and will work with Boards choosing to have contracted slots agreements to provide assistance in developing payment methodologies that ensure sound accounting processes. At this time, TWC is unable to modify The Workforce Information System of Texas (TWIST) to process contracted slots payments. TWC is pursuing a potential replacement of the TWIST child care system and will take this comment into consideration for future automation enhancements.

No changes were made in response to this comment.

Comment: One Board appreciated the flexibility to decide whether or not to enter into contracted slots agreements with providers. The Board also supported the plan to make these contracts available only to Texas Rising Star three- and four-star providers. The Board stated that implementation would require extensive support from TWC in terms of availability of data in order to determine need as required in §809.96(e) and to adhere to the reporting requirements in §809.96(h).

Response: TWC appreciates the comment and will work with Boards choosing to have contracted slots agreements to provide implementation assistance.

No changes were made in response to this comment.

SUBCHAPTER G. TEXAS RISING STAR PROGRAM

Comment: One provider stated that the changes are good. However, the commenter requested that TWC allow time to implement the amended rules.

Response: TWC appreciates your comment and began providing information about these proposed changes in November via three webinars for existing Texas Rising Star providers and one webinar for all providers. These webinars are also posted on TWC's website. TWC encourages all providers to begin familiarizing themselves with this information. When the changes are final, TWC plans to provide additional time for child care programs to become familiar with the changes. Implementation is planned for April 1, 2021; however, all programs will not be required to immediately implement the changes. Texas Rising Star revisions will have a rolling implementation, in which the program will be assessed against the new requirements during its next visit.

No changes were made in response to this comment.

Comment: One organization appreciated TWC's commitment to institute a marketing plan to provide enhanced consumer education so that parents are better educated about the importance of quality and the meaning and value of each higher Texas Rising Star level. The organization hopes that the plan will include consistent messaging around choosing high-quality programs at

each parent touch point--from Agency to Board to contractor, and that the messaging also promotes optimal child development through the use of developmental milestones.

Response: TWC appreciates the input and will take these comments into consideration as TWC finalizes this plan.

No changes were made in response to this comment.

Comment: One Board requested that the rules in Subchapter G be clarified to ensure that it is clear that the clause in §809.135, specifically, "The Texas Rising Star program is not subject to Chapter 823 of this title, the Integrated Complaints, Hearings, and Appeals rules," applies to the Texas Rising Star program as a whole and not just to the Texas Rising Star Process for Reconsideration.

Response: TWC appreciates the comment; however, this requested change is outside the scope of the proposed rulemaking.

§809.130. Short Title and Purpose

Comment: One Board and several commenters supported the reorganizing of Texas Rising Star measures and assigning more weight to the teacher-child interaction category in recognition of its correlation with child outcomes. The commenters support the streamlining of standards and reducing the standards from five to four categories. The commenters believe it will help avoid redundancy and eliminate duplication. Additionally, the commenters support the new reweighting of the categories, so they are most closely correlated with child outcomes, and believe that the heavy focus on teacher-child interactions is paramount to strong childhood outcomes.

Response: TWC appreciates the comment.

Comment: Several commenters requested additional clarification about how the changes in standards impact providers' current and future ratings.

Response: TWC has conducted an initial review of reweighting impacts noting that most impacts resulted in a higher overall star level being determined. However, with the additional revisions of specific measures, scoring methodology for teacher-child interactions, and new measures added, there may be impacts to some programs that TWC is unable to currently quantify. Mentoring, training modules, a director's toolkit of resources, use of the continuous quality improvement plan, and additional supports will be provided to programs to minimize any negative impacts.

No changes were made in response to these comments.

Comment: One advocacy group recommended coupling these requirements with additional resources to support providers in their efforts to improve interactions.

Response: Mentoring, training modules, a director's toolkit of resources, use of the continuous quality improvement plan, and additional supports will be provided to programs.

No changes were made in response to this comment.

§809.131. Eligibility for the Texas Rising Star Program

Comment: Several commenters support requiring current Texas Rising Star programs and applicants to create staff accounts within the WFR. Because of the increased challenges of recruiting and retaining staff, one commenter applauded the recommendation that the WFR not include a searchable database of teachers or their qualifications nor job postings.

Response: TWC appreciates the comments.

Comment: Two Boards requested clarification on potential ramifications on programs that do not comply with the requirement to agree to participate in the WFR and to encourage staff to create accounts within the WFR.

Response: TWC will require that Texas Rising Star child care providers create a director account in the WFR. TWC recommends that Texas Rising Star providers encourage their staff members to create individual accounts within the WFR.

Texas Rising Star staff will work with each provider to set individual CQIP goals to increase staff participation in the WFR. Additionally, mentors can assist in identifying any barriers that may have prevented an individual from creating his or her account.

A director account will be required for each Texas Rising Star provider so that participating staff members may associate their WFR profiles with their employer. However, if an individual staff member declines to create a WFR account, the provider's Texas Rising Star certification will not be affected.

No changes were made in response to these comments.

Comment: One Board supported the purpose behind the TECPDS WFR. However, the Board expressed concerns regarding providers that may not wish to participate due to privacy concerns related to posting information on the systems.

Two providers expressed similar concerns. One provider stated that the idea of a web-based professional development tool that tracks training, education, and employment seems very convenient and easily accessible for staff, employers, and other interested parties such as Child Care Licensing and Child Care Services. However, the provider stated that the information, which is easily accessible to the previously mentioned, can also become accessible to hackers and others who have nefarious intentions.

Sharing information concerning training, employment, and other personal identifying data is a matter of individual choice. Additionally, this is a right of privacy. By mandating enrollment in the WFR in order to participate as a Texas Rising Star provider, each individual's right to privacy is not being upheld.

The other provider stated that the provider can give copies of trainings to the local assessor.

Response: TWC acknowledges commenters' concerns regarding the privacy of their personal data in relation to the WFR. TWC shares these concerns and is committed to ensuring privacy and security of personal data. The WFR registry does not include any search function and access to individual data is controlled, monitored, and audited.

TWC's rule changes related to the WFR are intended to increase use of the WFR to provide TWC and Boards with summative information to support data-driven decisions on the investment of CCQ funds. Additionally, TWC uses the WFR's aggregate workforce data to satisfy federal reporting requirements on the state's annual CCDF Quality Progress Report, which asks for state-level information on the state of and progress of the workforce. [https://twc.texas.gov/files/partners/child-care-quality-performance-report-2019.pdf]

Everyone who creates an account in the WFR owns their own data and decides who can see their data. The database is not searchable by the public. Individuals have the option to share their education, employment, and training information with the directors of centers or facilities that also have accounts, such as

the individual's employer. The individual also has the ability to stop sharing his or her profile with a director.

As stated previously, TWC will require that Texas Rising Star child care providers create a director account in the WFR. The provider may determine who fills the director role in the WFR, and that individual may decide how much employment, education, and training data to include in his or her professional profile.

TWC also recommends that Texas Rising Star providers encourage their staff members to create individual accounts within the WFR. All information entered into the WFR is stored securely and may only be viewed by approved TECPDS/WFR staff and your local Board for the purposes of record validation and to assist assessors with scoring Texas Rising Star staff training/qualifications measures. All of these users are subject to contract provisions that limit their access to the data they need to do their jobs. For example, a Texas Rising Star assessor will only view records for individuals who had associated themselves with a provider with an agreement to provide subsidized child care in the assessor's assigned Board area. TWC staff do not have access to individual WFR records.

UTHealth, which houses the WFR, complies with the Family Educational Rights and Privacy Act, which prohibits the release of most education records without an individual's permission. Additionally, WFR data is governed by the University of Texas Health Science Center's data security standards, which adhere to the National Institute of Standards and Technology (NIST) Cybersecurity regular security scanning for vulnerabilities and an annual NIST security audit.

No changes were made in response to these comments.

Comment: One provider stated that it should not be mandatory to participate in the TECPDS WFR if a center has its own Training Tracking System. The provider suggested instead, that if a center has an electronic program that tracks its staff training, it should not have to use the registry because that would create an increased workload for a duplicate job.

Response: The intent of participation within the WFR is multifaceted, including the integration of automatic scoring for applicable Category 1 measures within the Texas Rising Star assessment tool.

TWC will explore opportunities to create interface capabilities between the WFR and providers' individual systems in order to reduce duplicate data entry.

No changes were made in response to this comment.

§809.132. Impact of Certain Deficiencies on Texas Rising Star Certification

Comment: Two Boards expressed concerns regarding certain aspects of the impact of licensing deficiencies. One Board expressed concerns that some deficiencies regarding the safety of children were not included. One Board is concerned that four probationary impacts during a three-year certification period decreases motivation to resolve issues when there is no financial impact to the program and would suggest reducing to three the number of probationary impacts during the three-year certification period.

Response: TWC recognizes that these standards contain elements that are supported by some, while others would prefer modifications. TWC has crafted these changes based on extensive discussions and input from the Texas Rising Star Workgroup. TWC will monitor the impact of these changes, including how many probationary periods providers are subject to, and determine if revisions are needed in the future.

No changes were made in response to these comments.

Comment: Several commenters supported a revised structure that continues to provide a high level of accountability for the most critical licensing issues, while also providing the opportunity for providers to correct issues without losing their star-level certification. Specifically, the group requested Texas Rising Star programs that receive licensing deficiencies have an opportunity to remedy those deficiencies within a six-month probationary period. Providers need increased technical assistance for programs at risk of losing or dropping their certification level.

Response: The revised screening form minimized the number of deficiencies that resulted in an immediate star-level drop and modified the impact for most to be placed on probation while receiving targeted assistance to address future compliance.

No changes were made in response to these comments.

Comment: One commenter appreciated the openness to consider COVID-19 in assessment and recommended that TWC provide adequate support and mentorship to better support providers.

The commenter also appreciated the recommendation to minimize deficiencies from ten to four that result in immediate star-level impact as well as the recommendation to institute probationary rather than star-level impacts in situations in which an employee is fired for inadequate care. The commenter further suggested that providers that have a proven record of exemplary star ratings be considered for a less stringent annual assessment. The commenter also stated that Texas Rising Star programs that receive licensing deficiencies that do not compromise child safety get an opportunity to remedy those deficiencies within a six-month probationary period.

Response: TWC appreciates the comments. Regarding adequate support and mentorship to support providers, TWC will provide coaching, credentialing, training modules, a mentor's toolkit of resources, and additional supports to mentors to assist in supporting programs during this time.

Regarding the impact of deficiencies on providers with a proven record of exemplary star rating being considered for less stringent annual assessment and providing opportunities to providers to remedy certain deficiencies within a certain period, TWC will make a future determination on modifications to annual assessments for providers that have a proven record of exemplary star rating.

No changes were made in response to these comments.

Comment: One Board supported the new approach on licensing deficiencies that allows providers to remedy deficiencies and maintain their star level or certification as this promotes financial stability. The Board asked if HHSC has evaluated inner-rater reliability to ensure consistency. Some providers have stated that some CCL representatives are more lenient on some standards.

Response: TWC appreciates your feedback. HHSC processes are not addressed in this rulemaking.

§809.133. Application and Assessments for the Texas Rising Star Program

Comment: One Board and several commenters support the development of a statewide Texas Rising Star Continuous Quality Improvement (CQI) framework. The Board expressed apprecia-

tion of the enhancement that will allow CLI Engage to automatically generate CQI documents that will better define needed areas of improvement, while allowing Texas Rising Star mentor staff the flexibility to address staff-specific needs.

Several commenters stated that the Texas Rising Star CQI framework will provide targeted technical assistance and customized coaching to help providers work toward achieving higher levels of quality. The group requested additional details on how the CQI framework will be implemented, and whether there will be an opportunity to provide input on how the framework should look.

Response: TWC appreciates the support. A draft CQI document is available for review on the TWC Texas Rising Star 4-Year Review webpage.

No changes were made in response to these comments.

§809.134. Minimum Qualifications for Texas Rising Star Staff

Comment: One Board asked whether a staff member's education level and years of experience will be taken into consideration when determining who needs to attend the training or will automatically qualify staff for some credentialing badges. The Board stated the different levels of education and experience should also be weighed when determining staff training.

Response: All mentors and assessors must take the Texas Rising Star Assessment Training course, regardless of education and experience. All Texas Rising Star assessors will be required to pass the test and achieve a Texas Rising Star Assessment certification. This will ensure all staff are trained and assessors are certified on the Texas Rising Star certification program, thus ensuring reliable and valid assessment scoring.

No changes were made in response to this comment.

Comment: One Board asked what are TWC's expectations if a Texas Rising Star staff member at the contractor or Board level does not achieve certification as an assessor. Currently hired staff were not required to pass any type of certifications, and imposing this requirement now may cause issues for employers.

Response: Statewide training for Texas Rising Star staff on the revisions will begin in January 2021, followed by a period for assessor staff to attain certification. Assessors are expected to pass all ten modules, and to attain their certification prior to the roll-out date for the new standards, which is scheduled for April 1, 2021. Assistance will be provided to assessor staff throughout the certification course to assist in increasing their knowledge, skills, and abilities so they can receive certification. This will include the availability of online training content, self-study online modules, small group-facilitated sessions, and peer learning communities. However, if the staff member still cannot become certified, employers should consider utilizing the staff member in a different role.

No changes were made in response to this comment.

Comment: Several commenters supported ensuring that all mentors and assessors complete the required certification as it will improve the reliability and ratings. The commenters requested that assessments be centralized under TWC to help ensure program reliability. The commenters encourage TWC to develop partnerships between TWC and Boards to strengthen the mentor and assessor collaboration and consistency.

Response: TWC appreciates the input. In order to centralize Texas Rising Star assessors, the Texas Government Code, §2308.3155, must be amended. TWC has included this in its legislative proposals to the 87th Texas Legislature.

No changes were made in response to these comments.

Comment: One Board requested that there should be training or certification requirements for Texas Rising Star program directors. Because directors are the leaders of their programs, to properly maintain Texas Rising Star standards, the Board believes that it is just as, if not more than, important for them to be certified to lead a Texas Rising Star program.

Response: TWC appreciates the input. The current measure in the Texas Rising Star guidelines for director training is being removed and integrated into the continuous quality improvement plan, which is individualized to the director and program's specific needs and goals.

No changes were made in response to this comment.

Comment: One Board expressed concern that, by imposing certain education requirements, work experience, and annual training-hour requirements for Texas Rising Star mentor and assessor staff, TWC is subverting local control of Boards (as the employer of record) to hire staff they believe are qualified to meet the demands of these positions. The Board requested TWC to evaluate the existing and proposed criteria to ensure they are not in violation of Title VII, which prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding individuals based on race, color, religion, sex (including sexual orientation and gender identity), or national origin if the tests or selection procedures are not "job-related for the position in question and consistent with business necessity." To that end, the Board encouraged TWC to review the current composition of mentors and assessors to determine if, in fact, it has potentially eliminated from consideration individuals in a disparate manner.

Response: Title VII prohibit employers from using neutral tests or selection procedures that have the effect of disproportionately excluding individuals based on race, color, religion, sex, or national origin if the tests or selection procedures are not job-related for the position in question and consistent with business necessity. The education and certification requirements for Texas Rising Star mentors and assessors are directly related to their job duties.

Regarding the new certification requirement for assessors, assistance will be provided to any assessor who is unable to pass a training module to help them achieve certification status. TWC's intent is to provide ample support and resources to Texas Rising Star staff who need additional assistance in mastering the competencies needed to serve as a Texas Rising Star assessor.

Mentors and assessors are responsible for making important determinations of a child care program's quality status, based on multiple measures and factors. Therefore, it is critical that the child care program has highly qualified staff, as their judgements impact a child care provider's Texas Rising Star certification. TWC also notes that other occupations have similar job-related education and certification requirements.

Boards may also wish to consider any opportunities they have to support their staff in the pursuit of their required education levels. Many employers, including TWC, offer education stipends/tuition assistance programs.

No changes were made in response to this comment.

PART IV. STATUTORY AUTHORITY

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §809.2

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement changes made to Texas Labor Code, Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

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 B. GENERAL MANAGEMENT

40 TAC §§809.12, 809.13, 809.16, 809.18, 809.19, 809.22

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement changes made to Texas Labor Code, Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

§809.16. Quality Improvement Activities.

(a) Child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, Subchapter B of this title (relating to Allocations), and specifically §800.58 of this title (relating to Child Care)), including local public transferred funds and local private donated funds, as provided in §809.17 of this subchapter, to the extent they are used for nondirect care quality improvement activities, may be expended in accordance with 45 CFR Part 98, §98.53, any applicable state laws, and the CCDF State Plan.

(b) Boards must ensure compliance with 45 CFR Part 98 regarding construction expenditures, as follows:

(1) State and local agencies and nonsectarian agencies or organizations.

(A) Funds shall not be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility.

(B) Funds may be expended for minor remodeling, and for upgrading child care facilities to ensure that providers meet state and local child care standards, including applicable health and safety requirements.

(2) Sectarian agencies or organizations.

(A) The prohibitions in paragraph (1) of this subsection apply.

(B) Funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to 45 CFR Part 98.

(c) Expenditures certified by a public entity, as provided in §809.17(b)(3) of this subchapter, may include expenditures for any quality improvement activity described in 45 CFR Part 98.

§809.19. Assessing the Parent Share of Cost.

(a) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, Subchapter B of this title (relating to Allocations), and specifically, §800.58 of this title (relating to Child Care)), including local public transferred funds and local private donated funds, as provided in §809.17 of this subchapter, the following shall apply.

(1) A Board shall set a parent share of cost policy that assesses the parent share of cost in a manner that results in the parent share of cost:

(A) being assessed to all parents, except in instances when an exemption under paragraph (2) of this subsection applies;

(B) being an amount determined by a sliding fee scale based on the family's size and gross monthly income, including a possible reexamination of the sliding fee scale if there are frequent terminations for lack of payment pursuant to subsection (e) of this section, which also may consider the number of children in care;

(C) being an amount that is affordable and does not result in a barrier to families receiving assistance;

(D) being assessed only at the following times:

(i) initial eligibility determination;

(ii) 12-month eligibility redetermination;

(iii) upon the addition of a child in care;

(iv) upon a parent's report of a change in income, family size, or number of children in care that would result in a reduced parent share of cost assessment; and

(v) upon resumption of work, job training, or education activities following temporary changes described in §809.51(a)(2) of this chapter, and upon resumption of work, job training, or education activities during the three-month continuation of care period described in §809.51(c) of this chapter; and

(E) not increasing above the amount assessed at initial eligibility determination or at the 12-month eligibility redetermination based on the factor in subparagraph (B) of this paragraph, except upon the addition of a child in care as described in subparagraph (D)(iii) of this paragraph.

(2) Parents who are one or more of the following are exempt from paying the parent share of cost:

(A) Parents who are participating in Choices or who are in Choices child care described in §809.45 of this chapter;

(B) Parents who are participating in SNAP E&T services or who are in SNAP E&T child care described in §809.47 of this chapter;

(C) Parents of a child receiving Child Care for Children Experiencing Homelessness as described in §809.52 of this chapter; or

(D) Parents who have children who are receiving protective services child care pursuant to §809.49 and §809.54(c) of this chapter, unless DFPS assesses the parent share of cost.

(3) Teen parents who are not covered under exemptions listed in paragraph (2) of this subsection shall be assessed a parent share of cost. The teen parent's share of cost is based solely on the teen parent's income and size of the teen's family as defined in §809.2 of this chapter.

(b) For child care services funded from sources other than those specified in subsection (a) of this section, a Board shall set a parent share of cost policy based on a sliding fee scale. The sliding fee scale may be the same as or different from the provisions contained in subsection (a) of this section.

(c) A Board shall establish a policy regarding reimbursement of providers when parents fail to pay the parent share of cost.

(d) A Board shall establish a policy regarding termination of child care services within a 12-month eligibility period when a parent fails to pay the parent share of cost. The Board's policy must include:

(1) a requirement to evaluate and document each family's financial situation for extenuating circumstances that may affect affordability of the assessed parent share of cost pursuant to paragraph (2) of this subsection, and a possible temporary reduction pursuant to subsection (g) of this section before the Board or its child care contractor may terminate care under this section;

(2) general criteria for determining affordability of a Board's parent share of cost, and a process to identify and assess the circumstances that may jeopardize a family's self-sufficiency under subsection (g) of this section;

(3) maintenance of a list of all terminations due to failure to pay the parent share of cost, including family size, income, family circumstances, and the reason for termination, for use when conducting evaluations of affordability, as required under paragraph (4) of this subsection; and

(4) the Board's definition of what constitutes frequent terminations and its process for assessing the general affordability of the Board's parent share of cost schedule, pursuant to subsection (e) of this section.

(e) A Board with frequent terminations of care for lack of payment of the parent share of cost must reexamine its sliding fee scale and adjust it to ensure that fees are not a barrier to assistance for families at certain income levels.

(f) A Board that does not have a policy to reimburse providers when parents fail to pay the parent share of cost may establish a policy to require the parent to pay the provider before the family can be redetermined eligible for future child care services.

(g) The Board or its child care contractor may review the assessed parent share of cost for a possible temporary reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. The Board or its child care contractor may temporarily reduce the assessed parent share of cost if warranted by these circumstances. Following the temporary reduction, the parent share of cost amount immediately prior to the reduction shall be reinstated.

(h) If the parent is not covered by an exemption as specified in subsection (a)(2) of this section, then the Board or its child care contractor shall not waive the assessed parent share of cost under any circumstances.

(i) If the parent share of cost, based on family income and family size, is calculated to be zero, then the Board or its child care contractor shall not charge the parent a minimum share of cost amount.

(j) A Board may establish a policy to reduce the parent share of cost amount assessed pursuant to subsection (a)(1)(B) of this section upon the parent's selection of a Texas Rising Star--certified provider. Such Board policy shall ensure:

(1) that the parent continue to receive the reduction if:

(A) the Texas Rising Star provider loses Texas Rising Star certification; or

(B) the parent moves or changes employment within the workforce area and no Texas Rising Star--certified providers are available to meet the needs of the parent's changed circumstances; and

(2) that the parent no longer receives the reduction if the parent voluntarily transfers the child from a Texas Rising Star--certified provider to a non-Texas Rising Star--certified provider.

(k) A Board may establish a policy to reduce the parent share of cost amount assessed pursuant to subsection (a)(1)(B) of this section upon the child's referral for part-time care. Such Board policy shall ensure that:

(1) the parent no longer receives the reduction if the referral is changed to full-time care; and

(2) a parent who qualifies for a reduction in parent share of cost for both selecting a Texas Rising Star--certified provider (as defined in subsection (j) of this section) and a child's part-time care referral will receive the greater of the two discounts.

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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Les Trobman
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SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §§809.91, 809.93, 809.96

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement changes made to Texas Labor Code, Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

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

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SUBCHAPTER G. TEXAS RISING STAR PROGRAM

40 TAC §§809.130 - 809.134, 809.136

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement changes made to Texas Labor Code, Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

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CHAPTER 823. INTEGRATED COMPLAINTS, HEARINGS, AND APPEALS

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 823, relating to Integrated Complaints, Hearings, and Appeals, without changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7566):

Subchapter A. General Provisions, §§823.1 - 823.4

Subchapter B. Board Complaint and Appeal Procedures, §§823.10 - 823.14

Subchapter C. Agency Complaint and Appeal Procedures, §§823.20 - 823.22 and §823.24

Subchapter D. Agency-Level Decisions, Reopenings, and Rehearings, §§823.30 - 823.32

TWC adopts the following new section of Chapter 823, relating to Integrated Complaints, Hearings, and Appeals, without changes, as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7566):

Subchapter D. Agency-Level Decisions, Reopenings, and Rehearings, §823.34

These rules will not be republished.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

TWC Chapter 823 rules set forth uniform procedures and time frames for complaints and appeals processes for all workforce services administered by Local Workforce Development Boards (Boards). The purpose of the Chapter 823 amendments is to specify the parties and programs to which Chapter 823 applies and does not apply, establish a distinction between state-level hearing officers and individuals who handle complaints at the Board level, align Chapter 823 with the Workforce Innovation and Opportunity Act (WIOA), and implement 20 Code of Federal Regulations (CFR) §683.600 relating to participants' and interested or affected parties' right to appeal local-level decisions and TWC's final decisions to the US Secretary of Labor.

This rulemaking serves as a rule review in accordance with Texas Government Code, §2001.039, which requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

TWC adopts the following amendments to Subchapter A:

§823.1. Short Title and Purpose

Section 823.1 is amended to update the list of programs that are subject to Chapter 823, add that Chapter 823 does not apply to contract disputes, and add §823.1(c)(9) and (10) to clarify which actions or disputes are not covered by Chapter 823.

§823.2. Definitions

Section 823.2 is amended to add a definition of "Board adjudicator" and to update language to distinguish between individuals who preside over Board-level and Agency-level disputes.

§823.3. Timeliness

Section 823.3 is amended to distinguish between Board-level complaints and reviews and Agency-level appeals.

§823.4. Representation

Section 823.4 is amended to clarify that a party may have a representative at an informal resolution proceeding in addition to a Board adjudication or an Agency hearing.

SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES

TWC adopts the following amendments to Subchapter B:

§823.10. Board-Level Complaints

Section 823.10 is amended to clarify and update language consistent with WIOA and current TWC terminology.

§823.11. Determinations

Section 823.11 is amended to reflect changes from the WIA program name to the current WIOA program name with related section updates.

§823.12. Board Informal Resolution Procedure

Section 823.12 is amended to provide clarity by changing "Boards" to "Each Board."

§823.13. Board Reviews

Section 823.13 is amended to reflect that Boards conduct reviews rather than hearings and the section title is changed from "Board Hearings" to "Board Reviews."

Section 823.13 is also amended to distinguish Board processes from Agency processes and to indicate that Board reviews are conducted by Board adjudicators and hearings are conducted by Agency hearing officers. The amendments also update the mailing address for submitting appeals to the Agency.

§823.14. Board Policies for Resolving Complaints and Appeals of Determinations

Section 823.14 is amended to reflect that individuals handling Board-level complaints are adjudicators and that the process by which they resolve disputes is called Board review.

SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

TWC adopts the following amendments to Subchapter C:

§823.20. State-Level Complaints

Section 823.20 is amended to update the mailing address for submitting appeals made directly to the Agency.

§823.21. Hearings

Section 823.21 is amended to update the WIOA program name and to state that parties may request accommodations for Board reviews and Agency hearings.

§823.22. Postponement and Continuance

Section 823.22 is amended to give Agency hearing officers the ability to postpone or continue hearings using their best judgment.

§823.24. Hearing Procedures

Section 823.24 is amended to remove language indicating that would provide transcripts of hearing recordings if a party pays the cost. The Agency does not transcribe hearings.

SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS

TWC adopts the following amendments to Subchapter D:

§823.30. Hearing Decision

Section 823.30 is amended to specify the number of days a hearing officer has to issue a written decision in WIOA-related cases. Section 823.30 is amended to add language indicating that the Agency may take continuing jurisdiction over an Agency decision for the purposes of reconsidering issues and taking additional evidence, in addition to issuing a corrected decision. The section is also amended to clarify that representatives and observers who attended a hearing need to be listed in the Agency's decision.

§823.31. Petition for Reopening

Section 823.31 is amended to update the name of the process by which a party requests that a hearing be reopened to petition. Additionally, the section is amended to state that a party must show good cause for failure to appear at the hearing and that timeliness rules in Chapter 823 apply to the petition.

§823.32. Motion for Rehearing and Decision

Section 823.32 is amended to align with Motion for Rehearing rules for other programs within the Agency which that require a Motion for Rehearing to meet certain criteria. The section is also amended to clarify that the Agency hearing officer may take certain actions in relation to that motion.

§823.34. Federal Appeals

New §823.34 implements 20 CFR §683.600, relating to participants' and interested or affected parties' right to appeal local-level decisions and final Agency decisions to the US Secretary of Labor.

TWC hereby certifies that the rules have been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENTS

The public comment period ended on November 23, 2020. No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§823.1 - 823.4

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, §301.192 and Texas Human Resources Code, §44.002, as well as those set forth in 29 USC §3241 and 29 USC §3152.

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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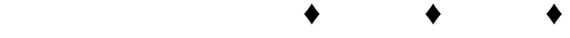

SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.10 - 823.14

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, §301.192 and Texas Human Resources Code, §44.002, as well as those set forth in 29 USC §3241 and 29 USC §3152.

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SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.20 - 823.22, 823.24

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, §301.192 and Texas Human Resources Code, §44.002, as well as those set forth in 29 USC §3241 and 29 USC §3152.

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SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS

40 TAC §§823.30 - 823.32, 832.34

The rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, §301.192 and Texas Human Resources Code, §44.002, as well as those set forth in 29 USC §3241 and 29 USC §3152.

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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